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IN THE SUPERIOR COURT OF GUAM

DAVID LUBOFSKY, Petitioner, vs. GUAM BOARD OF ALLIED HEALTH EXAMINERS and GUAM BOARD OF MEDICAL EXAMINERS, Respondents.	SPECIAL PROCEEDINGS CASE NO. SP0091-21 **OPPOSITION TO MOTION TO DISMISS**

INTRODUCTION

COMES NOW Petitioner David Lubofsky ("Petitioner") and hereby responds to the Respondents Guam Board of Allied Health Examiners and Guam Board of Medical Examiners' (collectively the "Boards") Memorandum of Law in Support of Verified Answer and Motion to Dismiss Petition for Writ of Mandamus. *See* Resp't Mem. re: Mot. to Dismiss (Oct. 19, 2021). The Boards' representation and response to the alternative writ only prove that nothing less than an order of this Court will compel them to promulgate the rules and publish the information necessary to protect the people of Guam. Despite the law unambiguously stating their "primary responsibility and obligation of the [Boards] is to protect the people of Guam"[1] the Boards feel they can continue to employ arbitrary processes for the investigations of complaints that have allowed these complaints to languish for years and ultimately resulted in both Boards declining to prosecute a single licensee since 2015. *See* Decl. of Balajadia ¶ 13(n) (Oct. 29 2021); Decl. of Berg ¶ 11(n) (Oct. 29, 2021). Their failure to adopt these rules is a flagrant abuse of discretion and blatant disregard for the law.

[1] 10 GCA §§ 12202, 12801(c).

ARGUMENT

The Boards mistake the procedures for bringing disciplinary actions against their licensees as a substitute for their mandatory duties to investigate complaints from non-Board members. The Boards repeatedly refer the Court to Sections 12210 and 12820 (Procedures for Enforcement and Disciplinary Action), but it is their duties under Sections 12212 and 12822 (Compulsory Reporting and Investigation) for which they have failed to promulgate rules. *Compare* 10 G.C.A. §§ 12210, 12820 *with* §§ 12212, 12822. Although the Physicians Practice Act and Allied Health Practice Act both provide procedures for the filing of accusations by the Board, what Petitioner seeks here are rules and procedures for the investigation of complaints by non-Board members. Therefore, a writ is required to compel the Board to adopt the necessary rules.

Dispensing with their strawman arguments, the Boards have no excuse for their failure to adopt rules to investigate complaints by non-Board members or the failure to publish physician profiles. Title 5 GCA § 9307 will not provide Petitioner with an adequate remedy. The law recognizes the distinction between prescribing specific rules for the Boards to adopt and the act of promulgating rules – or failure to do so – as required by law. Petitioner is beneficially interested in compelling the performance of a public duty and has standing to do so. The Boards do not have legislative immunity from their mandatory duty to promulgate rules. The language of the law is clear and compulsory, not merely instructive. Finally, the Boards admit they have not promulgated the rules of the investigation of complaints by the public nor published physician's profiles online as required by law. Therefore, they must be compelled to do so.

I. Section 9307 of the Administrative Adjudication Law is not a plain, speedy, adequate remedy to secure the performance of the Boards' duties.

Section 9307 of the Administrative Adjudication Law Rulemaking Procedures is not a plain, speedy, and adequate remedy. Section 9307 only gives people the right to petition an agency for the adoption, amendment or repeal or a specific rule, not the wholesale adoption of rules mandated by statute. Indeed, in *Holmes v. Territorial Land Use Comm'n*, the court found a writ of mandamus should be denied noting the distinction between requiring a board to promulgate rules as required by statute, versus ordering them to adopt specific rules which is in their

discretion. 1998 Guam 8 ¶ 15, 17 ("The court's further order for the promulgation of specific rules [the court] had formulated exceed its authority. … It is one thing for a court to order the promulgation of rules and regulations required by statute; it is an entirely different thing for a court to create and then order the adoption of specific rules and specific regulations.") (citations omitted). Unlike *Holmes*, Petitioner is not seeking promulgation of rules he has formulated, nor is he asking the Court to formulate the rules itself.

Even if Section 9307 could be interpreted to permit the petitioning for rules without providing a draft of the proposed rules, under the circumstances of this case such a petition is not a plain, speedy, or adequate remedy. Whether a remedy is plain, speedy, and adequate is a question on fact dependent on the circumstances of each case. *Villery v. Dept. of Corrections & Rehabilitation*, 246 Cal. App. 4th 407, 414. "Under the futility exception, a party need not exhaust administrative remedies if the record reflects that it would be futile to do so." *Barrett-Anderson v. Camacho*, 2015 Guam 20 (citing *Blaz v. Cruz*, No. CV84-0014A, 1985 WL 56592, at *4 (D. Guam App. Div. Apr. 29, 1985). *Accord DFS Guam L.P. v. Doris Flores Brooks et al*, Nos. SP0149-14, CV0094-15, at 10-11 (Super. Ct. Guam Sept. 18, 2015) (finding it was futile for the petitioner to pursue an administrative remedy under procurement law as it was unavailable when the public auditor recused herself). In *Barrett-Anderson*, the Court found the remedy of similar section 9309 of the Administrative Adjudication Law would be futile, and therefore the Court had jurisdiction ove the mandamus action. 2015 Guam 20 at ¶ 30. The Court found petitioning DRT to rule on the validity of regulations pursuant to Section 9309 would be futile because DRT had essentially determined the relevant regulations to be valid when it failed to respond to the petitioner's letters and continued issuing licenses in accordance with the regulation. *Id.* at ¶ 33.

Similarly, pursuing § 9307 to petition the Boards to adopt rules and regulations would be futile as the Boards determined that their arbitrary and inconsistent processes for investigation of complaints are adequate. *See* Decl. of Berg (Oct. 29, 2021); Decl. of Balajadia (Oct. 29, 2021). of Moreover, the Boards believe these processes are "above and beyond what the Guam Legislature has already provided in their enabling acts and the Administrative Adjudication Law." Resp't Mem. re: Mot. to Dismiss at 10.. Because the Boards have already decided on the validity

of their actions in light of 10 GCA §§ 12822, 12212, and 12212.1, pursing § 9307 would be futile for Petitioner.

Section 9307 is also an inadequate and unrealistic remedy because neither Board has not adopted the rules to prescribe the necessary forms or procedures to avail of this remedy. *See* 5 GCA § 9307 ("Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition."). A factor in determining whether mandamus is appropriate is whether no other realistic alternative is, or was, available to the petitioner. *In re Mersho*, 6 F.4th 891, 902 (9th Cir. 2021); *Accord Guam Fed. of Teachers v. Port Auth. of Guam et al*, No. SP0259-10 (Super. Ct. of Guam Mar. 23, 2010) (noting that if a petitioner experiences delays in the process of pursuing its administrative remedies, then the petitioner may request the court issue a writ). Without having any rules for the procedure of evaluating these petitions, any request Petitioner could make would languish in petition-purgatory without direction or process to ascertain a timely response or resolution – just like the investigation of non-Board member complaints. *See* Decl. of Berg ¶ 11(g)("There are generally no deadlines as to when certain aspects of an investigation must be completed…")(Oct. 29, 2021); Decl. of Balajadia ¶ 13 (Oct. 29, 2021). Therefore, based on the record, this is not a realistic or speedy remedy.

II. Petitioner is beneficially interested and has citizen standing to procure the enforcement of the Boards' public duties.

Petitioner has had several complaints languish before the Boards due to the failure promulgate rules to govern the procedures for investigations of complaints by non-Board members. Thus he has a legal and special interest in compelling the Board to promulgate such rules. However, even if he did not, as a citizen he has standing to procure the enforcement of the Boards' public duties. Although it is true that ordinarily the writ of mandate will be issued only to persons who are "beneficially interested", the California Supreme Court has said that when "the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty," the petitioner "need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." *Green v. Obledo*, 624 P.2d 256, 265 (Cal. 1981) (quoting *Bd. of Soc.*

Welfare v. County of L.A., 162 P.2d 627, 628 (Cal. 1945) (quotations and citations omitted). "This exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." *Id.* (citing *Bd. of Soc. Welfare*, 162 P.2d at 628). This exception has often been invoked by California courts. Thus, Petitioner, or any citizen, has standing to procure the enforcement of the Board's duties. California case law on writs of mandamus is persuasive. *Holmes*, 1998 Guam 8 ¶ 6 (finding that because Guam's mandamus statute was adopted from California, California cases are persuasive).

The Boards cite a host of other cases, but they are inapposite to the Petitioner's standing to seek a writ of mandamus. *See Linsangan v. GovGuam*, 2020 Guam 27 ¶ 15 (declining to address alternative theories for standing, like taxpayer standing, and only discussing standing for asserting civil rights claims); *People v. Superior Court of Guam (Laxamana)*, 2011 Guam 26 ¶ 24 (discussing the people's right to seek writs in criminal cases, not special proceedings); *cf. Bradue v. City of Los Angeles*, 226 Cal. App. 3d 83, 87 (Ct. App. 1990) (reaffirming the citizen-taxpayer's standing exception but finding it inapplicable as the petitioner was part of the board being sued and so an exception applied, and discussing only the city council's approval of a construction project, which was not a public right or public duty). The *A.B. Won Pat Int'l Airport Authority* case is consistent with California writ law and also supports Petitioner's standing. *In re A.B. Won Pat Int'l Airport Authority, Guam*, 2019 Guam 6 ¶ 21 (finding courts find a party has standing to seek access to public information based on three factors that correlate to constitutional standing requirements).

A. Petitioner does not seek the prosecution of another; he seeks rules and regulations to govern the investigation of non-Board member complaints.

The Boards argue Petitioner has no more legal interest in the discipline of a licensee any more than the public. Resp't Mem. re: Mot. to Dismiss at. 5. However, Petitioner does not seek to compel the Board to discipline licensees pursuant to 10 GCA §§ 12210 and 12820. The Petition seeks to compel the Board to adopt the rules necessary to perform their duties to investigate third-party complaints under 10 GCA §§ 12212 and 12822 (Compulsory Reporting and Investigation).

Thus, the cases cited by the Boards pertaining to criminal prosecution are not applicable. *See* Resp't Mem. re: Mot. to Dismiss at 5-6.[2]

Neither is the Petitioner does seeking judicial review of the Board's decision to not press charges under 10 GCA §§ 12210 and 12821. Therefore, the Boards' remaining proffers are entirely distinguishable. *See* Resp't Mem. re: Mot. to Dismiss at 5 citing *Hecvkler v. Chaney*, 470 U.S. 821 (1985) (discussing the question of when an agency's decision not to prosecute is subject to judicial review). *Spear v. Board of Med. Exam'rs* is inapposite to this case. 303 P.2d 886 (1956). There the court stated the "board was required to consider the request…[,]" to prosecute, which it did when the board had a full hearing on the matter presented and actually determined no violation had occurred. *Id.* at 890-91. However, it was the filing of an accusation of unprofessional conduct against a licensee that was within the discretion of the board. *Id.* at 890. Unlike *Spear*, Petitioner does not seek to compel the Boards to file an accusation or prosecute licensees pursuant to 10 GCA §§ 12210 and 12820.

B. The public duty doctrine applies to negligence actions, not special proceedings for mandamus relief.

The public duty doctrine does not apply to mandamus actions. This is not a civil action for negligence; this is a special proceeding for mandamus relief. The Boards argue Petitioner can only bring a suit against the government "only if there is a duty owed to the individual, separate and apart from a duty to the public in general." *See* Resp't Mem. re: Mot. to Dismiss at 6-7 (citing *Timson v. Pierce County Fire Dist. No. 15*, 149 P.3d 427, 431 (2006)). However, "[t]he public duty doctrine is a framework for determining when a government owes a duty to a plaintiff suing for negligence." *Timson*, 149 P.3d at 431 (citations omitted) (emphasis added). Thus, neither the public duty doctrine nor the cases cited by the Boards are applicable here. All the cases cited by the Boards deal with negligence actions against the government and therefore inapplicable. *See Timson*, 149 P.3d at 431 (discussing negligence action against the state after firefighters failed to

[2] Respondents cite *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (discussing a statute for to the criminal prosecution of parents who desert or neglect their children); *Stone v. Zipps*, No. 1:19-CV-01509 (UNA), 2019 WL 2343674, *2 (D.D.C. 2019) (discussing criminal and civil actions that were ultimately dismissed).

rescue her daughter from a vehicle); *Escoto v. GovGuam*, CV0261-11 (Super. Ct. Guam Dec. 17, 2012) (negligence action against Government of Guam for alleged failure to charge a driver with homicide despite prior DUIs); *Cruz v. Flores*, CV1105-10 (Super. Ct. Guam Sept. 28, 2015) (negligence action against Government after a driver was injured in a car accident when she stayed in her vehicle following an officer's instruction); *Ganian v. Wagstaffe*, 132 Cal. Rptr. 3d 487, 498 (2011) (discussing the criminal prosecution of another).

C. Petitioner does not petition the court to complete a particular result for Petitioner's complaints.

The Boards continue to mischaracterize the relief plainly requested. Boards argue Petitioner's writ of mandamus fails because he is not entitled to a particular result under the law. Resp't Mem. re: Mot. to Dismiss at 7-8. No matter how the Boards characterize the Petitioner or his complaints, the petition plainly does not seek to compel the Boards to reach a particular result in the complaints the Petitioner has filed, but only to prescribe rules that govern the investigation of all non-Board complaints as mandated by law. Thus the cases cited for the Boards' strawman argument are irrelevant. case law. *See* Resp't Mem. re: Mot. to Dismiss at 8. They merely stand for the proposition that the First Amendment's right to petition the government does not equate the right to a particular result or the right to redress.[3]

III. The Boards are not immune from mandamus relief for their failure to perform their mandatory duties.

The Boards argue government officials, like regulatory and licensing boards, may not be sued for any kind of relief. Resp't Mem. re: Mot. to Dismiss at 9. The Boards cite numerous cases

[3] *See Smith v. Arkansas State Highway Emp., Loc. 1315*, 441 U.S. 463, 465 (1979) (stating the First Amendment that "does not impose any affirmative obligation on the government to listen" or respond, not that government agencies are not compelled to respond in general); *Jones v. Brown*, 300 F. Supp. 2d 674, 679 (N.D. Ind. 2003) (stating the First Amendment does not require the government respond to a grievance); *Perales v. Bowlin*, 644 F. Supp. 2d 1090, 1100 (N.D. 2009) (discussing responses to grievance under the first, eight, and fourteenth amendment and in the context of inmates); *Petersen v. Cazemier*, 164 F. Supp. 1217, 1225 (D. Or. 2001) (finding the right to petition under the First Amendment does not guarantee redress for grievances and further stating the plaintiff had other routes for relief such as administrative procedures or legal action); *Mullen v. Thompson*, 155 F. Supp. 2d 448, 453 (W.D. Pa. 2001), *aff'd*, 31 F. App'x 77 (3rd Cir. 2002) (discussing the obligation on government officials to listen to grievances is not granted under the First Amendment).

to support its argument, but none are relevant as not one of the proffered cases states legislative immunity applies to mandamus relief; the proffers are limited to 42 USC § 1983 civil suits or actions for monetary or injunctive relief. All but one of these cases stand for the unapplicable proposition that state and regional legislators are immune from *civil* liability under § 1983 for their legislative acts.[4] The remaining case actually stateS quasi-legislative actions *may* be subject to writs but did not discuss legislative immunity at all. *Alborzi v. Univ. of Southern California*, 55 Cal. App. 5th 155 (2020). The term "civil action" is by definition not a special proceeding." *People v. Yartz*, 123 P.3d 604, 609 (Cal. 2005). The key distinction between civil actions and special proceedings is the remedy sought. *Agric. Lab. Bd. v. Superior Ct.*, 149 Cal. App. 3d 709, 714 (Ct. App. 1983). "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. …A 'special proceeding' is '[e]very other remedy….' Such proceedings are limited to cases that were neither actions at law nor suits in equity." *Id.* (citations omitted).

The Boards attempt to distinguish the one case that is relevant to the instant matter. *See*

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[4] *See Tenney v. Brandhove*, 341 U.S. 67, 378 (1951) (stating its holding is limited to finding no civil liability for a legislative committee); *cf. Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (finding local legislator was immune from civil liability from legislative activity); *Supreme Ct. of Virginia v. Consumers Union of U.S., Inc.*, 447 U.S. 719, 733-34 (1980) (discussing whether declaratory and injunctive relief are permitted under § 1983 in a civil rights suit against the court); *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005) (discussing whether declaratory and injunctive relief are permitted in a § 1983 action); *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2nd Cir. 2007) (stating § 1983 claims for injunctive relief may be barred by the doctrine of legislative immunity); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990) (discussing civil rights action which challenged Supreme Court's authority to promulgate mediation rules); *Church v. Missouri*, 913 F.3d 736, 753-54 (8th Cir. 2019) (stating state legislators enjoy immunity from § 1983 suits for legislative acts); *Tolman v. Finneran*, 171 F.Supp. 2d 31, 35 (D. Mass 2001) (discussing § 1983 legislative immunity for state legislators in a civil rights action). *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (discussing only whether an action is "legislative" for purposes of immunity under § 1983, whether an act is legislative in nature such that immunity applies, and is another § 1983 lawsuit for denial of permit to conduct wedding business)*; Gerow v. Washington*, 383 F.App'x 677, 678 (9th Cir. 2010) (discussing § 1983 in the context of a tort suit)*; Schmidt v. Contra Costa County*, 693 F.3d 1122, 1139 (9th Cir. 2012) (discussing a § 1983 action for court's committee adoption of allegedly discriminatory policy); *Perez v. Gamez*, 718 F.App'x 157, 160 (3d Cir. 2015) (discussing § 1983 legislative immunity of judge and US president after failure to appoint an interpreter to defendant who spoke limited-English).

Resp't Mem. re: Mot. to Dismiss at 11 (citing *Borja v. Miles*. No. CV85-0081A, 1987 WL 68917 (D. Guam App. Div. Oct. 22, 1987)). In *Borja*, the court found a writ was properly issued when the Guam Police Department ("GPD") failed to adopt rules and regulations related to resigning and the petitioner was terminated as a result of his forced resignation. Id. at *4. The Court stated there was a clear legal mandate for GPD to adopt rules and regulations related to resignation when the statute governing the resignation procedure used the word "shall." *Id.* at *3. It further held a writ was properly issued when "a significant public interest exists in requiring appellants to comply with statutory mandate." *Id.* at *4 ("When the duty is sharp and the public need weighty, the court will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced.") (citing *Bd. of Soc. Welfare*, 27 Cal. 2d at 101. Lastly, the court held there was no plain, speedy and adequate remedy at law unless the court issue a writ as "relief of mandamus is deemed to be appropriate … where the issue presented is purely one of law and it is in the public interest to have a prompt settlement of the question presented." *Id.* at *4 (citing *City of Huntington Beach v. Superior Court*, 78 Cal. App. 3d 333, 339 (1978).

Borja strongly supports the issuance of a writ here. Like in *Borja*, the Boards here have failed to adopt rules and regulations despite statutes requiring they "shall" be adopted. In 10 GCA § 12212 and § 12822, both statutes state each respective board "shall promptly acknowledge all reports received under this Section" and "Persons or entities reporting under this Section shall also be promptly informed of the Board's final disposition of the matters reported." Furthermore, in 10 GCA § 12212.1, GMBE "shall establish and maintain a searchable website that shall contain a separate profile page for all current and former licensees, whether active or inactive." Also like *Borja*, Petitioner's writ is related to an interest not only affecting him personally, but also when "a significant public interest exists in requiring appellants to comply with statutory mandate." *Id.* at *4.

Contrary to the Boards' argument, *Carlson v. Perez* does not limit *Borja*. 2007 Guam 6. The Boards argue *Carlson* requires the petitioner to allege some personal injury as a result of an agency's failure to adopt rules. Resp't Mem. re: Mot. to Dismiss at 11. This is not the point of

Carlson at all. In *Carlson*, the petitioners sought a mandate to void their adverse actions, which the courts declined as petitioners had the remedy of appealing the CSC's decision with judicial review. *Carlson*, 2007 Guam 6 ¶ 72. The Court did not limit *Borja*, but instead was distinguishing it from *Carlson* as the former claimed the failure of the agency to adopt personnel rules and regulations deprived the petitioner of due process of law. *Id.* at 46. The Guam Supreme Court was making the distinction that the affirmative obligation to promulgate regulations governing resignation created an explicit duty to issue those regulations, but nevertheless, the failure to adopt regulations does not mean there was a violation of due process. *Id.* As such, the Court was not saying there had to be a violation of due process in order for him to petition for mandamus relief. Therefore, like in *Borja*, Petitioner does not a legally cognizable interest in the outcome of his complaints, to which only a writ could remedy.

IV. The Boards are mandated to promulgates rules for the investigation of complaints and to publish physician's profiles.

The Board must adopt rules to investigate complaints of incompetence or unprofessional conduct brought by non-Board members, such as the complaints filed by the Petitioner. *See* 10 GCA § 12212 (Compulsory Reporting and Investigation by GBME) and § 12822 (Compulsory Reporting and Investigation by GBAHE). Sections 12821 and 12210, and the administrative procedures reference therein cited by Respondents, only apply to the due process given licensees when charges are brought *by the Board*. *See* Resp't Mem. re: Mot. to Dismiss at 12-13 citing 10 GCA § 12110 (Procedures for Enforcement and Disciplinary Action by GBME) and 10 GCA § 12821 (Procedures for Enforcement and Disciplinary Action by GBAHE). Therefore, the administrative procedures referenced in Sections 12110 and 12821 are irrelevant to the Boards' duties to adopt rules for investigating complaints under sections 12212 and 12822 respectively.

A. The rulemaking requirements of the Acts are compulsory not directory.

The Guam Supreme Court, relying on California authority, has distinguished between the court ordering the promulgation of rules and regulations required by statute - which is mandatory – versus the court creating then ordering the adoption of specific rules and regulations - which is discretionary. *See Holmes*, 1998 Guam 6 ¶¶ 12-13 citing *Sklar v. Franchise Tax Board*, 185 Cal.

App. 3d 616, 624, 230 Cal.Rptr. 42, 48 (Cal. Ct. App. 1986)(affirming the rule that "'[w]hile ordinarily, mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result, it does lie to command the *exercise* of discretion--to compel some action upon the subject involved.'")(emphasis added). *Accord Hollman v. Warren* 32 Cal. 2d 351, 354-356, 196 P.2d 562, 565-566 (1948) (mandamus lies to compel governor to exercise his discretion regarding appointment of notaries, but not to compel governor to exercise such discretion in a particular manner or to reach a particular result).

The *Sklar*, the California appellate court considered whether tax payers cvould obtain mandamus to compel the State Franchise Tax Board to adopt certain specific procedure to control certain deductions on state income tax returns. 185 Cal. App. 3d at 618. The Court found that the Board's failure to prescribe regulations containing the precise content the petitioners sought was not such a flagrant abuse of discretion for mandamus *Id.* at 623-625. ...." The Court's decision turned on the use of the words "necessary" and "reasonable" in the statute requiring the rules. Therefore, the Board's failure to promulgate the specific rule sought was within its discretion of determining what was necessary and reasonable to fulfill its duties under the Act. *Id.* at 623 (The relevant statute provided: "The ... Board shall have the power and it shall be its duty to administer this part. It shall prescribe all rules and regulations necessary and reasonable to carry out the provisions of this part...."). Here, the applicable statutes requiring the promulgation of rules and regulations by the respective Boards do not provide the Boards with the discretion to determine what is "necessary" or "reasonable". The law simply commands the Boards promulgate rules to fulfill their duties under the Act.

The applicable laws require the promulgation of rules governing the investigation of complaints. The language of the Physician's Practice Act shows that the adoption of rules to investigate complaints is not merely directory or suggestive, but one of the GBME's primary mandates. The stated policy of the Physician's Practice Act is that "it is necessary to provide laws and regulations to govern the granting and subsequent use of the privilege to practice medicine. The primary responsibility and obligation of the Guam Board of Medical Examiners is to protect

the people of Guam." 10 GCA § 12201 (emphasis added). One of the GBME's explicit responsibilities is to " receive, review, and investigate complaints." 10 GCA § 12203(b)(7). Finally, the Act provides "The Board shall adopt and enforce rules and regulations to carry into effect and fulfill its duties under the Act." 10 GCA § 12216. The GBME must adopt rules to carry into effect and fulfill its duty to receive, review, and investigate complaints by non-Board members.

Likewise, the GBAHE does not have discretion to forego rules for investigations of complaints. The stated policy of the Allied Health Practice Act is that "it is necessary to provide laws and regulations to govern the granting and subsequent use of the of the privilege to practice allied health professions. The primary responsibility and obligation of the Guam Board of Allied Health Examiners is to protect the people of Guam." 10 GCA § 12801(c). Then, the Act unambiguously mandates that "[u]pon receiving a written complaint against a licensee, the Board shall conduct an investigation[.]" 10 GCA § 12812. Thus, regulations to govern the mandatory investigations of written complaints against licensees by non-Board members are necessary and compulsory under the Act.

Nichols v. County of San Bernadino, CIVDS17-1356, 2016 WL 10006257 *2 (Cal. Super. 2016) does not support the Boards' argument that "shall" as used in the Physician's Practice Act and Allied Health Practice Act is merely directory. Neither the promulgation of rules nor state-mandated publication of information was at issue in *Nichols*. Nor was the court interpreting whether the unambiguous language of a statute was mandatory or directory. Instead, the issue was whether the court could compel the district attorney to take certain actions to bring about the extradition of a mother who had taken her children to Israel in violation of a custody order. The court found it could not because it fell within the district attorney's prosecutorial discretion in criminal matters. *Zheng v. Mayor's Council*, SP0076-15 (Guam Super. Ct. 2015) is also of no moment. There, the Superior Court found the duties of the Mayor's Council of Guam (MCOG) to comply with procurement law were only mandatory if the MCOG first exercised their discretion to procure. Here, the Boards do not have the discretion to decline promulgating rules.

B. The Boards' processes for investigation are arbitrary and justify a writ.

Although the Boards admit that the law requires there be a process for filing complaints against health care professionals, they argue that the law only requires they acknowledge these complaints, and any further action with respect to the complaints is unnecessary. Resp't Mem. re: Mot. to Dismiss at 7-8, 12. This is patently untrue as the law plainly tasks the boards with "investigations" of complaints by non-Board members. 10 GCA §§ 12203(b)(7), 12812. Thus, even if rules governing the investigations of complaints were discretionary, the Boards' arbitrary and haphazard processes for these mandatory investigations is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." *United Assn. of Journeymen v. City & Cty. of San Francisco*, 32 Cal. App. 4th 751, 759, 38 Cal. Rptr. 2d 280 (1995) *citing Los Angeles City etc. Employees Union v. Los Angeles City Bd. of Education*12 Cal.3d 851, 856 (1974). Therefore a peremptory writ must issue to control this flagrant abuse of discretion and arbitrary disregard of the law. *See e.g. McLeod v. Board of Pension Commissioners* 14 Cal.App.3d 23, 27, 94 Cal.Rptr. 58 (1970). At the very least GBME should be compelled to disclose the draft they claim to have been working on since 2012. *See* Decl. of Balajadia ¶ 7.

C. The searchable physician profile website is mandatory not a suggestion.

Public Law 34-79 unambiguously requires the creation of a searchable physician profile website and the legislative history indicates the intent to provide this public information within a specified timeframe.[5] First, Section 12212.1 operates as a right of the public to obtain information, not a suggestion to the GBME or something subject to their discretion. In fact, Section 12212.1 does have "Optional Disclosures" under subsection (d), which is distinct from the information required to be disclosed under subsections (b) and (c). 10 GCA § 12212.1(b)-(d). Thus, if the publication of physicians' profiles were optional under, a subsection for "Optional Disclosures" would not exist.

Second, there is no doubt the timeframe was provided to create consequences for the

[5] See Committee report for Bill 202-34 https://www.guamlegislature.com/Committee_Reports_34th/Bill%20No.%20202-34%20(LS)%20ComReport.pdf

GBMEs' failure to create this site. The Boards argue that the 120-day enactment requirement was discretionary because no " 'or else' consequence" existed in the law. Resp't Mem. re: Mot. to Dismiss at 16. However, Section 12212.1(g) states, "the Board shall disclose to an inquiring member of the public within four (4) working days, by traditional or electronic means, any information made publicly available under subsections (a) through (d)." Moreover, failing to disclose information would subject the Boards to the Sunshine Act, thereby making them personally liable. Until the GBME complies with their mandatory duty, there will continued to be an unmet "need for patients to have access to professional information about physicians licensed on Guam in order to make an informed decision when choosing a medical care provider, and to further promote a culture of trust when selecting healthcare professionals." P.L. 34-79:1. Therefore a peremptory writ should issue compelling the complete creation of a complete searchable physician profile website within the time required by law.

V. The Boards have not shown cause why the peremptory writ should not issue.

The Boards claim they do have rules, regulations and processes governing the investigation of complaints, of which the Petitioner has availed, yet their evidence states otherwise. The declaration of the Board chairs admit they only have broad strokes for a process of investigating complaints that has not gone through the rulemaking procedures required by the Administrative Adjudication Law. Decl. of Berg (Oct. 29, 2021); Decl. of Balajadia (Oct. 29, 2021). Moreover, the GBME admits the physicians profile website is a mandate, but allege it is unfunded. Section 12212.1(f) provides the Board with a funding mechanism. It is clear that they simply have not found the need for patients to have access to professional information about physicians licensed on Guam to be a priority. In any event, the Boards cannot be relieved of their duties simply because they are difficult or costly. *See e.g. san Agustin v. Gatewood, et. al.*, Superior Court of Guam SP231-10, Decision and Order (Oct. 28, 2011). Therefore, the peremptory writ must issue.

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CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court deny the Boards' Motion to Dismiss Petition for Writ of Mandamus and issue a peremptory writ of mandate directing the Board to implement the rules and regulations necessary for the investigation of complaints and for the GBME to establish and maintain a website in compliance with 10 G.C.A. § 122212.1.

Respectfully submitted this 3rd day of November 2021.

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