No. 23-_____

In The

Supreme Court of Appeals of West Virginia

STATE EX REL. JOSE RAVELO, DDS

Petitioner

v.

WEST VIRGINIA BOARD OF DENTISTRY

Respondent

ORIGINAL JURISDICTION (W. VA. CODE § 51-1-3)

PETITION FOR A WRIT OF PROHIBITION

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QUESTIONS PRESENTED

Question 1

West Virginia Code Section 30-1-5(c) generally gives the West Virginia Board of Dentistry (the "Board") only eighteen months to investigate alleged professional misconduct; it gets only six if it fails to issue a valid status report. The Board has been investigating Dr. Jose Ravelo for nearly two years and provided only the most perfunctory of status reports. The question presented is whether the Board violated Section 30-1-5(c)'s strict time limits.

Question 2

West Virginia Code Sections 30-1-5(c) and 30-4-19(a) permit the Board to investigate only where there is a complaint and to launch its own complaint only if based on "credible information" justifying a complaint. Here, the Board began investigating Dr. Ravelo based solely on information suggesting a patient experienced a minor surgical complication and before receiving or making any complaint. The question presented is whether, by doing so, it exceeded its statutory authority.

Question 3

Article III, Section 3-17 of the West Virginia Constitution guarantees that every citizen "shall have remedy by due course of law" and that "justice shall be administered without sale, denial, or delay." The Board has held Dr. Ravelo in limbo for nearly two years after receiving information it claims justified investigating him for professional misconduct. The question presented is whether the Board's inaction violates Dr. Ravelo's right to due process without delay.

INTRODUCTION

Because few things undermine confidence in courts and administrative tribunals more than a belief that "inefficiency and delay will drain even a just judgment of its value[,]" Chief Justice Warren Burger, United States Supreme Court, Address to the American Bar Association (Aug. 10, 1970), this Court has vigorously enforced statutory and constitutional time limits on agency investigations. It has repeatedly expressed special solicitude for citizens caught in protracted or unjustified agency investigations that span long beyond reasonable limits or devolve into fishing expeditions. It has not hesitated to issue writs of prohibition to end those investigations.

Yet in defiance of both this Court's decisions and unequivocal statutory time limits, the Board has—without cause—carried out a nearly two-year-long crusade to find some reason to discipline Dr. Ravelo based on a surgical complication. This, after having access to both the patient's dental and hospital records since October 2021, receiving a comprehensive expert report exonerating Dr. Ravelo, and spurning multiple efforts on the part of Dr. Ravelo's counsel to resolve the matter.

West Virginia law forbids administrative agencies to indefinitely hold a dentist's professional reputation hostage in this way. By statute, the Board has only eighteen months to resolve claims of professional misconduct—a deadline that, at best, it cannot meet here, and, at worst, it has already exceeded. Due process forbids inordinate delay in resolving legal claims, making the Board's actions here not only illegal, but unconstitutional. And the West Virginia legislature has put clear limits on the Board's power to investigate dentists, requiring credible evidence of misconduct (not just complications) and laying out a specific procedure the Board must follow. Limits the Board has ignored.

For any or all of these reasons, the Court should issue a writ of prohibition directing the Board to cease its current investigation of Dr. Ravelo and forswear any further efforts to discipline him based on the underlying surgical complication. Because the Board's actions are facially illegal and unjustified, this Court should also award him his reasonable attorney's fees and costs.

STATEMENT OF THE CASE

Dr. Ravelo is a board-certified oral surgeon who has been practicing oral surgery for approximately fifteen years. He has been licensed in West Virginia since November 2018 and currently practices at Mountain State Oral & Facial Surgery, one of the largest and most accomplished oral surgery practices in the State. Yet, for the reasons below, he has spent the last two years in limbo: forced to practice under the Board's implicit threat to suspend or revoke his license.

A. Dr. Ravelo treats a severe infection for a patient on blood thinners.

On August 19, 2021, Dr. Ravelo placed F.S., a 74-year-old man with a history of heart trouble, under light anesthesia.[1] (App. R. at 002) F.S.'s jaw was swollen and painful enough that he had trouble eating solid food because of a severe infection at his jaw line. (*Id.*) The best solution was a surgical procedure to remove the infection. (*Id.*)

At the time, F.S. was taking Plavix, a blood thinner designed to reduce his risk of heart attacks. (*Id.*) Plavix, like all blood thinners, increases surgical risk, because it makes it harder for blood to clot and to stop any bleeding if a procedure goes awry. (*See id.* at 075-076.)

[1] This brief uses the patient's initials to protect his privacy. Because the record includes confidential patient records protected by, among other things, the Health Insurance Portability and Accountability Act, Dr. Ravelo has filed the Appendix to this petition as confidential according to Rule 40 of the Rules of Appellate Procedure.

Even so, Dr. Ravelo did not direct F.S. to stop taking Plavix ahead of his August 26 surgery for two reasons. First, the surgery was superficial, minimizing the risk of a severe bleeding event. (*Id.* at 002.) Second, given F.S.'s cardiac history, halting the Plavix even temporarily was risky. (*Id.* at 075-076.) As Dr. Ravelo would later explain to the Board, literature he reviewed ahead of the surgery showed that there is only a remote (around 0.2%) chance that continuing a blood thinner like Plavix ahead of a surgery will lead to bleeding serious enough to require more than the usual steps to staunch bleeding during surgery. (*Id.* at 084.) But the same literature shows there is a "small but significant" chance that interrupting a patient's blood thinner treatment will lead to potentially fatal heart problems. (*Id.*)

Before the surgery, Dr. Ravelo and F.S. talked about the procedure's possible benefits and dangers. (*Id.* at 021, 054-055.) Dr. Ravelo highlighted the increased risk of bleeding connected with Plavix and the reasons for continuing the medication anyway. (*Id.*) Knowing these risks, F.S. consented to proceeding with the surgery as discussed. He also decided on his own not to take Plavix on the day of the operation. (*Id.* at 103).

F.S. had surgery a few days later. Dr. Ravelo successfully drained the infected areas, removed the unhealthy or infected tissue, and sutured the incisions on both the right and left sides of F.S.'s mouth. (*Id.* at 040-041) When he noted that an incision on the left side bled more than similar incisions on the right, Dr. Ravelo immediately acted to control the bleeding and investigate its source, which turned out to be a small venous structure, not a major blood vessel. (*Id.*) The bleeding was not especially intense, nor was there any "pumping" that would suggest a major complication. (*Id.*) So, Dr. Ravelo continued and successfully completed the operation.

B. Dr. Ravelo treats a complication then sends the patient to the hospital to safeguard his health.

Dr. Ravelo kept F.S. at the office after the surgery to make sure there were no complications. (*Id.*) Before he was discharged, he and his staff made sure that F.S.'s vital signs were in normal ranges, he had a full range of motion in his neck and tongue, and the relevant areas of his mouth were not painful to the touch. (*Id.*) F.S. and his wife received detailed post operative instructions, which—among other things—told them to call Dr. Ravelo or go to the emergency room if F.S. had trouble breathing. (*Id.*)

Late that afternoon, Dr. Ravelo's office reached out to F.S. to see how he was doing. (*Id.* at 002, 037.) When his wife expressed concerns, Dr. Ravelo video conferenced with F.S. via FaceTime, and, based on that conference, asked him to return to the office. (*Id.* at 010, 037.) He was back under Dr. Ravelo's care within the hour. (*Id.* at 002.)

Dr. Ravelo then discovered some swelling and clotting on the floor of F.S.'s mouth. (*Id.*) Even so, F.S. was breathing normally, had stable vital signs, and was in no distress. (*Id.*)

After draining the area to reduce swelling, Dr. Ravelo suggested that F.S. go to the emergency room. (*Id.*) The preoperative diagnosis at the hospital was a hematoma on the floor of the mouth causing airway obstruction and arterial bleeding. (*Id.* at 111). F.S. underwent surgery to drain the hematoma and ligate (close off) the left alveolar artery. (*Id.* at 112-113)

F.S. was released a few days later in good condition. (*Id.* at 114)

C. The Board launches an investigation that remains pending nearly two years after the patient's surgery.

F.S. has never complained to the Board or filed any malpractice action against Dr. Ravelo. But, on September 7, 2021, to be safe and to ensure he complied with the Board's rules, Dr. Ravelo voluntarily informed the Board—through a letter from counsel attaching a complete copy of F.S.'s

dental chart—that F.S. had experienced complications and had been hospitalized. (*Id.* at 001–069.) He received no response for more than five months.

Then, in February 2022, the Board sent Dr. Ravelo a certified letter saying that the Board's complaint committee reviewed the self-report and F.S.'s hospital records (which it improperly subpoenaed in October 2021) and recommended that a complaint be filed based on the belief "that violations of the standard of care may have occurred." (*Id.* at 071-072.) In particular, the Board claimed Dr. Ravelo should have consulted F.S.'s physician about keeping him on Plavix or advised F.S. to stop taking the medication before surgery. (*Id.*) The Board also claimed that Dr. Ravelo "nicked an artery during surgery, and that with Plavix still at a therapeutic level, caused the bleeding and swelling that required a nine-day hospital stay, in which he was on a ventilator for five of those days." (*Id.*) Dr. Ravelo was given thirty days to respond. (*Id.*)

Dr. Ravelo, with the assistance of counsel, timely submitted another detailed letter to the Board explaining his course of treatment and contesting the Board's allegations. (*Id.* at 073–078.) He also attached a copy of a 2014 article from the American Journal of Medicine supporting his decision to continue F.S.'s Plavix treatment. (*Id.* at 079–086.) Then, in April 2022, he sent the Board a copy of an outside expert report prepared by Caroline M. Webber, a board-certified oral surgeon with decades of experience, much of it as an oral surgeon for the U.S. Navy. (*Id.* at 087–094.) Dr. Webber concluded that Dr. Ravelo did not, in any way, violate the standard of care. (*Id.* at 091-093.)

The Board took no action until July 2022, nearly a year after F.S.'s surgery and fully ten months after he filed his self-report. First, on July 21, he received a subpoena requesting copies of CT scans related to F.S. (*Id.* at 094.) Then, on July 26, the Board sent a letter purporting to be a "status report" as required by W. VA. CODE § 30-1-5(c). (*Id.* at 095.)

The July 26 letter contained no substantive information about the status of the Board's investigation.[2] Instead, it merely said that "the Complaint Committee of the Board [was] still reviewing and considering the matters alleged" and would "attempt" to keep Dr. Ravelo informed. (*Id.*) If the Board found probable cause, it said, it would issue a charging statement. (*Id.*)

Then, the Board again went silent. Ten months later, in May 2023, Dr. Ravelo, through undersigned counsel sent the Board a letter detailing the Board's numerous violations of West Virginia law and the Board's own regulations and a Freedom of Information Act request for, among other things, the Board's investigatory file. (*Id.* at 096–100.)

On or around July 5, 2023, the Board produced *for the first time,* F.S.'s August 2021 hospital records and an expert report from a Board-retained expert dated August 14, 2022.[3] (*Id.* at 101-161.) Also included in the Board's production was a June 28, 2023 correspondence from the Board (Board President John E. Bogers, DDS) to itself (Executive Director Susan Combs) proposing an agreed extension of time to July 20, 2024 to issue a final ruling in Dr. Ravelo's matter. (*Id.* at 162-163.)

Dr. Ravelo has filed this Petition to stop the Board's dilatory, legally unjustified, and now unconstitutional investigation.

[2] For example, the status report did not update Dr. Ravelo that the Board had retained an expert to review the medical records and prepare a report. (*Id.* at 116).

[3] The Board's July 5, 2023 production totaled 1,227 pages. Undersigned counsel has attached portions as referenced above.

D. This Court has subject-matter jurisdiction.

This Court has subject-matter jurisdiction over this Petition under Article VIII, Section 8-3 of the West Virginia Constitution and West Virginia Code § 51-1-3, which provide that this Court "shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition."

SUMMARY OF THE ARGUMENT

This Court will issue a writ of prohibition where an agency exercising quasi-judicial power exceeds its jurisdiction or its legitimate powers. The Board's investigation into Dr. Ravelo's treatment of F.S. has done both, repeatedly abusing or ignoring the statutory procedures for investigating professional misconduct and violating Dr. Ravelo's constitutional rights.

First, the Board has exceeded the statutory time limit on its investigation. W. VA. CODE § 30-1-5(c) requires the Board to complete its investigation within one year of issuing a status report, which it must do within six months of the complaint being filed. Here, even considering the facts in the light most favorable to the Board and treating its February 2022 letter as a complaint starting the statutory clock, the Board either (1) has already exceeded its time limit because it issued a facially defective status report or (2) does not have enough time to issue formal charges, hold a hearing, and issue a filing ruling before July 26, 2023. Alternatively, if Dr. Ravelo's September 2021 self-report served as the complaint, the Board's deadline came and went months ago. Either way, persisting in the current investigation both violates Section 30-1-5(c) and flouts this Court's decisions enforcing an agency's obligation to strictly comply with statutory deadlines. The Board's contrary position, which is based on the idea that the Board can agree with itself to extend its own deadline, is not only absurd but also contrary to the statutory text and in conflict with the statute's purpose.

Second, the Board launched its investigation without cause. When the Board began investigating, it knew only that a patient experienced a surgical complication. That alone cannot amount to "credible evidence" supporting an investigation, especially where the patient has never complained about his treatment. Plus, even if it could or he had, the Board must make or receive a complaint before it begins investigating. But it did not do so. Instead, it subpoenaed F.S.'s medical records without a complaint in violation of its statutory mandate.

Since that time, it has only received further confirmation that Dr. Ravelo did not violate professional norms. That includes not only a copy of professional literature supporting Dr. Ravelo's medical judgment but an independent export report reviewing Dr. Ravelo's decisions and finding no cause for discipline. Yet the Board trundles on, heedless of the impact on Dr. Ravelo's professional reputation and unwilling even to decide whether it believes any professional misconduct occurred that would justify a hearing.

Finally, the Board's delay in resolving this matter violates Dr. Ravelo's due process rights. Under this Court's precedents, due process requires the Board to complete any investigation based on a self-report within eighteen months, even if Section 30-1-5(c) does not itself apply to self-reports. The Board has exceeded that time limit, placing Dr. Ravelo's professional reputation and livelihood under a lingering cloud and preventing him from benefiting from business opportunities in other States.

This must stop. And any one or more of these clear errors of law justifies issuing a writ of prohibition.

STATEMENT RESPECTING ORAL ARGUMENT AND DECISION

Dr. Ravelo requests that the Court hold oral argument because he believes it will aid the Court's consideration of this case. Oral Argument is appropriate under Rule 20(a) of the Rules of

Appellate Procedure because Dr. Ravelo's Petition involves issues of first impression with respect to the application of W. VA. CODE § 30-1-5 and the constitutionality of the Board's delay in concluding its investigation. In the alternative, to the extent the Court believes past decisions speak authoritatively on the points raised, argument is appropriate under Rule 19(a) because the Petition involves an error in the application of that settled law and an unsustainable exercise of agency discretion. Dr. Ravelo does not believe this case is appropriate for memorandum decision under Rule 21.

ARGUMENT

"An administrative agency is but a creature of statute[ ] and has no greater authority than conferred under the governing statutes." *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996). To ensure that State agencies adhere to these statutory limits, this Court will issue a writ of prohibition where, in a quasi-judicial proceeding, an agency either acts outside its jurisdiction or exceeds its legitimate powers. *See State ex rel. York v. W. Va. Real Est. Appraiser Licensing and Certification Bd.*, 236 W.Va. 608, 612, 760 S.E.2d 856, 860 (2014) ("A writ of prohibition . . . will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers."); *State ex rel. Gordon v. W. Va. State Bd. of Examiners for Registered Nurses*, 136 W.Va. 88, 101, 66 S.E.2d 1, 9 (1951) (explaining that a writ of prohibition will lie against administrative agency where it is exercising a quasi-judicial function).

Here, the Board has exceeded the statutory limits on its power and jurisdiction by (1) unlawfully and unconstitutionally exceeding the maximum time to resolve its allegations against Dr. Ravelo, and (2) launching its investigation without sufficient cause.

Where a Petitioner claims that a quasi-judicial body exceeded its legitimate powers or jurisdiction, this Court considers five factors to determine whether to issue a writ of prohibition.

State ex rel. Fillinger v. Rhodes, 230 W.Va. 560, 564, 741 S.E.2d 118, 122 (2013). Those factors are: (1) whether the party seeking the writ has no other adequate means of obtaining relief, (2) whether the petitioner will be damaged or prejudiced by waiting until the ordinary process of dispute resolution runs its course, (3) whether the agency's action is clearly erroneous as a matter of law, (4) whether the agency's action "is an oft repeated error or manifests persistent disregard for either procedural or substantive law," and (5) whether the agency's action raises an issue of first impression. *Id.* "Although all five factors need not be satisfied, it is clear that the third factor . . . should be given substantial weight." *Id.*

Each of these factors weighs in favor of granting Dr. Ravelo's Petition. Because the third factor—whether an agency clearly violated the law—is the most significant, this Petition first addresses that factor (*see* Sections A, B, and C, *infra*) before turning to the remaining four (*see* Section D, *infra*).

A. The Board's delay violates the statutory time limit on disciplinary actions.

To begin, in reviewing Dr. Ravelo's treatment of F.S., the Board exceeded its jurisdiction and regulatory powers here because it breached the statutory time limits of W. VA. CODE § 30-1-5(c). The Dental Practices Act requires that every Board investigation begin with a complaint, which can come from two sources. W. VA. CODE § 30-4-19(a). By law, "any person" can file a complaint with the Board alleging a dentist committed some form of professional misconduct. *Id.* Or the Board can make its own complaint based on either (1) credible information suggesting misconduct or (2) based on a quarterly report from the Board of Pharmacy related to controlled substances. *Id.*

Whatever the source, the Board must issue a status report by certified mail, return receipt requested to both the complaining party and the responding dentist "within six months of the

complaint being filed." W. VA. CODE § 30-1-5(c). And it must hold an evidentiary hearing and finally dispose of the complaint, finding misconduct or not, within one year of the status report. *Id.* At most, then, the Board has eighteen months to resolve allegations against dentists.

This Court has repeatedly stressed the importance of abiding by Section 30-1-5(c)'s strict time requirements. Before 1996, there was no definite time limit on Board actions; Section 30-1-5(c) only said that the Board should "investigate and resolve complaints which it receives and shall do so in a timely manner." *State ex rel. Miles v. W. Va. Bd. of Registered Nurses*, 236 W.Va. 100, 105, 777 S.E.2d 669, 674 (2015). But the Legislature amended the statute "for the express purpose of 'establishing a time limit for licensing boards to issue a final ruling on complaints.'" *Id.* "Clearly, the Legislature has determined that professionals are entitled to resolution of the cloud over their license within a specific time frame." *Id.* at 107, 777 S.E.2d at 676. "More critically, the Legislature has determined that the public should not be interminably exposed to professionals who potential present a risk of harm to their patients, clients or the public at large." *Id.* Thus, Section 30-1-5(c)'s time limits are not "matters of mere 'convenience' or 'form,'" they are "unquestionably *mandatory* and therefore, jurisdictional, as pertains to these types of proceedings." *Id.* at 105, 777 S.E.2d at 674 (emphasis added). And this Court has not hesitated to issue a writ of prohibition when the Board fails to strictly comply. *See, e.g., id.* at 107, 777 S.E.2d at 676 (issuing the writ and directing that the nursing board's complaint be dismissed because the board exceeded the statutory time limit); *State ex rel. Fillinger v. Rhodes*, 230 W.Va. 560, 565–67, 741 S.E.2d 118, 123–25 (2013) (same).

It is unclear how Section 30-1-5(c)'s time limit applies when the Board learns of a potential rule violation via a self-report from a dentist. But there are essentially two options. Perhaps the clock starts when the Board issues its own complaint based on the self-report. Alternatively, the

self-report itself might count as a "complaint," starting the clock some time before the Board decides to investigate further or make a formal allegation of misconduct. This Court need not decide which is the case here, however, because the Board has violated Section 30-1-5(c) either way.

1. Even if the Board's February 2022 letter were the "complaint," the Board is still out of time to pursue disciplinary action.

Based on the status report it sent in July 2022, the Board suggests its February 2022 letter is the "complaint" in this case. But even if that were true, the Board would still be out of time under Section 30-1-5(c) for three reasons.

First, assuming the July 2022 letter is a valid status report (which it is not) giving the Board another year to investigate, the Board's time to investigate expires on July 26, 2023. To date, the Board has not issued formal charges against Dr. Ravelo. Once it does so, it will need to give him at least 30 days' notice before it holds a hearing. W. VA. CODE § 30-1-8(f). That alone dooms the Board here because less than 30 days remain before the statutory deadline for issuing a final ruling. For that reason alone, Dr. Ravelo is entitled to a writ of prohibition halting this investigation.

But it is worse than that. Under Section 30-1-5(c), the Board is required not only to hold a hearing—presumably scheduling it to accommodate the schedules of its members, Dr. Ravelo and his counsel, and any witnesses—but also to reach a final disposition within a year of its status report. Thus, the Board would need to draft a complaint, subpoena witnesses, hold a hearing on a complicated medical question, carefully consider the evidence, meet to reach a decision, and draft and issue a final ruling all in less than thirty days. That is simply not feasible in any case, let alone a case like this one that will likely involve complex medical testimony. As a result, the Board cannot discipline Dr. Ravelo consistent with its statutory authority, and the Court should issue the writ.

Second, the Board's July 2022 letter is not an adequate status report, so the Board had only six months to resolve this case, not eighteen. The letter is conclusory at best, saying only that the Board had not yet made any probable cause finding and was still "reviewing and considering" Dr. Ravelo's case. (App. R. at 096.) That tells Dr. Ravelo nothing about the status of the case. It does not, for example, let Dr. Ravelo know what records the Board has reviewed, what it is still waiting on, how long its investigation might continue, and so on.

West Virginia courts have not yet addressed what a status report must include, however, it seems far-fetched to think that such a blithe assurance that the agency is "working on it" is what the Legislature had in mind when it wrote a status report requirement into the West Virginia Code. *Cf. State ex rel. Hoover v. Smith*, 198 W.Va. 507, 516, 482 S.E.2d 124, 133 (1997) ("The Board of Medicine may not conduct its investigation in such a manner so as to purposefully prevent the physician from obtaining information he or she may need to adequately address the charges pending against him or her."). Indeed, such a crimped reading of Section 30-1-5(c)'s status report requirement undermines the purpose of the 1996 amendments: to bring greater accountability and urgency to the Board's resolution of professional conduct issues. As this Court explained in *Miles*, by introducing specific time limits and status report requirements, the legislature meant to enhance and underline the "responsibility of the Board to act diligently and promptly in reviewing, investigating, and conducting disciplinary hearings on complaints brought before it not only to guarantee that nurses will be held accountable for proven misconduct, but most importantly, to ensure the safety of patients and the public." 236 W.Va. at 107, 777 S.E.2d at 676. That purpose is not served by a status report that provides no insight into what the Board has done, what additional steps it plans to take, or when it plans to take them.

Nor would it be particularly difficult for the Board to do better. For example, the Board's February 2022 letter here would likely suffice. There, the Board at least told Dr. Ravelo what it had done so far—namely, reviewed F.S.'s dental chart and (improperly) subpoenaed hospital records—and identified its concerns with Dr. Ravelo's conduct. (App. R. at 071.) It also implicitly explained the next step in the case by requesting a response from Dr. Ravelo. (*Id.*) Making it far superior to the barebones July 2022 letter.

Because that letter was too conclusory to count as a status report, and because Section 30-1-5(c) conditions its one-year extension of time on issuing a valid status report, the Board's time to investigate Dr. Ravelo's treatment of F.S. expired in July 2022 (six months after the Board's February 2022 letter) under the Board's own theory.

Third, the Board did not properly seek additional time under the statute. The Court should not accept the Board's attempt to ignore Section 30-1-5(c)'s time limits and create an *ad hoc* exception in cases where the Board issues a complaint (thereby serving as the complainant). In its June 28, 2023 letter, the Board purports to ask itself for an additional 12-months, until July 20, 2024[4], to "complete its investigation and issue a final ruling on **. . .** [its] complaint." (App. R. at 163.) Then, it purports to agree to that extension.[5] Section 30-1-5(c) does not allow this gamesmanship.

Allowing the Board to abuse Section 30-1-5(c)'s extension clause like this would defeat the Legislature's purpose in imposing a strict time limit on Board actions, discussed above. After all, if the Board's position is valid, there is nothing preventing the Board from requesting another 12-month extension (of itself) next June. And again, the year after that. And so on. Though the

[4] This would be nearly *three years* after Dr. Ravelo's self-report in September 2021.

West Virginia courts have not addressed the question directly, it is far-fetched to claim that the Legislature intended for the Board to seemingly have an endless amount of time to investigate when the Board serves as the complainant. Here, the Board obtained an expert opinion in August 2022, stuck it in the proverbial drawer, and did nothing for nearly a year. The Board did not provide a copy to Dr. Ravelo, issue formal administrative charges, or propose a consent agreement; it instead did nothing. And now, if the Court adopts their theory, it is empowered to grant themselves as much time as they want to "investigate" or, as it has done to date, simply keep Dr. Ravelo in interminable limbo. The Court should reject such an absurd result. *See Vanderpool v. Hunt*, 241 W.Va. 254, 262, 823 S.E.2d 526, 534 (2019) ("[A] statute should not be construed in such a manner as to reach an absurd result."). If Dr. Ravelo's September 7 self-report counts as a "complaint," the Board's ability to discipline Dr. Ravelo expired in February 2023.

Alternatively, it could be that Dr. Ravelo's September 2021 self-report effectively served as a complaint, starting the clock on the Board's investigation. While not styled as a complaint, the self-report letter served the same purpose: alerting the Board to conduct it might want to investigate. Indeed, that is why the Dental Practices Act, in the same section it discusses when the Board may issue a complaint, requires dentists to disclose "any life-threatening occurrence, serious injury, or death of a patient resulting from . . . dental treatment." W. VA. CODE § 30-4-19(g)(18). In fact, in this case, the Board would not have known there was anything to investigate but for Dr. Ravelo's self-report—because F.S. has never complained about the care he received.

Further, the Dental Practices Act allows "any person" to file a complaint, *id.* § 30-4-19(a). Unless the Board believes *any* somehow means something other than *any* here, that means that a dentist can, if he chooses, alert the Board to his own potential misconduct. *Any*, Am. Heritage Dictionary of the Eng. Lang. (5th ed. 2018) (*any* means "one, some, every, or all without

specification"). Indeed, the Board already requires dentists to report on other dentists in other circumstances. *See, e.g., id.* § 30-4-19(g)(13) (defining professional misconduct to include "[k]nowing or suspecting that a licensee is incapable of engaging in the practice of dentistry or dental hygiene, with reasonable skill, competence, and safety to the public, and failing to report that information to the board").

It follows that a self-report is effectively a complaint and the Board had until February 2023 (one year after its February 2022 letter) to issue a final decision on Dr. Ravelo's conduct. Because it didn't, the Board is barred from taking any further action on the matter, and this Court should issue a writ of prohibition forbidding it to do so.

After all, the same concerns that motivated the *Miles* and *Fillinger* courts to issue the writ apply here. If Dr. Ravelo's self-report is not the "complaint" in this case—if it does not start the Section 30-1-5(c) clock—the Board would have essentially unlimited time to investigate or hold dentists in limbo. It would be free to launch an endless fishing expedition, confident that it would face time constraints only once it decided to issue a formal complaint.

It is this Court's role to prevent professional disciplinary matters from devolving into such a "fishing enterprise" and protect professionals from "meddling curiosity concerning an individual's personal affairs." *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 19, 483 S.E.2d 12, 19 (1996). After all, "there can be no greater judicial function of the court than to stand between the government and the citizen, and, thus, to protect the latter from harassment and unfounded intrusion." *Id.*

It is also notable that the Board itself treated the self-report letter as a complaint. In February 2022—five months after receiving Dr. Ravelo's letter—the Board sent him a letter (functionally, a status report) explaining what it had done so far to investigate his treatment of F.S.

and next steps. (App. R. at 071.) That status report started the statutory, one-year countdown on the Board's jurisdiction.

As discussed above, the Board will likely deny that its February 2022 letter was a status report and suggest instead that the letter (rather than Dr. Ravelo's self-report) is the complaint here. But the Board's letter does not meet the Board's own definition of a complaint. Under the Board's own rules, a complaint must identify the date and location of the challenged treatment, the name of any person who treated the patient after the dentist charged, and the location of any post-treatment care. W. VA. CODE R. § 5-5-5.1.

Beyond that, if the self-report was not a complaint, the Board would have had no authority to investigate—as in Section C—because the Board can only investigate *complaints*, whether submitted by a third-party or instigated by the Board itself. W. VA. CODE § 30-4-19(a). Yet its February 2022 letter reveals that, by the time it wrote Dr. Ravelo, the Board had already subpoenaed hospital records. (App. R. at 070.) In other words, the Board was investigating and must have believed it had the authority to do so. After all, this Court generally assumes that agencies act according to their duties and in good faith, unless the evidence shows otherwise. *See Jarvis v. W. Va. State Police*, 227 W.Va. 472, 478 n.6, 711 S.E.2d 542 n.6 (2016) ("Under our law, '[a] public official, in the performance of official duties imposed upon him by law, is presumed to have done his duty and to have acted in good faith and from proper motives until the contrary is shown.'" (quoting *State v. Prof. Reality Co.*, 144 W.Va. 652, 662–63, 110 S.E.2d 616, 623 (1959)).[6]

[6] If the Board does argue that the February 2022 letter is the complaint here and, thus, admits that it launched an investigation without a complaint, this presumption would no longer apply, and, as Section C explains, that alone would justify issuing a writ of prohibition.

Because the Board's February 2022 letter is, at best, construed as a status report, the Board had until February 14, 2023, to complete its investigation. W. VA. CODE § 30-1-5(c) (requiring the Board to "issue a final ruling" within "one year of the status report's return receipt date"). That was four months ago. Thus, the Board's jurisdiction to discipline Dr. Ravelo for his treatment of F.S. has expired and this Court should issue a writ of prohibition.

B. Even if the Board's investigation were timely, it lacked a proper predicate.

Next, assuming again that the Board's theory of what counts as a "complaint" in this case (i.e., the February 2022 letter) holds true, the Board may "initiate a complaint" only "upon receipt of credible information" justifying an investigation. W. VA. CODE § 30-4-19(a). And it must take that step before launching any sort of investigation. *Id.; see also* W. VA. CODE § 30-1-5(c) (the "board . . . shall investigate and resolve *complaints*" (emphasis added)); *id.* § 30-1-8(k) (the Board must promulgate rules that "specify a procedure for the investigation . . . of . . . *complaints* (emphasis added)). Here the Board failed on both counts.

First, nothing in Dr. Ravelo's September 2021 self-report suggested unprofessional conduct. To the contrary, F.S.'s care was unfailingly conscientious. For example, Dr. Ravelo and his staff reviewed and documented F.S.'s history of heart troubles—including three heart attacks and an aortic aneurysm. (App. R. at 051.) They also documented his current medications, including Plavix. (*Id.*) Contemporaneous documents support Dr. Ravelo's claim that he carefully considered his decision to keep F.S. on Plavix in the lead up to his operation. (*Id.* at 055.) They also show that Dr. Ravelo discussed the risks of doing so, including the risk of increased bleeding, with F.S. beforehand. (*Id.* at 055 ("We told [F.S.] that the most important thing is to get him back infection free . . . . We will plan not to hold his blood thinners since the risk of holding it can be higher than later on. Patient is aware that there can be more bleeding . . . ."). According to the records and his

self-report, Dr. Ravelo carefully performed the surgery to minimize the risk of bleeding, promptly reacted to increased bleeding, followed up with the patient and took appropriate steps to mitigate later complications, and sent him to the hospital as a precaution. (*See id.* at 040–043.) And so on.

Nothing in this suggests that Dr. Ravelo acted unprofessionally. Complications can happen even where a surgeon, as was the case here, does nothing wrong. So, a self-reported complication is not itself "credible information" supporting a Board investigation.

Second, even if it were, the Board did not take the correct next step and issue a complaint. Instead, it immediately launched an investigation as shown by the Board's February 2022 letter indicating it subpoenaed F.S.'s hospital records in October 2021, more than three months *before* its Complaint Committee "recommended to the Board that a complaint be filed" against Dr. Ravelo. (*Id.* at 071.)

This is no mere technical error. For one thing, this Court has always refused to assume that "the Legislature meant less than what it said" in establishing procedural rules to govern Board investigations. *See, e.g., Fillinger*, 230 W.Va. at 567, 741 S.E.3d at 125. For another, as discussed above, the complaint is what starts the statutory clock on Board investigations. If the Board could easily evade that time limit by simply delaying its complaint until it completed its investigation, "there would have been little reason for the Legislature to alter the language of the statute to provide for specific acts and deadlines." *Miles*, 236 W.Va. at 106, 777 S.E.2d at 675.

Because the Board both lacked an adequate basis for its investigation and failed to abide by the statutory procedures for launching one, this Court should grant Dr. Ravello's petition and issue a writ of prohibition.

C. The Board's delay violates Dr. Ravelo's due process rights.

Finally, setting aside for the moment the statutes governing professional conduct investigations, the West Virginia Constitution guarantees that "justice shall be administered without sale, denial, or delay." W. VA. CONST. ART. III, § 17. The Board's conduct here violates these principles, even if this Court were to conclude that it has not exceeded the statutory time limit.

In other contexts, this Court has not hesitated to halt overly dilatory agency actions, even in the absence of "time constraints imposed by rule or statute." *Frazier v. Derechin*, 246 W.Va. 36, 41, 866 S.E.2d 101, 106 (2021) (years-long delay in issuing a license-revocation decision violated due process); *see also Reed v. Staffileno*, 239 W.Va. 538, 803 S.E.2d 508 (2017) (thirty-nine-month delay in issuing a license revocation decision violated due process). Due process and the constitutional mandate to avoid delay "operate[ ] as an outer limit on" agency action, enforcing their "affirmative duty to dispose promptly of matters properly submitted." *Frazier*, 246 W.Va. at 41, 866 S.E.2d at 106.

How long is too long? This Court need not establish a firm limit. A June 2022 report from the Office of the Legislative Auditor reported that, on average, the Board took only 77 days to resolve a complaint against a dentist or other licensee in 2021—down from 123 days in 2019. W.Va. Office of the Legislative Auditor, *Regulatory Board Review: Board of Dentistry* 24 (June 2022), available at: https://tinyurl.com/y8x3sh77. Yet Dr. Ravelo's case has been pending for more than 500 days, even though the Board has had all the pertinent records since September 2021 (when Dr. Ravelo provided F.S.'s entire chart). It has also had F.S.'s hospital records since at least February 2022 and an expert report exonerating Dr. Ravelo since April 2022. A delay that is nearly

five times the average resolution time and, as discussed below, has prejudiced Dr. Ravelo's business prospects, should be enough to establish a due process violation.

That aside, this Court need not merely rely on statistical response times or decide on its own what time limits due process places on the Board's actions. In the past, when confronted with a statute that did not place a time limit on agency action, this Court has looked to the time limits the Legislature imposed on analogous processes within the same statutory scheme. For example, in *Allen v. State of W.Va. Human Rights Comm'n*, the Legislature did not impose a specific time limit for the Human Rights Commission to resolve unlawful discrimination complaints. *See* 174 W.Va. 139, 154–55, 324 S.E.2d 99, 114–15 (1984). But the legislature did require the Commission to issue a "right to sue" letter if it had not resolved a discrimination complaint within one year. *Id.* at 159–60, 324 S.E.2d at 120. This, the Court said, suggested that the Legislature intended the Commission to enter a final order resolving discrimination complaints within one year. *Id.* And it used that time limit to conclude that the Due Process Clause required the same. *Id.*

Here, the analogue is even more obvious. A dentist's self-report is functionally equivalent to a patient's complaint, because both prompt the Board to consider whether it should investigate a dentist's conduct. The Legislature has, in Section 30-1-5(c), expressed its intent that all professional licensing investigations be completed within eighteen months for both due process and public safety reasons. So even if 30-1-5(c)'s time limits do not apply to Dr. Ravelo's situation by their express terms, due process extends those limits to self-report investigations. Indeed, as one justice recognized in his *Fillinger* concurrence, Section 30-1-5(c)'s time limitations are themselves founded, at least in part, on due process concerns. *Fillinger*, 230 W.Va. 560, 568, 741 S.E. 118, 126 (Loughry, J., concurring) ("Due process and fundamental fairness clearly dictate that a nursing professional subject to the disciplinary authority of tis licensing board be afforded a

fair and prompt hearing . . . ."). The Court should therefore rely on that time limit in determining that Board's delay violates Dr. Ravelo's due process rights.

Dr. Ravelo can easily satisfy the prejudice requirement for a due process claim. *Frazier*, 246 W.Va. at 41, 866 S.E.2d at 106. Over the last year or so, Dr. Ravelo has been looking to extend his oral surgery practice into other states. But he has been unable to do so because some states will not admit out-of-state practitioners with pending disciplinary matters. Moreover, even in States that would do so, Dr. Ravelo's applications would be delayed or complicated by the need to explain the status and nature of the Board's investigation. (A process frustrated by the Board's failure to explain what the status is in its "status report.") These frustrations show prejudice. *See id.* at 43–44, 866 S.E.2d at 108–09 (driver showed prejudice where he missed out on potential employment opportunities because his license had been revoked). Beyond that, the Board has forced Dr. Ravelo to operate in the shadow of potential disciplinary action for nearly two years, clouding his professional reputation and putting his livelihood at risk.

Where an agency's delay in resolving a quasi-judicial matter violates due process, a writ of prohibition is the proper remedy. *See State ex rel. Hoover v. Smith*, 198 W.Va. at 518, 482 S.E.2d at 135 (issuing the writ based on a violation of due process). This Court should therefore issue a writ of prohibition directing the Board to cease its investigation into Dr. Ravelo's treatment of F.S.

* * *

In sum, the Board has clearly erred in at least three ways. It has exceeded the statutory time limit on its investigation into Dr. Ravelo's conduct. Its investigation has violated Dr. Ravelo's due process rights. And its investigation lacked a proper predicate. The third—and most important—factor this Court considers in issuing a writ of prohibition thus weighs in his favor.

D. The other factors this Court considers point to issuing the writ.

Each of the other four factors also tip in favor of Dr. Ravelo.

As to the first factor, this Court long held that dentists lack an adequate alternative remedy where the Board fails to act and instead merely holds him in limbo awaiting a decision. *State ex rel. Sheppe v. W. Va. Bd. of Dental Examiners*, 147 W.Va. 473, 480–82, 128 S.E.2d 620, 624–25 (1962). While there is a statutory right to seek judicial review of Board decisions, that remedy is not available until the Board decides, which it has not done here. *See id.*

Similarly, Dr. Ravelo would be prejudiced if he were forced to wait and use the ordinary judicial review procedure, satisfying the second factor. He would have to continue to endure the cloud over his license and delay his business plans while the Board crawls towards a decision at its own pace. Then he would "be compelled to go through a contested hearing" and perhaps "appeal from a final judgment" to vindicate his statutory and constitutional claims. *See State ex rel. Hoover v. Berger*, 199 W.Va. at 21, 483 S.E.2d at 21.

Dr. Ravelo's Petition raises multiple issues of first impression related to the application of Section 30-1-5(c) and constitutional due process to self-report cases. It also asks the Court to determine what quantum of evidence the Board must have before launching an investigation.

Finally, while Dr. Ravelo cannot point to a long record of untimely Board actions, it is true that agencies through West Virginia have often violated Section 30-1-5(c)'s time limitations, as shown by the *Miles* and *Fillinger* cases. Moreover, the Board does have some history of ignoring both statutory commands and its own rules in investigating other oral surgeons in Dr. Ravelo's practice. Thus, the fifth factor weighs at least slightly in Dr. Ravelo's favor. (And, even if it didn't, Dr. Ravelo need not satisfy all five to obtain a writ.)

E. The Court should order the Board to pay Dr. Ravelo's reasonable attorney's fees and costs.

Because of the severity and obviousness of the Board's statutory and constitutional violations, the Court should award Dr. Ravelo his reasonable attorney's fees and costs.

"[T]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Trozzi v. Bd. of Rev. of W. Va. Bureau of Emp. Programs*, 214 W.Va. 604, 607, 591 S.E.2d 162, 165 (2003). By unreasonably delaying, violating statutory time limits, and acting without a proper statutory predicate, the Board has acted at least vexatiously and wantonly.

Indeed, this Court has, in the past, awarded attorney's fees where a professional licensing Board unlawfully delayed a disciplinary matter, emphasizing that the professional's "reputation h[ad] been under a cloud of doubt and suspicion occasioned by . . . long-pending charges." *State ex rel. York v. W. Va. Real Est. Appraiser Licensing and Certification Bd.*, 236 W.Va. 608, 614, 760 S.E.2d 856, 862 (2014); *see also Miller v. Hare*, 227 W.Va. 337, 342, 708 S.E.2d 531, 536 (2011) (awarding attorney's fees to a driver where DMV improperly delayed a license revocation proceeding). It has also recognized that "[c]itizens should not have to resort to lawsuits to force government officials to perform their legally prescribed non-discretionary duties." *Allen*, 174 W.Va. at 166, 324 S.E.2d at 127. When they do, however, "the government ought to bear the reasonable expense incurred by the citizen in maintaining the action." *See id.* "No individual citizen ought to bear the legal expense incurred in requiring the government to do its job." *Id.*

The evidence of misconduct on Dr. Ravelo's part has always been weak, if it exists at all. The Board has had all the information relevant to its charging decision since, at the latest February 2022. And the evidence it has obtained since that time, like Dr. Webber's report, has only

undermined any claim of wrongdoing. Yet it has continued to prevaricate, refusing either to cease its investigation or make a formal allegation of misconduct.

In the meantime, Dr. Ravelo has been living under a cloud for nearly two years. He has been unable to expand his business as he wishes or plan effectively for the future. This despite warning the Board, through counsel, that its investigation violated multiple statutory commands and the Board's own regulations. Indeed, this investigation comes after the Board was already forced to abandon a different investigation involving a different surgeon at Mountain State Oral & Facial Surgery after being warned of similar statutory violations.

In short, the Board's repeated defiance of statutory mandates, infringement on Dr. Ravelo's constitutional rights, and foot dragging in resolving what should be a simple case—in the face of multiple written and oral efforts to resolve the matter—has left Dr. Ravelo with little choice but to file this Petition to get the Board to do its job. The Board should pay the attorney's fees and other expenses he has incurred to do so.

CONCLUSION

No matter how it is framed, the Board's conduct here violated West Virginia law. That might be because, by statute, the Board took too long to finish its investigation. Or because its delay violated Dr. Ravelo's due process rights. Or because there was no predicate for an investigation.

For any one of these reasons, the Court should grant Dr. Ravelo's Petition and issue a writ of prohibition precluding the Board from taking further action against him based on his treatment of F.S. and award him his reasonable attorney's fees.

Respectfully submitted,

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VERIFICATION

I, Jose Ravelo, DDS, after first being duly sworn, state that I have read the for forgoing Petition for a Writ of Prohibition, and that the facts and allegations in it are true and correct to the best of my knowledge, information, and belief.

Jose Ravelo, DDS

Taken, subscribed, and sworn before me this 17th day of July, 2023.

My commission expires: October 19, 2024

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
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My Commission Expires October 19, 2024

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I certify that a true copy of this petition and its associated appendix was served on both the Respondent and the West Virginia Attorney General the individuals below by U.S. Mail on July 19, 2023:

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