

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEHAN ZEB MIR, M.D.,
Petitioner,

v.

SHARON LEVINE, M.D., ET AL.,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni, Jr., Esq. (Counsel of Record)
BROWNSTONE, P.A.
Attorney for Petitioner
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
(f) 407-622-1511
robert@brownstonelaw.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was denied Due Process when the Respondents revoked his license by operation of law without adequate procedural protections, contrary to United States Supreme Court precedent?
2. Whether Petitioner was denied his Constitutionally-entitled fair notice about charges brought against him in the Respondents' administrative proceeding when the Board Members failed to provide notice of his license revocation hearing, contrary to United States Supreme Court precedent?
3. Whether Petitioner was denied Equal Protection as a Class of One when the Respondents repeatedly targeted and maliciously sought to revoke Petitioner's medical license without justification, despite contrary United States Supreme Court precedent?
4. Whether a Panel of the United States Court of Appeals for the Ninth Circuit erred in denying Petitioner's claims under the theory of issue preclusion, despite Supreme Court precedent that states issue preclusion does not apply when there was inadequate procedural due process in the first proceeding?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Jehan Zeb Mir, MD, Petitioner

Sharon Levine, *et al.*, Respondents

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari issue to review the Denial of his appeal by the United States Court of Appeals for the Ninth Circuit on February 6, 2019.

OPINIONS BELOW

The February 6, 2019 Order of the United States Court of Appeals for the Ninth Circuit denying Mir's Petition for en banc review, which decision is herein sought to be reviewed was not published. The December 18, 2018, Opinion of the Panel of the United States Court of Appeals for the Ninth Circuit was unpublished, but can be found at *Mir v. Levine*, 745 F. App'x 726 (9th Cir. 2018). The September 26, 2017, Opinion of the United States District Court for the Southern District of California was unpublished, but can be found at *Mir v. Kirchmeyer*, No. 12-cv-2340-GPC-DHB, 2017 U.S. Dist. LEXIS 157919 (S.D. Cal. Sep. 26, 2017).

BASIS FOR JURISDICTION IN THIS COURT

28 U.S.C. § 1257 confers this Court jurisdiction to review a Writ of Certiorari challenging the judgments in question.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1 to the Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Petition brings an as applied challenge to the Constitutionality of the Respondents' decision to revoke Dr. Mir's license to practice medicine. The Petition's central argument is that the Respondents' decision discriminated against Dr. Mir, and as a result, Dr. Mir's Constitutional rights to Equal Protection and Due Process under the law were abhorrently infringed. Dr. Mir requests this Court grant Certiorari so the Court may address novel and important questions of Constitutional law that arise from his case.

First, Dr. Mir alleges his Fourteenth and Fifth Amendment right to Due Process under the law was violated when he was repeatedly denied appropriate procedural process during the revocation of his medical license. Namely, Dr. Mir contends he was not even informed or given notice of the hearing at which his medical license was revoked by the State. Dr. Mir further contends there was animus against him for his belonging to a minority group. Dr. Mir also alleges his right to Equal Protection under the law as a Class of One was violated in the above series of events. These and the further Constitutional challenges discussed below compel the Court to grant Certiorari.

A. UNDERLYING FACTS PROMPTING REVOCATION OF MEDICAL LICENSE.

Dr. Mir was licensed by the State of California in 1972 as a Doctor of Medicine and Surgery. On June 8, 2000, Mir admitted an 81-year old female patient, (hereafter “G.F.” or “the patient”), to the San Antonio Community Hospital in Upland, California. Mir later transferred the patient to Pomona Valley Hospital, where Plaintiff was a provisional member of the medical staff working under active members of the staff.¹

B. PROCEEDINGS IN THE RECORD BELOW.

On July 16, 2003, Respondents filed an accusation against Mir relating to his care of G.F. for

¹ Petitioner also contends that federal jurisdiction does exist under 42 U.S.C. § 11111 *et seq.* particularly § 11132 of review over medical board's actions. He raised this issue on his Petition for Re-Hearing before the Ninth Circuit and in his Initial Brief before the Ninth Circuit Court of Appeals. This issue was raised in opposition to the 4th Amended Complaint (Dist.Ct.doc.159, pg. 34-37/39), the Appellant's Opening Brief Court of Appeals doc.10-18) Petition for Rehearing. (Court of Appeal doc 32, 25). The section defines the term “Medical Board”. 42 U.S.C. Section 11111 requires a Medical Board to report to National Data Bank or Secretary of the Health all disciplinary matters. It also requires review of all disciplinary actions. Respondent incorrectly reported to National Data Bank that Petitioner made wrong diagnosis, made false statements and had adverse documentation findings. Petitioner alleged that such action created jurisdiction of District Court. Petitioner should be entitled to review by a District Court on Respondent's Decision to revoke his license.

alleged repeated acts of negligence regarding one wrong diagnosis and improper transfer of the patient. Mir was also charged for not doing a history and physical examination of the patient, although this charge was dismissed subsequently when Mir produced evidence of an 'Admission Note.'

Mir received a state administrative hearing that took place over thirteen days before an administrative law judge of the Office of Administrative Hearings. The hearings were held between October 2004 and April of 2005.

At the conclusion of the hearing on April 6, 2005, the Respondents filed the Second Amended Accusation ("SAA") which alleged Mir made seven false statements during the hearing that were based on testimony of two rebuttal witnesses. One of the seven charges was immediately dismissed since it was not supported by any testimony or any witnesses.

On May 11, 2005, the parties presented oral argument before the administrative law judge regarding whether the SAA could be filed. Mir's attorney argued that Mir was entitled to "notice and opportunity to present his defenses" and requested time to present further evidence on the charges alleged in the SAA. On May 25, 2005, the judge denied Mir's motion to strike the SAA, but granted the request for additional time to present evidence against the allegations set forth in the SAA. On July 29, 2005, Mir filed a "Witness designation of Jehan Mir, M.D." indicating an intent to oppose the Second Amended Accusation. The judge denied Mir's Motion

to Call Additional Witnesses on the same day, which violated California Government Code §§ 11507 and 11516. In the 2006 Decision that revoked Dr. Mir's medical license, the Respondents admitted there was not an administrative penalty for a single act of negligence. [See District Court Doc. 17-3 at 25, para. 4].

On March 3, 2006, the administrative judge issued a proposed decision recommending revocation of Mir's license. Based on this recommendation, the Respondents issued a decision on May 22, 2006 revoking Mir's medical license. Mir then filed a petition for reconsideration and request for stay of the Respondents' decision.

On December 6, 2006, the Respondents issued a Decision After Reconsideration revoking Mir's medical license. The Respondents then inserted new 'documentation findings' into the Decision without providing Notice, an Accusation Hearing, or Proof; and the Respondents, based on that, improperly determined the penalty assessed to Dr. Mir. This assessment was made contrary to California law, *see Wheeler v. Board of Forestry*, Cal. App. 3d 522, 192 Cal. Rptr. 693 (3d Dist. 1983), since California law requires an Accusation Hearing prior to a penalty assessment. The Board allowed Mir the opportunity to petition for reinstatement of his license in "two years after the effective date of [the] decision." Following the revocation, on January 9, 2007, Mir filed a writ of mandamus with the Superior Court of California, Sacramento County challenging the revocation of his license.

On August 10, 2007, the superior court granted Mir's mandamus petition in part, and remanded to the Respondents to reconsider a penalty consistent with the superior court's opinion, having found that there was not sufficient evidence to support the findings against Mir. The Court dismissed the charge of improper transfer of patient, which, then, converted the accusation Dr. Mir faced from repeated acts of negligence to a single act of negligence. In 2006, as stated above the Respondents had previously admitted there was not an administrative penalty for a single act of negligence.

The superior court went on to find that only one of the six charges of making false statements in the SAA had sufficient evidence to support it; and this one statement was not proven made in the administrative record. The Respondents failed to inform Mir of exactly where he had made such a statement, nor did they articulate wherein the statement was false, nor did they provide him with a hearing as to such falsity. The court additionally found that “[p]etitioner ha[d] not persuaded the court that he was denied a fair trial by the amendment of the accusation at the conclusion of the proceedings” where Mir failed to show what additional evidence might have been presented or how it might have changed the outcome, before affirming the administrative judge's findings as to the allegations in the original Accusation and the FAA.

In September 2007, Mir filed a motion for new trial. The superior court confirmed its original ruling and denied Mir's motion for a new trial on January 29, 2008. On January 29, 2008, the superior court

filed an interlocutory judgment consistent with its August 10, 2007 ruling, requiring a redetermination of penalty consistent with the findings dismissed by the court prior to March 25, 2008.

On February 29, 2008, Mir was served with a notice of entry of judgment. Mir then filed a petition for writ relief with the California Court of Appeal, pursuant to California Business & Professions Code § 2337, which the court summarily denied on April 4, 2008.

On June 13, 2008, the Respondents reissued a Corrected Decision on Remand again revoking Mir's license without providing a Notice about the Hearing and oral arguments. Mir again filed a post remand motion for writ of relief with the California Superior Court to set aside and vacate the penalty, alleging the Respondents had not redetermined the penalty consistent with the findings made by the court on writ petition but rather had simply reissued the previous findings of 'repeated negligence' on finding of single act of negligence as determined by court on the writ petition. On October 17, 2008, the superior court denied Mir's motion. The superior court denied a subsequent motion for new trial filed by Plaintiff on January 29, 2009 without providing relief. The court discharged the writ petition without providing relief.

On April 22, 2009, Mir appealed to the California Third District Court of Appeal for an extraordinary writ challenging the superior court's order. Mir petitioned on the grounds that no penalty could be determined for a single act of negligence after

dismissal of the second charge of improper transfer of the patient, that he was not provided Notice of the oral arguments, and that the evidence of mitigation was not considered and his constitutional rights of due process and equal protection were violated. [See District Court Doc. 17-6 at 72-77; 85-87].

On February 22, 2010, the Court of Appeal agreed with Mir and directed the superior court to vacate its prior peremptory writ of mandate and to issue a new writ directing the Respondents to set aside its 2008 decision revoking on remand and re-determine the penalty consistent with the court's 2007 findings on the writ petition. The court found that the dismissal of finding of the improper transfer charge changed the factual and legal basis of the 2006 decision. The court further ordered that remand was limited to redetermination of the penalty, meaning, it was limited to the court's decision not to make any findings. The court ordered oral and written argument pursuant to the Administrative Procedures Act and *Ventimiglia v. Board of Behavioral Sciences*, 168 Cal. App. 4th 296, 313-314 (2008). The Court further stated that "a summary denial of the petition is necessarily on the merits" and declined to reconsider its April 24, 2008 decision summarily denying Mir's first writ of mandate challenging the Board's findings on the false statement and other evidentiary issues.

On September 27, 2010, the Respondents issued another decision, reissuing the dismissed finding of "repeated" and "gross negligence" and imposed a five-year probation with various terms and

conditions that was impossible to comply with, in contradiction to the writ and order from the California Court of Appeals by making findings of “repeated” and “gross negligence” and an implied finding of psychiatric illness for ordering a psychiatric examination without notice. It was necessary for Respondents to include the finding of repeated negligence because without such a finding the Respondents could not determine any penalty against Dr. Mir. On November 12, 2010, Mir filed a third writ of mandamus in the superior court challenging the Respondents’ decision. The superior court, on August 24, 2011, mandated the Respondents to vacate the probation term requiring Plaintiff to undergo a psychiatric evaluation when Respondents disclosed to the court during oral arguments that the reason for such an evaluation was that Mir had filed the writ petition against the Respondents thus violating Mir's First Amendment constitutional rights to petition government. The Court agreed with the Board that “[t]he issues previously decided by the Board and sustained by the Court in its January 29, 2008 Judgment in Case No. 07CS00036 [were] no longer open for reexamination.” The Court noted that it remanded to the Board “only to redetermine the penalty, not to reassess whether grounds for discipline existed.” The court failed to determine the propriety of the penalty of probation and declined to enforce the 2007 Writ and Order from the superior court and the writ and the February 22, 2010 order from the California Court of Appeals because Dr. Mir had filed the Petition under a new case number, the Court inconsistently cited *Carmel by the Sea v. Board of Supervisors* (1982) 137 Cal. App. 3d 964 providing

for petitioner to challenge return to writ by new or supplemental petition. [District Court Doc. 17-7 at 65, 67]. So, thus, there was not a final judgment on the merits on the 2006 revocation and the writs thereafter, thus defeating the entire purpose of filing writ to completely remove the penalty and nothing else.

On November 3, 2011, without presenting Dr. Mir notice, the Respondents filed a Petition to Revoke Probation against Dr. Mir. On August 16, 2012, again, without presenting notice to Dr. Mir, the Respondents issued a Default Decision and Order setting aside the 2012 Corrected Decision After Remand on the grounds that Mir had violated the terms and conditions of his probation. Mir could not file any motion as to the Default Decision because Mir had no knowledge of it. And, after the Respondents revoked Mir's license for not complying with the conditions of probation, California Government Code § 11523 provides only a 30-day statute of limitations before a writ petition must be filed.

C. DR. MIR BROUGHT SUIT SEEKING CONSTITUTIONAL RELIEF IN THE FEDERAL COURTS.

On September 25, 2012, Dr. Mir filed suit in the United States District Court for the Southern District of California under 42 U.S.C. § 1983 alleging the Respondents wrongfully took disciplinary actions against Dr. Mir surmounting to a Constitutional violation. Dr. Mir sought equitable relief in the form of an injunction fully reinstating his license to

practice medicine without any probationary restriction. On January 17, 2013, Mir filed a First Amended Complaint, alleging revocation in 2012 without Notice and Hearing. After extensive litigation pursued by both sides, on June 2, 2017, Mir filed his Motion for Summary Judgment, on the grounds that Respondents committed repeated violations of due process and favorable admissions by Respondents during discovery of no wrongdoing by Mir in 2006 when first revoked, while the Defendants filed a cross motion on the ground that Mir was provided due process and principles of issue preclusion applied to admissions by Respondents. The District Court consolidated the cross motions for summary judgment and set a September 22, 2017 hearing.

Several important revelations were established in Dr. Mir's favor during discovery. First, during discovery, Petitioner obtained a valuable admission from the respondents that indicated he had actually made the correct diagnosis as to the 2000 patient (G.F.) that first prompted the review of his license. And, second, it was also admitted by the Respondents that they had no evidence to support that Dr. Mir made any false statement in the prior proceedings as was alleged in the "SAA." Third, Respondents admitted that "documentation findings" were inserted into the 2006 decision without Notice or Accusation even though Respondents had the opportunity to amend the Accusation twice. And fourth, Dr. Mir avers that in two instances, the Appellee-Defendants directly disobeyed the writs of the California courts.

But despite these revelations, on September 26, 2017, the District Court denied Mir's Motion for Summary Judgment and granted the Defendants' cross motion. The heart of the District Court's decision concerned Dr. Mir's right to due process. The problem with the District Court's decision granting summary judgment for the Respondents was that it was limited to administrative hearings and judicial review thereof from 2003 up to the February 22, 2010 California Court of Appeals Decision and nothing after that about the propriety of probation in 2010 and revocation without Notice in 2012.

The central issue in the 4th Amended Complaint was that the September 27, 2010 Probation by Respondents was in disobedience of the 2010 writ and order of the Court of Appeals, and that the State Court had failed to determine the propriety of the penalty of probation and had declined to enforce the 2007 writ and order of the Superior Court and 2010 order and writ of Court of Appeal thus rendering the entire writ proceedings over years a nullity.

This issue was not decided by the district court in granting summary judgment for the Defendants. Mir made a post dismissal *ex parte* application to stay proceedings and amend the order granting Defendant's motion for summary judgment because the district court in granting summary judgment for Defendants had not disposed of all issues alleged in the 4th Amended Complaint. [District Court Doc. 292].

With regard to the due process claim, the court applied the *Mathews v. Eldridge* balancing test, concluding:

Plaintiff's significant interest in his medical license does not outweigh (1) the low risk of erroneous deprivation from the state's procedures and (2) the state's significant interest in ensuring proper healthcare. California's statutory scheme provided Plaintiff with notice of the government's deprivation of his property right and multiple opportunities to be meaningfully heard on these issues. The multi-level review and statutory scheme ensure that there was a low risk of erroneous deprivation.

Mir v. Kirchmeyer, No. 12-cv-2340-GPC-DHB, 2017 U.S. Dist. LEXIS 157919, at *39–40 (S.D. Cal. Sep. 26, 2017). Concerning Mir's meaningful opportunity to be heard, the court found:

Here, Plaintiff was afforded thirteen days of hearings before an administrative law judge between October 18, 2004, and April 6, 2005. (ECF No. 29-22 at 14; 262-1 at 2-4; 29-27 at 16.) Plaintiff was represented by counsel throughout these hearings, presented evidence, and was allowed to cross examine and subpoena witnesses who testified under oath with a verbatim transcript. (ECF No. 29-27 at 16; 29-39 at 6-194.) Adequate procedural due process need not even require an adversarial hearing, approximate a trial-like

proceeding, nor even offer the opportunity to cross-examine witnesses. See *Hickey*, 722 F.2d at 549; *Brewster*, 149 F.3d at 985; *Brock*, 481 at 266. Meanwhile, Plaintiff was afforded a wealth of procedural protections including an adversarial hearing that approximated a trial-like proceeding, the opportunity to call and cross examine witnesses, and the opportunity to make his arguments through extensive written briefing.

Mir v. Kirchmeyer, No. 12-cv-2340-GPC-DHB, 2017 U.S. Dist. LEXIS 157919, at *48–49 (S.D. Cal. Sep. 26, 2017). The District Court thus granted the Defendants' motion denying Dr. Mir's claims.

On October 16, 2017, Mir filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. On December 18, 2018, a three-member panel of the Ninth Circuit denied Mir's appeal, holding in relevant part:

The district court properly granted summary judgment on Mir's lack of due process claim. Mir, who was represented by counsel, had a thirteen-day administrative hearing under procedures set forth in the California Code of Regulations and the California Business and Professions Code. California law provides a means for redressing incorrect administrative decisions through a motion for reconsideration and an appeal to the state courts. There are no facts suggesting that this process was inadequate. . . . Contrary to Mir's

contentions, the district court did not err in denying his motion for summary judgment on his lack of due process claim because Mir failed to establish that he was entitled to judgment as a matter of law.

Mir v. Levine, 745 F. App'x 726, 728 (9th Cir. 2018). On February 6, 2019, the Ninth Circuit denied Mir's Motion for Rehearing En Banc.

The Petition for Certiorari now follows, challenging the lower court's findings in granting summary judgment for Respondents and denying Mir's motion for summary judgment on an irrelevant issue that California law provides Constitutionally adequate administrative procedure without deciding the real issue on Appeal that Respondents violated Mir's due process rights by not providing Notice and Hearing according to California law, Government Code § 11500 et seq. particularly § 11507 and § 11516; California case law, and federal law, and disobeying the writs and orders of the Court reviewing one sided administrative decisions which are integral to due process.

**D. DR. MIR'S ALLEGATIONS OF FACT
DEMONSTRATE HIS
UNCONSTITUTIONAL TREATMENT BY
THE RESPONDENTS SINCE HE WAS
DENIED DUE PROCESS OF LAW
REPEATEDLY.**

Dr. Mir set forth the following allegations of fact in his Petition for En Banc rehearing submitted to the Ninth Circuit Court of Appeals. [Appellate Docket Entry 32].

The Respondents exhibited animus against Dr. Mir when they falsely accused him of falsifying the medical records of the patient he was accused of negligently treating. [Doc. 32 at 8]. The Respondents charged that Dr. Mir placed a fabricated admission note in the medical records, but there was no evidence of such a note, as the hospital's medical records personnel testified, and if there was, then the Respondents should have subpoenaed it. [*Id.*] Dr. Mir further alleges that after the Respondents finally realized Dr. Mir did not misdiagnose the patient, the Respondents fabricated the whole false records story. [*Id.* at 8–15]. Dr. Mir contends this constitutes animus.

The Respondents denied Dr. Mir his Due Process rights when, after Dr. Mir requested a hearing pursuant to California Government Code Sections 11507 and 11516, as Dr. Mir contends, the hearing was denied. [Doc. 32 at 9]. Dr. Mir contends the denial of a hearing constituted a plain Due Process violation. [Doc. 32 at 9].

Dr. Mir also contends the Respondents denied him due process when they did not consider and rule on admissions by their medical expert and the testifying radiologist at the administrative hearing where it was determined Mir made the correct diagnosis. *See Morgan v. United States*, 298 U.S. 468, 481 (1936); [see “Fourth Amended Complaint,” District Court Doc. 102 at 61, 69; 87-89; 92].

It was a violation of Due Process when, on December 5, 2006, after completion of oral argument, the Appellee-Defendants included the California state prosecutor in their closed-door deliberations but denied the Petitioner Dr. Mir the opportunity to be present in those conversations. [Doc. 32 at 9].

Dr. Mir alleges it was also a violation of Due Process when Respondents inserted ‘documentation findings’ into the 2006 Decision of the administrative panel without providing Dr. Mir notice, a formal accusation, a hearing, or proof; and Dr. Mir further alleges it was a Due Process violation when Respondents determined the penalty to documentation findings inserted into 2006 Decision without Notice and Accusation apparently in retaliation for losing out on Charge of fabrication of ‘Admission Note.’ *See Wheeler v. State Bd. of Forestry*, 144 Cal. App. 3d 522, 192 Cal. Rptr. 693 (1983).

Thereafter, Dr. Mir alleges the California courts repeatedly issued a ‘findings dismissed’ determination as to Dr. Mir, but the Respondents ignored this determination and instead continued to reissue ‘findings dismissed’ in order to revoke Dr. Mir

in 2008 or be put on probation in 2010. [Doc. 32 at 11]. This unconstitutionally deprived Dr. Mir of the right to practice medicine.

Dr. Mir alleges that on June 13, 2008, while on remand for redetermination of penalty consistent with the dismissed findings of the court, the Respondents denied Dr. Mir any Notice of the hearing; denied the opportunity for oral argument; and disregarded the order of findings dismissed. These acts of the Respondents were set aside by the California Court of Appeals on February 22, 2010.

Dr. Mir alleges the Respondents ordered Dr. Mir to undergo a psychiatric evaluation in response to Dr. Mir's filing of the writ petition in 2007. [Doc. 32 at 12]. Dr. Mir contends this was animus. [*Id.*] Then, after Dr. Mir had not completed the psychiatric evaluation, on November 3, 2011, Appellee-Defendants petitioned to revoke Dr. Mir's probation without providing Dr. Mir any notice. [Doc. 32 at 12]. Dr. Mir contends this failure to provide notice constitutes a violation of Dr. Mir's rights to Due Process. [*Id.*] Respondents had apparently mailed Dr. Mir notice, but the notice was undelivered by **certified mail**. [Doc. 32 at 14–15]. In light of their failure to deliver notice, Dr. Mir contends notice was required to be served by personal service or registered mail under California Government Code §11505(c) which was not done. [Doc. 32 at 15].

Dr. Mir states that in July 17, 2012 (effective date August 16, 2012) the Respondents entirely revoked Dr. Mir's medical license and probation

without any notice or hearing. [Doc. 32 at 12]. Dr. Mir's amended Complaint filed in the District Court in this Federal suit sought to remedy this injustice. The District Court's grant of summary judgment never adequately addressed this Due Process violation even though Dr. Mir made an *ex parte* application post-dismissal to correct the District Court's erroneous failure to dispose of all issues before it. [District Court Doc. No. 292]. Dr. Mir argues the Respondents failed to make the requisite counterfactual showing that there was indeed adequate Due Process provided.

REASONS TO GRANT THIS PETITION

I. THE NINTH CIRCUIT VIOLATED BOTH THE CONSTITUTION AND SUPREME COURT PRECEDENT IN AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT.

The lower courts denied Dr. Mir his Constitutional rights in the several ways set forth below. But equally important, as applied in the facts of Dr. Mir's case, the Respondents' actions against Dr. Mir. present both important and novel Constitutional questions that merit granting Certiorari.

A. THE LOWER COURTS CLEARLY DENIED DR. MIR'S RIGHT TO DUE PROCESS OF LAW.

Dr. Mir brought his original claim in the District Court under Title 42 § 1983, which was the jurisdiction-granting statute that allowed him to

bring his Constitutional claims. Dr. Mir's first Constitutional claim is that, as applied, the Respondents and the California courts violated his rights to due process of law under both the Fifth and Fourteenth Amendments, and other Constitutional provisions, when revoking his license to practice medicine.

(i) Dr. Mir has Legitimate Due Process Claims.

Section One of the Fourteenth Amendment provides that "Nor shall any State deprive any person of life, liberty, or property, without due process of law..." Likewise, the Fifth Amendment of the Constitution provides that no one "be deprived of life, liberty, or property, without due process of law." The right to Due Process under the Fourteenth and Fifth Amendments are exactly the same. *Malinski v. New York*, 324 U.S. 401, 415 (1945) ("To suppose that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.") (internal quote omitted). Both Amendments require that all U.S. courts provide a party procedural safeguards in the course of litigation.

State administrative agency adjudicative proceedings, like the one in this case, must meet the equal protection requirements set forth in the Fourteenth Amendment under Supreme Court jurisprudence. *Richardson v. Perales*, 402 U.S. 389, 401-02 (1971). The case *Mathews v. Eldridge* is the controlling case on whether procedural due process

was provided in this context. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) In *Mathews v. Eldridge*, the United States Supreme Court established a three-part test to determine whether the requirements of due process protection have been met when depriving someone of his or her interests:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903 (1976). Since “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,” such balancing is necessary in order to ensure that someone has not been unfairly deprived of his rights under the law. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *see Mathews*, 424 U.S. at 334.

Applying the three-part test to the case at hand, both parties agree as to the first and third factors. Dr. Mir's private interest being affected, namely his license to practice medicine, is unquestionably high. This was acknowledged by the district court, which stated that "Defendants concede that plaintiff has a protected property interest in his medical license and that the Respondents, a government agency, deprived that interest." *Mir v. Kirchmeyer*, No. 12-cv-2340-GPC-DHB, 2017 U.S. Dist. LEXIS 157919, at *34 (S.D. Cal. Sep. 26, 2017). Meanwhile, all parties agree that California has an interest in regulating the quality of the healthcare providers within the state. The result of the balancing test must rest on the extent to which the process risked an erroneous deprivation of Mir's right to practice medicine. The risk of erroneous deprivation of Mir's right to practice medicine is extremely high, because both the district court and the Ninth Circuit Panel failed to take into consideration the facts of the case demonstrating that Mir's proceedings were not handled in such a way as to adequately protect his interests.

In its ruling affirming the District Court's decision, the Ninth Circuit Panel stated:

Mir, who was represented by counsel, had a thirteen-day administrative hearing under procedures set forth in the California Code of Regulations and the California Business and Professions Code. California law provides a means for redressing incorrect administrative decisions through a motion for

reconsideration and an appeal to the state courts. *There are no facts suggesting that this process was inadequate.*

Mir v. Levine, 745 F. App'x at 727 (emphasis added).

While it is true that California has procedures in place designed to protect due process generally in cases such as these, this ignores a laundry list of facts in Mir's case in particular demonstrating the inadequacy of the process, including that the actions taken against Mir came from only one incident in violation of the guidelines set out by the California Business & Professions Code,² that Mir was denied a meaningful opportunity to present the necessary witnesses to testify on his behalf, and, most glaringly, that the Respondents introduced charges against Mir derived from the proceedings themselves without affording Mir the appropriate time or methods to defend himself against them.³

The factual predicates undergirding the extensive Due Process violations in this case are fully set forth in Dr. Mir's Statement of the Case. The repeated due process violations described therein well demonstrate Dr. Mir was denied the appropriate procedural safeguards to which he was entitled.

² California Business & Professions Code § 2220.05(a)(1) states in part that Medical Boards should prosecute “*repeated* negligent acts that involve death or serious bodily injury to one or more patients, such that the physician and surgeon or the doctor of podiatric medicine represents a danger to the public” (emphasis added).

³ These will be discussed in greater detail the next section of this Petition.

Therefore using the three-part test set by this Court, it is clear that the lower courts failed to provide the proper due process protections to Dr. Mir. The government's interest is drastically outweighed by Mir's interest in his medical license and the inconsistent manner in which the administrative judge applied California's procedures to Mir's case merits Certiorari.

B. DR. MIR WAS DENIED FAIR NOTICE OF THE CHARGES AGAINST HIM IN VIOLATION OF CLEAR PRECEDENT ESTABLISHED BY THIS COURT IN *IN RE RUFFALO*.

This Court has declared that “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation marks omitted); *see Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). More specifically, “[u]nder the Due Process Clause, ‘reasonable notice’ must include disclosure of ‘the specific issues [the party] must meet,’ *In re Gault*, 387 U.S. 1, 33-34 (1967) (emphasis added), and appraisal of ‘the factual material on which the agency relies for decision so that he may rebut it,’ *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n. 4 (1974).” *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 671, 105 S. Ct. 2265, 2292 (1985). Those facing professional discipline, including loss of license, are “entitled to procedural due process, which includes fair notice of the charge.”

In re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226 (1968).

“An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). “Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair procedure.” *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1438 1445 (CA. Fourth Dist. 1992).

The *In re Ruffalo* decision, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226 (1968), provides a near exact analogue to Mir’s case. There, too, the Court was faced with a professional who lost his ability to practice as a result of an adversarial proceeding in which, in part, his own statements made to defend himself in those very proceedings were used against him. *See In re Ruffalo*, 390 U.S. at 546–48. The Court found that because “adversary proceedings [are] of a quasi-criminal nature... the charge must be known before the proceedings commence.” *Id.* at 551. If this is not the case, the charges “become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. [The Plaintiff] can then be given no opportunity to expunge the earlier statements and start afresh.” *Id.* at 553–54.

This “trap” language was further affirmed by this Court, finding that “the feature of [*Ruffalo*] that was particularly offensive was that the change was

such that the very evidence put on by the petitioner in defense of the original charges became, under the revised charges, inculpatory. Thus, in that case, the original charges functioned as a ‘trap,’ for they lulled the petitioner into presenting evidence that “irrevocably [assured] his disbarment under charges not yet made.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 655 n.18, 105 S. Ct. 2265, 2284 (1985) (internal citations omitted).

Dr. Mir’s case mirrors *Ruffalo* almost exactly. In both cases, new amended charges were added at the end of the hearing based upon statements made in defense of the original charges, which in turn were used to help bolster the case for the eventual revocation of the professional license in question. For Mir, the Respondents filed a Second Amended Accusation against him nearly six months after the commencement of his hearing, giving him no time to attempt to defend himself from the charges and without informing him where in the administrative record he even made the alleged statement, let alone, wherein the record the alleged falsehoods lay. Moreover, when Mir attempted to call witnesses to his defense, the judge denied his request. The irony and injustice is that Dr. Mir never made such an allegedly false statement, which the Respondents would later admit, but not until after fourteen years of character assassination.

Even if the court had allowed Mir to call additional witnesses to support himself, the proceedings would have been fatally flawed, as Mir was “given no opportunity to expunge the earlier

statements and start afresh.” *In re Ruffalo*, 390 U.S. at 553–54. The “trap” described in *Ruffalo* and affirmed in *Zauderer* had been sprung, tainting Mir’s defense and denying his constitutional right to due process.

C. DR. MIR’S ENTITLEMENT TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AS A “CLASS OF ONE” WAS VIOLATED BY THE JUDGMENTS BELOW, WHICH PRESENTS THE COURT THE OPPORTUNITY TO RESOLVE AN UNCERTAIN AREA OF EQUAL PROTECTION JURISPRUDENCE.

Dr. Mir has a “Class of One” claim since he was unfairly harmed by state officials who revoked his medical license without regard for Equal Protection under the law. Dr. Mir’s case presents a chance for the Court to clarify the standard required for a successful “Class of One” claim.

Under the procedure explained in *Willowbrook v. Olech*, 528 U.S. 562 (2000), individuals who are not by their own nature in a protected Equal Protection class can nevertheless bring an Equal Protection claim under Section 1983 when they have been singled-out for adverse treatment by state officials without justification. These are known as “Class of One” claims. Several Circuit Courts have applied “Class of One” Equal Protection jurisprudence in the State licensing context, and some have held that a “Class of One” claim surmounted to an Equal

Protection violation. *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (J. Posner) (holding that a malicious denial of a liquor license validly stated a claim meriting Equal Protection analysis); *Zahra v. Town of Southold*, 48 F.3d 674, 676–79 (2d Cir. 1995) (alleging vindictive revocation of a building permit was a valid Equal Protection claim); *Le Clair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980) (arguing that a farm license suspension was a malicious state action that violated the Equal Protection Clause).

Despite this precedent, the exact legal elements that comprise a “Class of One” have not been clearly explained by the Court. The common theme, however, seems to be whether the state action in question was a consistently malicious, and vindictive singling-out of an individual to receive adverse treatment without good justification. In short, the standard is whether the claimant is being repeatedly picked-on without cause. In *Olech* for example, where a municipal government required only Olech to have a 33-foot easement between her property and a public water line, but required all other citizens to have an only 15-foot easement, the Court found there was an Equal Protection violation even though the claimant did not belong to a protected class. *Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). The Court in *Olech* reasoned that since the claimant was intentionally targeted for adverse treatment by the state without a good reason, there was a claim. *Id.* at 564 (reasoning that there was an Equal Protection claim because the claimant had “been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”) (citing

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) (and citing *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989)); *see also Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 890 (7th Cir. 2012) (finding that animus is ground for “Class of One” claim).

The facts in Dr. Mir’s case mirror those in *Olech* where the Court did find an Equal Protection violation and the facts here also mirror the state licensing cases discussed above. In Dr. Mir’s case, despite later admitting during discovery that Dr. Mir had indeed not provided professionally negligent care for the patient in the investigation that prompted revocation of his license, the Respondents had been consistently and maliciously doing everything possible to ensure Mir could not practice medicine for over a decade. As Dr. Mir alleges, the Respondents consistently ignored the State Court finding that the Respondents’ penalties were dismissed. And once they finally obeyed this order, they nevertheless held a hearing without notifying Dr. Mir, and essentially, revoked his medical license with him completely *in absentia*. Thus under the above authority from this Court, Dr. Mir was targeted and isolated for no justifiable reason, and when the State of California revoked his medical license without just cause, Dr. Mir’s Constitutional right to Equal Protection as a Class of One was infringed. While the standard elements on this claim are not well-settled by the existing cases on point, Dr. Mir’s case meets all of the known elements expounded by the Court so far, and thus presents a chance for this Honorable Court to clarify the law.

**D. THE COURTS BELOW
INAPPROPRIATELY APPLIED ISSUE
PRECLUSION TO DR. MIR'S CLAIMS.**

Dr. Mir's constitutional claims are not barred by the doctrine of issue preclusion. The District Court, which was affirmed by the Ninth Circuit, held that Dr. Mir's claims as to the California Medical Board members were barred as previously litigated under the doctrine of issue preclusion. *Mir v. Levine*, 745 F. App'x 726, 727 (9th Cir. 2018). The District Court concluded that Dr. Mir could not relitigate issues that were presented to the Respondents. *Mir v. Kirchmeyer*, No. 12-cv-2340-GPC-DHB, 2017 U.S. Dist. LEXIS 157919, at *33 (S.D. Cal. Sep. 26, 2017).

The Court has long recognized that the doctrines of issue preclusion and collateral estoppel derive from the Courts' equitable powers. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). And pursuant to this equitable power, Federal Courts may not apply issue preclusion when the party in the prior litigation did not have a fair chance to fully present their case. As the Court explained in *Allen v. McCurry*, "But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328–29 (1971).

In the context of this case, where Dr. Mir brings a 42 U.S.C. § 1983 claim in federal court challenging the Constitutionality of a state court proceeding, the doctrine of issue preclusion will generally apply. *McCurry*, 449 U.S. 90 at 104. But issue preclusion only applies when the State Courts have provided the litigant a full and fair opportunity to present claims. As the Court explained,

[N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

McCurry, 449 U.S. 90 at 104–05. Therefore, *only when* there was a full and fair opportunity to present claims in state court, can issue preclusion apply in Dr. Mir’s case.

In Dr. Mir’s case the repeated instances of Due Process and Equal Protection violations demonstrates there was indeed *not* a full and fair opportunity to litigate his claims in the State Courts. The Respondents’ repeated violations of procedural safeguards, their likely animus, their failure to even notify Dr. Mir of his license revocation hearing, and the other procedural violations discussed *passim* in this Petition well-establish that issue preclusion simply cannot apply here.

As stated above there was no valid final judgment on merit on 2006 writ petition for issue preclusion to apply because court never determined the propriety of penalty, the sole reason to file writ petition. *Hernandez v. City of Pomona*, 46 Cal. 4th 501, 511 (Cal. Supreme Court 2009). Judgment is on merit if it completely disposes of the underlying cause of action. Redetermination of issue is warranted if there is reason to doubt the quality extensiveness or fairness of procedure followed in prior litigation. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

Furthermore, issue preclusion does not apply to facts that are unessential to a judgment. *Montana*, 440 U.S. at 153–55 (explaining that facts unessential to a judgment are not barred by issue preclusion). In this case, the facts essential to the interlocutory judgment of 2008 were those which were dismissed by the court on the writ petition in 2007. In other words, if the court *did not* dismiss any findings, there would be no reason to remand; and a writ petition Mir's favor, issue preclusion does not apply when there is a significant change in controlling facts. And here, the Respondents admitted *post facto* in the District Court litigation that Dr. Mir had done nothing wrong in regard to the original charges. [See Court of Appeal doc. 32, *13, para. 21].

The Respondents actions in using issue preclusion prejudiced Mir because it was deployed on the eve of trial after five years of litigation. *Arizona v. California*, 530 U.S. 392, 397 (2000) (finding that the affirmative defense of issue preclusion is lost if not timely raised); *Foman v. Davis*, 371 U.S. 178, 182

(1962) (holding that pleadings may not be amended if there is bad faith).

For these reasons the Courts below erred in dismissing Dr. Mir's claims on issue preclusion grounds, and this plain Constitutional error should be reversed in the interests of justice.

CONCLUSION

As the proceedings surrounding the revocation of Dr. Mir's medical license failed to protect his due process rights, his right to equal protection under the law, and because the District Court unconstitutionally applied issue preclusion, the Ninth Circuit's decision should be reversed in Mir's favor.

Unfortunately, this is necessary because despite the procedural protections put in place in the California administrative law at the hearing, Dr. Mir's defense in this case was irreversibly tainted in violation of this Court's precedent. By reversing the decision of the Ninth Circuit Court of Appeals, this Court can right the miscarriage of justice done in the lower courts.

Respectfully submitted,

/s/ *Robert L. Sirianni, Jr.*
Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
robert@brownstonelaw.com