

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

Docket Nos. 20-0257 & 20-0457

**ARMED CITIZENS’ LEGAL
DEFENSE NETWORK, INC.,**

**OIC’S BRIEF REGARDING SCOPE
OF TRIBUNAL’S REVIEW OF
CONSTITUTIONAL ISSUES**

Appellant.

I. INTRODUCTION

This tribunal requested additional briefing concerning the scope of its authority under *Bare v. Gorton*, 84 Wn.2d 380 (1974), to consider Armed Citizens’ Legal Defense Network, Inc.’s (“Armed Citizens”) “as applied” constitutional challenge to the Office of the Insurance Commissioner’s (“OIC” and “Insurance Commissioner”) Cease and Desist Order 20-0257 (“Order”). As the Insurance Commissioner’s delegated representative to preside over administrative proceedings, this tribunal only has the authority delegated by the Insurance Commissioner. Because the Insurance Commissioner lacks authority to determine the constitutionality of the Insurance Code provisions that the Insurance Commissioner enforces, the tribunal lacks such authority as well. However, as the court determined in *Harrington v. Spokane County*, 128 Wn. App 202 (2005), there is important work the tribunal must complete before Armed Citizens’ constitutional claims are ripe for review.

In the context of Armed Citizens’ request for a discretionary stay of the Order, the tribunal does not have authority to determine whether the procedures and processes outlined in Title 48 are constitutional “as applied” to Armed Citizens. However, the tribunal can, and should, consider whether the procedures and processes outlined in Title 48 have in fact been followed by the OIC. In the context of Armed Citizens’ request for a stay, the tribunal should consider:

1. Do RCW 48.15.023(5)(a)(i) and RCW 48.02.080(3)(a) authorize the OIC to issue cease and desist orders when the OIC has cause to believe someone is

1 violating RCW 48.15.020(1) and RCW 48.05.030(1) by transacting the
2 unauthorized sale of insurance products?

3 2. Did the OIC demonstrate it has sufficient cause to believe that Armed Citizens
4 solicited and entered into contracts “whereby one undertakes to indemnify
5 another or pay a specified amount upon determinable contingencies” when
6 Armed Citizens’ marketing materials indicated members are “buying” a
7 guarantee that Armed Citizens will cover up to \$25,000 for bail, forward
8 \$25,000 to defense counsel, and cover additional legal expenses, in the event a
9 member of Armed Citizens is charged with the use of excessive force?

10 3. Did the OIC demonstrate it has sufficient cause to believe that Armed Citizens
11 is not authorized to solicit and transact insurance?

12 4. Did the OIC follow all of the processes and procedures mandated in
13 RCW 48.15.023(5)(a)(i) and RCW 48.02.080(3)(a) before issuing a cease and
14 desist order?

15 5. Has Armed Citizens failed to demonstrate why it should be permitted to
16 continue with conduct that the OIC has cause to believe is in violation of
17 RCW 48.15.020(1) and RCW 48.05.030(1), during the pendency of this
18 hearing?

19 Although the tribunal does not have authority to determine Armed Citizens’
20 constitutional claims, by deciding the enumerated issues above, the tribunal can provide the
21 superior court with the information necessary to consider any request for a stay that Armed
22 Citizens may choose to bring under RCW 48.04.020(2).

23 II. BACKGROUND

24 In *Armed Citizens’ Motion for Stay* (“Motion”), filed on May 26, 2020, it asserted that
25 the Order “violates the Due Process Clause by failing to provide ACLDN the opportunity to
26 present its case before a competent tribunal before the Order deprived ACLDN of liberty and
property rights.” *Motion*, pp. 4-8, 9. The *OIC’s Response In Opposition To Appellant’s Motion
To Stay Cease And Desist* (“OIC’s Response”), filed on June 5, 2020, focused primarily on
OIC’s findings of Armed Citizens’ unlawful and unregulated insurance conduct in
Washington, OIC’s clear authority to issue the Order in the manner it did, and OIC’s interest in
ordering such misconduct to stop immediately. These areas of discussion are essential to the
tribunal’s review of Armed Citizens’ Motion.

At the Oral Argument on June 17, 2020, OIC cited to *Bare v. Gorton*, 84 Wn.2d 380,
383 (1974), and explained how the case was applicable regarding the scope of the tribunal’s

1 review of Armed Citizens' Motion. As a result of the tribunal and parties' discussion during
2 Oral Argument, the Presiding Officer set a schedule for the parties to provide additional
3 briefing regarding *Bare v. Gorton* and its application to the tribunal's review of Armed
4 Citizens' Motion.

5 III. AUTHORITY

6 RCW 48.01.030 provides the following:

7 The business of insurance is one affected by the public interest, requiring that all
8 persons be actuated by good faith, abstain from deception, and practice honesty
9 and equity in all insurance matters. Upon the insurer, the insured, their providers,
and their representatives rests the duty of preserving inviolate the integrity of
insurance.

10 RCW 48.02.060(1) provides that the Insurance Commissioner "has the authority expressly
11 conferred upon him or her by or reasonably implied from the provisions of this code."

12 RCW 48.02.060(2) provides that the Insurance Commissioner "must execute his or her duties
13 and must enforce the provisions of this code."

14 The Insurance Commissioner issued the Order pursuant to his authority set forth under
15 RCW 48.15.023(5)(i) and RCW 48.02.080(3)(a). RCW 48.15.023(5)(a)(i)(5)(a) provides:

16 If the commissioner has cause to believe that any person has violated the
17 provisions of RCW 48.15.020(1), the commissioner may: (i) Issue and enforce a
cease and desist order in accordance with the provisions of RCW 48.02.080.

18 RCW 48.02.080(3)(a) further provides:

19 If the commissioner has cause to believe that any person is violating or is about to
20 violate any provision of this code or any regulation or order of the commissioner,
he or she may: (a) issue a cease and desist order.

21 The business of insurance affects the public interest. RCW 48.01.030. As such, the
22 Legislature determined that no one shall solicit or transact insurance in this state unless
23 authorized to do so by the Insurance Commissioner. RCW 48.05.030(1) and
24 RCW 48.15.020(1). Additionally, the Legislature authorized the OIC to issue a cease and
25 desist order, prior to any hearing, when the OIC has reason to believe that someone is soliciting
26 or transacting insurance without a certificate of authority. RCW 48.15.023(5)(a)(i) and
RCW 48.02.080(3)(a). The OIC has established that it has reason to believe that part of the

1 services offered through Armed Citizens' membership constitute insurance, and that Armed
2 Citizens is not authorized to transact insurance in Washington.

3 As discussed in more detail below, the tribunal does not have the authority to rule on
4 Armed Citizens' constitutional argument. However, the tribunal can, and should, decide
5 whether the OIC followed the procedure specifically set forth by Title 48. The tribunal should
6 also determine whether the OIC acted within its statutory authority when it issued the Order
7 barring Armed Citizens from selling insurance without a certificate of authority. Lastly, the
8 tribunal should determine whether the OIC afforded Armed Citizens the due process prescribed
9 by the Legislature in chapters 34.05 and 48.04 RCW when a cease and desist order is issued by
10 the OIC against an unauthorized insurer. This same process will allow the gathering of facts for
11 the record that would assist a reviewing court to determine any constitutional questions.

12 In the event the tribunal chooses to issue an advisory opinion concerning the
13 constitutionality of RCW 48.15.023 and RCW 48.02.080, the tribunal can determine that the
14 Order does not deprive Armed Citizens of any liberty or property interests because the Order
15 only orders Armed Citizens to stop the unlawful conduct of transacting insurance without a
16 certificate of authority, and because the OIC followed all statutory procedures in issuing the
17 Order.

18 IV. ARGUMENT

19 Insurance activities in Washington affect the public interest. *See* RCW 48.01.030. The
20 Insurance Commissioner has been provided broad authority and the duty to enforce the
21 Insurance Code. RCW 48.02.060(1) and RCW 48.02.060(2). *See also* RCW 48.01.040
22 (broadly defining "insurance"). The Insurance Commissioner's broad regulatory authority is
23 necessary to protect the public and preserve the integrity of the insurance industry.

24 The Insurance Code prohibits an entity from soliciting and transacting insurance in
25 Washington without a license. *See* RCW 48.15.020(1) and RCW 48.05.030(1). An entity
26 without a certificate of authority to act as an insurer does not have a protected property right to
solicit or transact insurance in Washington. Furthermore, the Legislature granted the Insurance
Commissioner with the authority to issue a cease and desist order, effective immediately,
against an unauthorized insurer. The Order was necessary upon OIC's finding that Armed

1 Citizens has been conducting unlawful and unregulated insurance activities in Washington as
2 an unauthorized insurer since 2008 and therefore violating RCW 48.15.020(1) and
3 RCW 48.05.030(1).

4 **i. The Insurance Commissioner was clearly authorized to issue the Order.**

5 The Legislature intended for the Insurance Commissioner to have the authority to
6 immediately halt unauthorized insurance activities. *See* RCW 48.15.023(5)(a)(i) and
7 RCW 48.02.080(3)(a). The Insurance Code does not set forth or require any notice periods for
8 a cease and desist order issued by the Insurance Commissioner against an unauthorized insurer.
9 In stark contrast, the Legislature decided to provide advance notice to authorized entities and
10 licensed individuals, *see* RCW 48.17.540(2)(a) and RCW 48.05.150, and decided not to
11 provide advance notice to unauthorized entities, such as Armed Citizens.

12 Furthermore, the same statutory scheme does not provide for an automatic stay when a
13 hearing demand is received on or after the effective date of an order on appeal. RCW
14 48.04.020. The discussed statutes, when read in harmony, demonstrate that the Legislature did
15 not intend for unlawful activities to receive a stay as a matter of right. *See also* OIC's
16 Response, p. 1-2 (discussing OIC's Regulatory Authority of Unauthorized Insurers).

17 Unauthorized insurers are purposefully and appropriately treated differently because
18 they are failing to submit to the Insurance Commissioner's regulatory authority and are acting
19 unlawfully. To this end, the Legislature has specifically authorized the Insurance
20 Commissioner to issue a cease and desist order against an unauthorized insurer, like Armed
21 Citizens, without a notice period before the effective date and without providing an automatic
22 stay. Lastly, OIC is not aware of a cease and desist order which was issued with a notice
23 period; the OIC's practice is to issue cease and desist orders effective immediately.

- 24 a. As a result of Armed Citizens' unlawful conduct and the applicable statutory
25 framework, Armed Citizens was provided the required notice and due process that the
26 Legislature prescribed to contest the Order.

“In any case where an automatic stay is not provided for, and if the commissioner after
written request therefor fails to grant a stay, the person aggrieved thereby may apply to the
superior court for Thurston county for a stay of the commissioner's action.”

1 RCW 48.04.020(2). Armed Citizens has been afforded an opportunity to contest the Order by
2 exercising its rights to an administrative hearing and request for a discretionary stay. *See*
3 *also* OIC’s Response, pp. 8-10 (discussing the scope of the Order). As discussed elsewhere,
4 the OIC followed the statutory procedure for issuance of the Order and had ample authority to
5 do so.

6 It is appropriate for the tribunal to confirm OIC complied with all relevant statutes and
7 regulations pertaining to the issuance of the Order in this matter. However, following the
8 necessary development of the record, any adjudication of the constitutionality of the statutory
9 procedure OIC followed in issuing the Order shall be reserved for the Washington Courts to
10 decide.

11 **ii. The tribunal does not have the authority to decide whether the Order, which was
12 properly issued pursuant to Title 48, violated Armed Citizens’ procedural due
13 process rights.**

14 “An administrative body does not have authority to determine the constitutionality of
15 the law it administers; only the courts have that power.” *Bare v. Gorton*, 84 Wn.2d 380, 383
16 (1974) (citing *United States v. Kissinger*, 250 F.2d 940 (3d Cir. 1958); *cert. denied*, 356 U.S.
17 958 (1958) and 3 K. Davis, *Administrative Law Treatise* § 20.04, at 74 (1958)). *See also*
18 *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 798 (1987).

19 Washington administrative law judges have recognized when they did not have the
20 authority to decide constitutional issues. *See, e.g., Haines-Marchel v. Wash. State Liquor &*
21 *Cannabis Bd.*, 1 Wn. App. 2d 712, 748, n.7 (2017) (“The ALJ ruled it did not have authority to
22 address [the appellant’s] argument that denial of the application violated her constitutional
23 liberty interest to work and be free of marital discrimination.”); *In re Fuel Tax or Prorate*
24 *Assessment*, 129 Wn. App. 556, 572, n.9 (2005) (“The ALJ noted that she did not have
25 authority to decide the constitutional issue [appellant’s equal protection and procedural due
26 process claims]”).

27 The Washington Supreme Court discusses two main types of constitutional challenges:
28 as-applied and facial:

29 An as-applied challenge to the constitutional validity of a statute is characterized
30 by a party’s allegation that application of the statute in the specific context of the
31 party’s actions or intended actions is unconstitutional. Holding a statute

1 unconstitutional as-applied prohibits future application of the statute in a similar
2 context, but the statute is not totally invalidated. In contrast, a successful facial
3 challenge is one where no set of circumstances exists in which the statute, as
4 currently written, can be constitutionally applied. The remedy for holding a
5 statute facially unconstitutional is to render the statute totally inoperative.

6 *City of Redmond v. Moore*, 151 Wn.2d 664, 668-669 (2004) (Citations omitted). Under
7 RCW 34.05.570(3)(a), Washington Courts have the authority to grant relief from an agency
8 order in an adjudicative proceeding upon the determination that:

9 (a) The order, or the statute or rule on which the order is based, is in violation of
10 constitutional provisions on its face or as applied.

11 Armed Citizens has not pointed to any specific statute as being facially
12 unconstitutional, but rather asserts the procedure in which OIC issued the Order, effective
13 immediately, violates Armed Citizens' procedural due process rights. As a result, Armed
14 Citizens has presented an as-applied challenge.

15 Administrative review of an as-applied challenge is required to develop the facts
16 necessary for the court to adjudicate such constitutional challenge. *Harrington v. Spokane
17 County*, 128 Wn. App. 202, 210 (2005) (citing *Presbytery of Seattle v. King County*, 114
18 Wn.2d 320, 337-38). In *Harrington v. Spokane County*, the Appellate Court reviewed an as-
19 applied and facial challenge which were not first presented at the administrative level. The
20 Court explained the following:

21 [The Appellant] is correct that administrative agencies may not pass on the facial
22 constitutionality of the statutes they administer. But here, [the Appellant] does not
23 challenge the facial constitutionality of the Act. He is challenging the County's
24 compliance with the Act and its constitutionality *as applied to him*.
25 Administrative review is, therefore, required to develop the facts necessary to
26 adjudicate this "as applied" constitutional challenge... In short, because the
administrative review process has not run its course, the agency has had no
opportunity to correct any errors it might have made or to develop a factual and
technical record for adequate review. The constitutional issues are not, therefore,
ripe for review.

Harrington, 128 Wn. App. at 210-211 (Citations omitted); *see also Presbytery of Seattle*, 114
Wn.2d at 337 (stating "Exhaustion of administrative remedies is, therefore, necessary in order
for a court to have before it the facts necessary to make such a determination.")

1 These authorities are instructive regarding this tribunal’s authority to review an as-
2 applied constitutional challenge presented at the administrative level. The administrative
3 review process of such challenge is important as it provides an administrative agency an
4 opportunity to correct any errors it might have made or to develop a factual and technical
5 record for adequate review by the Washington Courts. *Harrington*, 128 Wn. App. at 210-211.
6 Further, once this occurs, an as-applied constitutional issue becomes “ripe for review.” *Id.* at
7 211. These authorities do not provide that Washington administrative agencies, like the OIC,
8 have the authority to decide an as-applied constitutional challenge.

9 As a result, the parties should be able to develop facts pertaining to this issue, however,
10 the tribunal should not make any determination regarding Armed Citizens’ as-applied due
11 process constitutional challenge to the Order under the Insurance Code.

12 V. CONCLUSION

13 The Insurance Commissioner respectfully requests that the Presiding Officer rule that
14 the tribunal’s review of Armed Citizens’ Motion is limited to whether OIC has cause to believe
15 Armed Citizens is transacting insurance in Washington as an unauthorized insurer, whether the
16 Insurance Commissioner was authorized to issue Cease and Desist Order No. 20-0257 and
17 whether a discretionary stay of the Order to Cease and Desist No. 20-0257 should be granted,
18 as more fully discussed earlier in this brief. Lastly, after fully developing the record on the
19 foregoing questions, the tribunal’s review need not decide on Armed Citizens’ procedural due
20 process constitutional argument as such issue is an as-applied constitutional claim and thus is
21 reserved to Washington Courts to determine.

22 SIGNED this 24th day of June, 2020.

23 /s/: Sofia Pasarow
24 SOFIA PASAROW
25 Insurance Enforcement Specialist
26 Legal Affairs Division

CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC’S BRIEF REGARDING SCOPE OF TRIBUNAL’S REVIEW OF CONSTITUTIONAL ISSUES, on the following individuals in the manner indicated:

<p>Julia Eisentrout, Presiding Officer Office of the Insurance Commissioner 5000 Capitol Boulevard SE Tumwater, WA 98501 hearingsu@oic.wa.gov juliae@oic.wa.gov</p> <p><i>By email per tribunal’s request.</i></p>	<p>Spencer D. Freeman Attorney at Law Freeman Law Firm, Inc. 1107-½ Tacoma Avenue South Tacoma, WA 98402 sfreeman@freemanlawfirm.org sierra@freemanlawfirm.org</p> <p><i>By email per electronic service agreement between the parties.</i></p>
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SIGNED this 24th day of June, 2020, at Tumwater, Washington.

/s/ Kimberly Shoblom
Kimberly Shoblom
Paralegal
Legal Affairs Division