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**STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER**

*In the Matter of*

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

Appellant.

Docket No. 20-0257 & 20-0457

**ARMED CITIZENS’ LEGAL  
DEFENSE NETWORK, INC.’S REPLY  
TO OIC BRIEF REGARDING SCOPE  
OF TRIBUNAL’S REVIEW OF  
CONSTITUTIONAL ISSUES**

COMES NOW Appellant Armed Citizens’ Legal Defense Network, Inc. (hereinafter “ACLDN”), by and through its counsel, Spencer Freeman, Freeman Law Firm, Inc., and files this Reply to OIC Brief Regarding Scope of Tribunal Review of Constitutional Issues and in further support of ACLDN’s Motion to Stay the Cease and Desist Order filed pursuant to RCW 48.04.020.

**I. INTRODUCTION**

On June 17, 2020, oral arguments were held regarding ACLDN’s Motion to Stay the Cease and Desist Order. While the parties had previously submitted written briefs presenting respective positions and arguments, during oral argument OIC presented a new defense to ACLDN’s motion. For the first time, OIC argued that the Presiding Officer does not have the authority to rule on any constitutional issues, citing *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d

1 379 (1974). ACLDN requested that if the Presiding Officer were to consider these new  
2 arguments OIC be required to provide the case citation in writing and ACLDN provided an  
3 opportunity to respond to the argument. The Presiding Officer permitted OIC to provide a  
4 written brief on the issue. ACLDN files this response.

5 OIC's written submission fails to establish the Presiding Officer cannot issue the  
6 requested stay based upon compliance with constitutionally mandated procedural due process.  
7 OIC focuses heavily on statutory authority granted by the legislature for OIC to issue a Cease  
8 and Desist Order (even effective immediately and without an automatic stay). However, such  
9 focus is misguided regarding the issue at hand because it is well-known and well-accepted that  
10 all actions of the legislature and all actions of government agencies are governed by federal and  
11 state constitutions. Thus, just because the legislature says so does not mean that it is  
12 constitutionally viable to do so.

13 OIC's argument regarding the Presiding Officer's authority to determine constitutional  
14 issues is equally misguided. Much of the case law cited by OIC makes it clear that an  
15 administrative law judge ("ALJ") does not have authority to determine the constitutionality of a  
16 statute. ACLDN does not present such arguments here. The case law presented by OIC  
17 regarding "as-applied" constitution arguments is presented by short quotes purporting to support  
18 OIC's position that the Presiding Officer cannot decide constitutional issues. For two reasons,  
19 such presentation fails.

20 First, OIC misunderstands ACLDN's position and argument. ACLDN is not asking that  
21 the Presiding Officer find that OIC has violated constitutional procedural due process by issuing  
22 a Cease and Desist Order effective immediately. While ACLDN does believe that, such  
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1 determination need not be made here. Rather, ACLDN asks that the Presiding Office exercise  
2 discretion and issue a stay because procedural due process requires one.<sup>1</sup>

3 Second, OIC's presentation of short quotes from the case law does not adequately or  
4 properly present the *actual* issues being decided in those cases. A proper review illustrates that  
5 the cases do not stand for the proposition the Presiding Officer here cannot issue a stay of the  
6 Cease and Desist Order based upon compliance with procedural due process. There simply is  
7 no case that says that an ALJ cannot issue a stay of a Cease and Desist Order (or any order)  
8 from a government agency based upon compliance with due process.

9 Procedural due process requires, in *any* instance of a taking of property or liberty rights,  
10 the person/entity subject to the taking be provided an opportunity to be heard by a neutral  
11 tribunal before the taking, unless extraordinary circumstances exist. No such circumstance  
12 exists here, and ACLDN should be afforded its procedural due process rights by way of a stay  
13 of the Cease and Desist Order.

## 14 II. FACTS

15 ACLDN will not reiterate facts previously presented or argued but rely upon those  
16 previously presented *except* it is necessary to comment on facts again relayed by OIC which are  
17 inaccurate. In Introduction OIC lists five issues OIC believes the Presiding Officer should  
18 decide.<sup>2</sup> In Issue No. 2, OIC states:

19 Did the OIC demonstrate it has sufficient cause to believe that  
20 Armed Citizens solicited and entered into contracts "whereby one  
21 undertakes to indemnify another or pay a specified amount upon  
22 determinable contingencies" when Armed Citizens' marketing  
23 materials indicated members are "buying" a guarantee that Armed  
Citizens will cover up to \$25,000 for bail, forward \$25,000 to

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24 <sup>1</sup> A civil suit in superior court will be the proper place to present argument whether OIC has violated ACLDN's  
25 procedural due process rights and the damages stemming from such violation. OIC's briefing and argument against  
the requested stay here serve only to further bolster ACLDN's position later.

26 <sup>2</sup> ACLDN vehemently disagrees that these five issues are what the Presiding Officer needs to decide. Rather, as  
outlined in previous briefing, the Presiding Officer must decide whether constitutional procedural due process is a  
proper basis to exercise discretion and issue a stay of the cease and desist order pending hearing. (It is.)

1 defense counsel, and cover additional legal expenses, in the event a  
2 member of Armed Citizens is charged with the use of excessive  
3 force.

4 OIC Brief p. 2.

5 There are three problems here. First, an ACLDN member is *not* “buying a guarantee”  
6 that bail monies, attorneys’ fees, or other legal expenses. As made clear in ACLDN’s prior  
7 briefing, there is no such guarantee. Rather, access to the Fund is *wholly* discretionary on the  
8 part of ACLDN, should ACLDN be convinced an incident is a legitimate act of self-defense.  
(Such is not a contingent act, but instead a voluntary and intentional act.)

9 Second, the stated \$25,000 in the marketing materials is not a specified amount, to the  
10 extent OIC implies it is. Rather, such was a cap (the language has since changed) *if* it was  
11 determined there was a legitimate act of self-defense and ACLDN decided to provide  
12 assistance.

13 Third, contrary to the statement of OIC, there is no such criminal charge of “excessive  
14 force.”

### 15 III. ARGUMENT

16 The Due Process Clause of the United States Constitution prohibits the government from  
17 depriving a person of life, liberty, and property rights without first undertaking an adequate  
18 process. The fundamental requirement of due process is the “opportunity to be heard at a  
19 meaningful time and in a meaningful manner.” In the absence of extraordinary  
20 circumstances, procedural due process requires notice and opportunity to be heard *before* any  
21 governmental deprivation of a liberty or property interest. See *Cleveland Bd. Of Educ. V.*  
22 *Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985); *Mathews v. Eldridge*,  
23 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Zinerman v. Burch*, 494 U.S. 113,  
24 127, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); *Tom Growney Equip., Inc. v. Shelley Irr. Dev.*,

1 *Inc.*, 834 F.2d 833, 835 (9th Cir. 1987) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.  
2 Ct. 780, 28 L. Ed. 2d 113 (1971)).

3 ACLDN requests a stay be issued on the Cease and Desist Order in compliance with  
4 procedural due process requirements, allowing ACLDN to be heard before a neutral tribunal  
5 prior to the taking of its business and liberty. OIC's position here is that the Presiding Officer  
6 cannot grant this request because the Presiding Officer cannot rule on constitutional issues.  
7

8 In support, OIC re-asserts statutory authority for its actions and presents quotes from  
9 case law purportedly supporting its assertion. Both fail to establish that the Presiding Officer  
10 here cannot issue a stay as required by procedural due process.

11 **A. Statutory Authority.**

12 ACLDN does not argue state statutes fail to provide OIC with authority to issue a Cease  
13 and Desist Order effective immediately. Such authority is provided to OIC by the legislature.  
14 However, such begs the question of whether exercising such statutory authority complies with  
15 the requirements of procedural due process. Whether the legislature intended such authority has  
16 no bearing on whether due process allows for such in particular circumstances.  
17

18 OIC, by clear implication in its briefing, believes that statutory authority is the only  
19 authority regulating its actions. OIC states:

20  
21 Lastly, the tribunal should determine whether the OIC afforded Armed  
22 Citizens the due process prescribed by the Legislature in chapters 34.05  
23 and 48.04 RCW when a Cease and Desist Order is issued by the OIC  
24 against and unauthorized insurer.

25 OIC Brief, p 4, 1 6-9. Also:

26  
27 Unauthorized insurers are purposefully and appropriately treated  
28 differently because they are failing to submit to the Insurance  
29 Commissioner's regulatory authority and are acting unlawfully.

1 OIC Brief, p 5, l 15-17. Further:

2           The discussed statutes, when read in harmony, demonstrate that the  
3           Legislature did not intend for unlawful activities to receive a stay as a  
4           matter of right.

5 OIC Brief, p 5, l 12-13.

6           These statements by OIC should be of great concern. OIC asserts only “statutory due  
7           process,” and doesn’t even attempt to justify its actions under constitutionally mandated  
8           procedural due process. OIC fails to even recognize a duty to comply with federal or state  
9           constitutions.

10           The Commissioner’s determination regarding whether certain activity is unlawful may  
11           well be wrong, as demonstrated in *In the Matter of Regan Bail Bonds, Inc. and David A. Regan*,  
12           Docket No. 19-0370. As such, there is great reason for compliance with procedural due process  
13           and permitting for a stay of a Cease and Desist Order (therefore an opportunity to be heard  
14           before a neutral tribunal before a taking occurs) while a hearing is pending.

15           In fact, the procedures set forth by the Legislature present procedural safeguards to  
16           appellants like ACLDN to ensure procedural due process in that a requested stay may be  
17           granted upon the discretion of the Presiding Officer. ACLDN now so requests – arguing that  
18           OIC’s Cease and Desist Order constitutes a taking of a property and liberty right and there are  
19           no extraordinary circumstances justifying a denial of the request. OIC’s arguments otherwise  
20           (while conceding a taking and failing to argue extraordinary circumstances) is greatly  
21           concerning regarding OIC’s understanding of and willingness to comply with the Constitution.  
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1           **B. Cited Case Law Does Not Establish Presiding Office Does not have Authority to**  
2           **Issue Stay Based Upon Procedural Due Process.**

3           OIC asserts the Presiding Officer cannot enter a stay on the basis of procedural due  
4 process because the Officer does not have authority to render decisions on constitutional issues,  
5 citing *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). As anticipated by ACLDN,  
6 *Bare* simply does not apply here because there the Supreme Court ruled an administrative law  
7 judge does not have the authority to determine whether a statute is unconstitutional on its face.  
8 *Id.* Here, ACLDN is NOT arguing that the statutes which provide OIC authority to issue the  
9 Cease and Desist Order are unconstitutional.  
10

11           OIC addresses arguments regarding “as-applied” challenges to OIC’s Cease and Desist  
12 Order. While nuanced, it should be clear that ACLDN is not asking the Presiding Officer to  
13 affirmatively rule or determine that OIC has violated ACLDN’s procedural due process rights.  
14 Rather, ACLDN is requesting the Presiding Officer to exercise discretion and issue a stay of the  
15 Cease and Desist Order on the basis of procedural due process. ACLDN argues that procedural  
16 due process not only allows for the stay but requires it.<sup>3</sup>  
17

18           None of the cases cited by OIC stand for the proposition that the Presiding Officer  
19 cannot issue a stay of a Cease and Desist Order in compliance or accordance with procedural  
20 due process.

21           OIC cites *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712,  
22 406 P.3d 1199 (2017) to show that a Washington ALJ recognized they did not have authority to  
23 decide a constitutional challenge. There, the plaintiff appealed the denial of a marijuana  
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25 <sup>3</sup> It is noteworthy that not *once* has OIC argued that procedural due process law does not require a stay of the cease  
26 and desist order. OIC’s arguments have been limited to presenting statutory authority for the stay, appellate stay  
standards (*after* a neutral tribunal has already reviewed the merits of a case), and that the Presiding Officer does not  
have authority to rule on constitutional challenges.

1 distributor license arguing, in part, that the denial violated constitutional rights. The denial was  
2 because the application was married to a man incarcerated for a murder conviction, which  
3 relevant statutes forbade. In affirming the agency decision, the ALJ declined to rule on the  
4 allegations of an unconstitutional denial – as was noted in a footnote by the appellate court. *Id.*  
5 at 748, n. 7.

6  
7 *Haines-Marchel* did not involved procedural due process, as there was no “taking” of a  
8 right but rather a denial of license afforded by state statutes. Moreover, that an ALJ declined to  
9 decide an argument that an agency order violated constitutional rights is simply not analogous  
10 here. It does not mean that an ALJ/Presiding Officer cannot exercise statutory discretion to  
11 issue a stay of a Cease and Desist Order and do so to ensure the proceedings comply with  
12 procedural due process.

13  
14 OIC cites *In re Fuel Tax or Probate Assessment*, 129 Wn. App. 556, 119 P.3d 889  
15 (2005) for the same reason as *Haines-Marchel*, that an ALJ declined to decide constitutional  
16 challenges presented at hearing. In *In re Fuel*, the plaintiff presented a facial constitutional  
17 challenge to a statute which limited the time period for recovery of tax refunds for a shorter time  
18 period than allotted the Department to collect on taxes. The plaintiff presented facial challenges  
19 to the statute as violating equal protection rights and procedural due process rights.<sup>4</sup> *Id.* at 559-  
20 561. There was no issue of a stay of an order or a taking of a property or liberty right.

21  
22 That a footnote recited the fact that the ALJ declined to determine the facial  
23 constitutional challenges has no influence or import here. There is simply nothing in the  
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26 <sup>4</sup> The procedural due process analysis therein provides no guidance here, as the plaintiff merely asserted a  
procedural due process argument because it did not know it was entitled to a tax refund until the agency informed  
them. There was no further analysis and not legal authority for the argument. Thus, it was declined by the appellate  
court. *Id.* at 571.



1 opinion which supports an assertion that an ALJ/Presiding Officer cannot exercise statutory  
2 discretion to issue a stay of a Cease and Desist Order and do so to ensure the proceedings  
3 comply with procedural due process.

4 OIC cites *Harrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (2005) for  
5 the assertion that an ALJ/Presiding Officer does not have authority to review as-applied  
6 challenges at the administrative level. *Harrington* makes no such ruling. There, the plaintiff  
7 filed suit against the county in superior court regarding shoreline designation in a permitting  
8 process, alleging that the county violated equal protection and the application of statutes  
9 violated due process. *Id.* at 205-208. The appellate court determined that an as-applied  
10 constitutional challenge required the issues to be first addressed in an administrative process  
11 and an exhaustion of all administrative remedies. Thus, the doctrine of exhaustion of remedies  
12 required dismissal of the claims.<sup>5</sup> *Id.* at 210.

13  
14  
15 The *Harrington* case has no application here. The current matter is not an issue of the  
16 doctrine of exhaustion of remedies. Further, ACLDN is not asking the Presiding Officer to  
17 make a finding that OIC has violated procedural due process (thus arguing that the use of  
18 statutes is unconstitutional as applied). Rather, ACLDN is requesting the Presiding Officer to  
19 exercise statutory discretion and grant a stay of the Cease and Desist Order arguing that  
20 procedural due process both justifies and requires the stay. In fact, there is nothing in  
21 *Harrington* which finds that the ALJ could not rule on the constitutional issues in the  
22 administrative process. Nothing in *Harrington* can be read to imply and nor can it be logically  
23 inferred that the Presiding Officer does not have authority to grant the stay on this basis.  
24

25  
26 <sup>5</sup> Conversely, a facial constitutional challenge would not require exhaustion of administrative remedies because the  
issues there do not require a fact-finding procedure inherent in the administrative process. *Id.* at 210.

1 OIC cites *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990) for  
2 the same as *Harrington*. The crux of *Presbytery* is eminent domain and zoning. The relevant  
3 issue decided therein was that when presenting a facial challenge to a statute authorizing agency  
4 action, exhaustion of administrative remedies was not required while such would be for an as-  
5 applied challenge.

6  
7 Again, there is nothing in *Presbytery* which means or could be interpreted to mean that  
8 an ALJ/Presiding Officer cannot exercise statutory discretion to issue a stay of a Cease and  
9 Desist Order and do so to ensure the proceedings comply with procedural due process.

10 None of the cases cited by OIC stand for the proposition that the Presiding Officer  
11 cannot issue a stay of a Cease and Desist Order on the basis that procedural due process requires  
12 notice and opportunity to be heard *before* a governmental taking. What is presented here is not  
13 a request for a finding that OIC violated due process right, but rather actions (the stay) to ensure  
14 those rights are protected.

#### 16 IV. CONCLUSION

17 Procedural due process requires notice and opportunity to be heard before a government  
18 taking is effective, absent extraordinary circumstances. OIC does not attempt to argue  
19 extraordinary circumstances nor has that constitutional due process been met. Rather, OIC  
20 argues that statutory authority is sufficient and the Presiding Officer cannot say otherwise.

21 Statutory authority does not circumvent constitutional mandates or limits. Thus,  
22 statutory authority to issue a Cease and Desist Order effective upon issuance must still comport  
23 with procedural due process. In fact, the Presiding Officer has statutory authority to issue a stay  
24 on the Cease and Desist Order, thus preserving due process.

25 While it is clear an ALJ/Presiding Officer does not have authority to rule a statute as  
26 unconstitutional on its face, such is not being argued here and none of the case law cited by OIC

1 stands for the proposition, and such cannot be logically inferred, that the Presiding Officer  
2 cannot issue a stay justified by procedural due process.

3         ACLDN has a constitutional right to procedural due process. The only way to ensure  
4 such rights at this point is to issue the requested stay.

5             Dated this 3<sup>rd</sup> day of July 2020.  
6

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8                                     **FREEMAN LAW FIRM, INC.**

9  
10                                     Spencer D. Freeman  
11                                     Spencer D. Freeman  
12                                     WSBA No. 25069  
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