No. 24-3777

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN STOCKTON, et al.,

Plaintiffs–Appellants,

v.

ROBERT W. FERGUSON, et al.,

Defendants–Appellees.

On Appeal from the United States District Court for the
Eastern District of Washington, Case No. 2:24-cv-00071-TOR
The Honorable Thomas O. Rice, U.S. District Court Judge

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Statutes

Other Authorities

I. INTRODUCTION

Washington's Medical Commission regulates the conduct and quality of physicians in Washington to ensure accountability and public confidence in the practice of medicine. To that end, when it receives complaints about physicians engaging in unprofessional conduct—including dishonesty or misrepresentations concerning the practice of medicine—it investigates those complaints to determine whether corrective action is necessary. And if, following an adjudicative process and a full hearing on the merits, the Commission determines that a physician has engaged in unprofessional conduct, it may order a wide range of sanctions, from license revocation to a reprimand to remedial education, depending on the nature and severity of the violation.

Appellants are three physicians, an advocacy organization, and a former NBA player, who seek to enjoin ongoing Washington Medical Commission proceedings—and hypothetical future proceedings—of physicians who allegedly engaged in unprofessional conduct by spreading dangerous and demonstrably false COVID-19 misinformation. Appellants contend the Commission's investigations violate their constitutional rights, but their claims are barred at the threshold by *Younger* and both constitutional and prudential ripeness. The case for *Younger* abstention could hardly be clearer: Appellants are asking a federal court to shut down active state medical board investigations that implicate Washington's important

interest in ensuring quality healthcare and public confidence in the medical profession. Their suit is just as clearly constitutionally unripe. No Appellant has been punished for their speech nor concretely alleged any actual chill. They thus have failed to plausibly allege any Article III injury. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1175 (9th Cir. 2022). And because (1) proceedings are ongoing; (2) no Appellant has been subject to discipline; and (3) Appellants have an alternative means to raise their objections in state court, their claims are prudentially unripe too. *See Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 781 (9th Cir. 2000).

These defects alone are reason to affirm the district court's dismissal of their suit. But even if they weren't, Appellants also fail to state plausible claims on the merits. No physician is being investigated or disciplined based on statements against the "mainstream COVID-19 narrative." They are being investigated based on complaints from members of the public that the physicians engaged in unprofessional conduct by spreading dangerous misrepresentations of fact. Whether they are subject to any corrective action will be determined following a full review of their conduct and an adversary hearing before the Washington Medical Commission, and any sanction will presumably be tailored as the Commission deems necessary to remedy the harm. The First Amendment does not bar the Commission from reviewing these claims.

Appellants' remaining claims fare no better. Their overbreadth challenge to Washington's definition of unprofessional conduct by physicians fails as a matter of law because they cannot show that the statute sweeps too broadly in regulating concededly legitimate misconduct by physicians, and their due process challenge fails because Washington's Administrative Procedure Act gives them ample opportunity to raise their constitutional challenges in the event the Washington Medical Commission finds they have committed unprofessional conduct.

The district court's dismissal order should be affirmed on any and all grounds.

II. STATEMENT OF THE ISSUES

This appeal presents four issues:

1. Did the district court err in concluding Appellants' claims are constitutionally unripe because no Appellants have been sanctioned and Appellants have failed to concretely identify an injury-in-fact caused by ongoing Washington Medical Commission proceedings?

2. Did the district court err in finding Appellants' claims prudentially unripe when the Washington Medical Commission proceedings are ongoing and Appellants failed to identify any hardship from withholding judicial review at this early juncture?

3. Did the district court err in concluding Appellants' request to enjoin ongoing Washington Medical Commission disciplinary proceedings were barred by Younger abstention?

4 Did the district court err in finding Appellants failed to state a plausible claim for relief when: (1) the Washington Medical Commission's ongoing proceedings relate primarily to Appellants' conduct in spreading dangerous misinformation, with only an incidental effect on speech; (2) Appellants have not been prevented from speaking, and there are no sanctions to review for First Amendment compliance; (3) Appellants' facial challenge to Washington's unprofessional conduct statute makes no effort to show that the statute is unconstitutional in a significant number of applications; and (4) Appellants' due process challenge simply ignores that Appellants have a full opportunity to raise any and all arguments in state court (should they ever be sanctioned)?

III. STATEMENT OF THE CASE

A. The Washington Medical Commission and COVID Misinformation

The Washington Medical Commission (WMC) regulates physicians to assure accountability and public confidence in the practice of medicine. As such, it investigates "all complaints or reports of unprofessional conduct" by physicians. Wash. Rev. Code § 18.130.050(2). This includes complaints alleging "moral turpitude, dishonesty, or corruption relating to the practice of" medicine, and

"[m]isrepresentation or fraud in any aspect of" the practice of medicine. Wash. Rev. Code § 18.130.180(1), (13).

Perhaps no issue in recent memory implicates honesty and public confidence in the medical profession more than COVID-19 misinformation. In 2021, the Federation of State Medical Boards (FSMB) observed "a dramatic increase in the dissemination of COVID-19 vaccine misinformation and disinformation by physicians and other health care professionals on social media platforms, online and in the media." ER-134-35. As FSMB explained, "due to their specialized knowledge and training," physicians "have an ethical and professional responsibility . . . [to] share information that is factual, scientifically grounded, and consensus-driven for the betterment of public health." *Id.* Spreading COVID-19 misinformation "contradicts that responsibility [and] threatens to further erode public trust in the medical profession[.]" *Id.* Thus, FSMB explained that physicians "who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards." *Id.*

WMC subsequently adopted a position statement on COVID-19 misinformation expressing its commitment to regulate COVID-19 treatment and advice "in the same manner as any other disease process." Washington Medical Comission, *Covid-19 Misinformation Position Statement*, https://wmc.wa.gov/news/covid-19-misinformation-position-statement. Along these lines, treatments and

recommendations falling below the "standard of care as established by medical experts, federal authorities, and legitimate medical research" may be subject to disciplinary action. *Id.* WMC cautioned that medical providers "who generate and spread COVID-19 misinformation, or disinformation, erode the public trust in the medical profession and endanger patients." *Id.*

WMC has received numerous complaints from the public about the spreading of COVID-19 misinformation. ER-89. But it ultimately pursued charges against just five practitioners, including Drs. Siler and Eggleston. ER-89-90. As detailed in the district court's opinion, under Washington's Uniform Disciplinary Act (UDA), Wash. Rev. Code § 18.130*, et seq.*, the Commission responds to public complaints. ER-7; Wash. Rev. Code § 18.130.080. Each complaint is reviewed by a panel of three Commissioners, who determine whether to initiate an investigation. ER-7; Wash. Rev. Code § 18.130.080(2). When the Commission authorizes an investigation, the complaint is assigned to an investigator, who prepares a report. ER-7. That report is forwarded to another panel of Commissioners who decide whether to take action, including whether to file charges. *Id.* In evaluating whether to charge a practitioner accused of spreading COVID-19 misinformation, the Commission only proceeded when two conditions were met: (1) the complained-of misinformation was demonstrably, factually untrue; and (2) the practitioner identified themselves as a licensed medical professional to give their misstatements

the imprimatur of medical authority. ER-89.

The filing of a Statement of Charges is akin to the filing of a complaint in court: it begins an adjudicative process governed by the UDA, Washington's Administrative Procedure Act (WAPA), Wash. Rev. Code § 34.05 *et seq*., and Washington's Model Procedural Rules for Boards, codified at Wash. Admin. Code § 246-11 *et seq. See* ER-7; ER-88; Wash. Admin. Code § 246-11-270, 290. Parties may file motions, take discovery, and the like. *See, e.g.*, Wash. Admin. Code § 246-11-370, 380. A physician under investigation may request a hearing in front of yet another Commission panel (presided over by a health law judge), at which they can marshal evidence and legal arguments to show they did not engage in unprofessional conduct. ER-7-8; Wash. Admin. Code § 246-11-270, 480. If the panel ultimately concludes that the physician acted unprofessionally, they may order a wide array of sanctions tailored to the conduct and designed to remedy it. Wash. Rev. Code § 18.130.160. A physician who disagrees with a panel's order can seek reconsideration from the panel or seek direct judicial review in Washington state court under WAPA. Wash. Admin. Code § 246-11-560, 580, 600; Wash. Rev. Code § 34.05.510.

B. WMC Investigates Dr. Eggleston and Dr. Siler

Following public complaints and an investigation, WMC issued a Statement of Charges against Dr. Eggleston on August 3, 2022, concerning newspaper articles

he wrote about COVID-19. ER-95-104. Dr. Eggleston's articles minimized deaths from the SARS-CoV-2 virus, incorrectly asserted that PCR tests for a COVID diagnosis are inaccurate, and falsely stated that COVID-19 vaccines and mRNA vaccines are harmful or ineffective and that ivermectin is a safe and effective treatment for COVID-19. *Id*. WMC charged Dr. Eggleston with unprofessional conduct in violation of Wash. Rev. Code § 18.130.180(1), (13), and (21). *Id.* A full hearing was originally scheduled for May 2023, though that hearing has been delayed while Dr. Eggleston filed multiple unsuccessful lawsuits in state and federal court attacking the validity of the investigation into him. *Eggleston v. Wash. Med. Comm'n*, Case No. 23-0006902 (Asotin Cnty. Super. Ct. 2023); *Wilkinson v. Rodgers*, 1:23-cv-3035-TOR (E.D. Wash. 2023).

WMC issued a Statement of Charges against Dr. Siler on October 25, 2023, after it received complaints about blog posts Dr. Siler wrote that included false statements about the risks of contracting COVID-19, the effectiveness of hydroxychloroquine and ivermectin as treatments for COVID-19, that children cannot spread COVID-19, and that COVID-19 vaccines were unsafe. ER-106-109. Dr. Siler was charged with unprofessional conduct in violation of Wash. Rev. Code § 18.130.180(1) and (13). *Id*. Dr. Siler's case is ongoing.

The third doctor–appellant, Dr. Daniel Moynihan, is not currently subject to any WMC disciplinary proceedings.

C. Appellants File Lawsuits to Halt WMC's Ongoing Investigations

In 2023, Dr. Eggleston filed his first federal lawsuit seeking to halt WMC's ongoing investigation of him. *Wilkinson v. Rodgers*, 1:23-cv-3035-TOR, 2023 WL 2562387 (E.D. Wash. Mar. 17, 2023). In July 2023, the district court dismissed Dr. Eggleston's lawsuit, with prejudice, on *Younger* abstention grounds. *Id.* at *3.

Dr. Eggleston did not appeal. Instead, nine months later, he filed this substantively identical lawsuit—this time joined by two other doctors, a non-profit, and former Utah Jazz point guard John Stockton—seeking the same relief the district court had already denied. ECF No. 1, *Stockton v. Ferguson*, Case. No. 2:24-cv-00071-TOR (E.D. Wash. Mar. 7, 2024).

Appellants' complaint alleged WMC's investigations of providers violate the First Amendment, that statutes authorizing the WMC's investigations are facially overbroad or vague, and that WMC's interpretation of law requiring exhaustion and compliance with WAPA violates their due process rights. ER-213-37.

Appellants sought a preliminary injunction to halt the ongoing investigations. ER-17-18. In response, Appellees moved to dismiss on numerous grounds, including constitutional ripeness, prudential ripeness, *Younger* abstention, and Appellants' failure to plead any plausible claims for relief. ER-9-18. The district court granted Appellees' motion and dismissed Appellants' complaint with prejudice. ER-3-20.

On constitutional ripeness, the court explained that Appellants "fail[ed] to

allege a cognizable injury with concreteness and particularity." ER-11. None of the physician Appellants had actually "been sanctioned for their speech by the Commission," nor did any Appellant concretely allege that their speech had actually been chilled or their access to information impaired by WMC's ongoing investigations. ER-11-12.

On prudential ripeness, the court concluded that Appellants sought "to enjoin nonfinal agency actions that are contingent upon future factual developments, and [Appellants] have not otherwise established that hardship would result from the Court declining to exercise jurisdiction" before the WMC proceedings had reached any conclusion. ER-12.

On *Younger* abstention, the court concluded that it was required to abstain because "caselaw directly on point . . . make[s] plain" that medical board proceedings meet all the elements for *Younger* abstention because "active state medical board investigations and hearings are ongoing state judicial proceedings; the regulation of medical practice is an important state issue; and federal constitutional challenges to medical board determinations may be raised on appeal in state court." ER-14 (citing *Alsager v. Bd. of Osteopathic Med. & Surgery*, 945 F. Supp. 2d 1190 (W.D. Wash. 2013), *aff'd,* 573 F. App'x 619 (9th Cir. 2014); *Amanatullah v. Colorado Bd. of Med. Examiners*, 187 F.3d 1160 (10th Cir. 1999)).

On the merits, the court concluded Appellants failed to state any claims.

Appellants' First Amendment claim failed because WMC's "investigations regulate professional conduct, with only an incidental impact on speech." ER-15. Moreover, because "the Commission's investigations and prosecutions are ongoing," and there were no sanctions "for this Court to review," Appellants could not show that WMC's proceedings were not "narrowly tailored to achieve the compelling government interest in regulating medical professionals and protecting the public health." ER-16. Appellants' Due Process claim failed because Appellants have ample opportunity to raise any constitutional challenges in Washington state court. ER-17 (citing *Alsager*, 573 Fed. App'x at 620-21).

Finally, because Appellants failed to raise a justiciable or plausible claim, the court denied their request for a preliminary injunction. ER-17-18.

While this appeal was pending, Appellants sought a preliminary injunction from this Court. DktEntry 7-1. That motion was denied by a panel of this Court. DktEntry 19-1.

IV. SUMMARY OF THE ARGUMENT

The district court dismissed Appellants' complaint on four separate bases, finding Appellants' claims: (1) constitutionally unripe; (2) prudentially unripe; (3) barred by *Younger* abstention; and (4) legally insufficient on the merits. Appellants cannot show the district court erred in any of these determinations, let alone all four.

To present a constitutionally ripe claim and obtain Article III jurisdiction, a plaintiff must allege a "concrete and particularized" injury that is "actual or imminent[.]" *Twitter*, 56 F.4th at 1173 (quotation omitted). Although the threshold for demonstrating a First Amendment injury is modest, it is not a mere formality: a plaintiff who alleges their speech is chilled must concretely allege actual chilled speech. Naked assertions of chill, or allegations of potential or intended chill, are insufficient. That, however, is all Appellants offer. They make no concrete allegation that they have been punished for their speech or that any WMC proceeding has actually chilled their speech. Of the Appellants, Dr. Eggleston comes the closest, when he alleges that he has changed what he writes about pending WMC's investigation. But his own admissions ultimately undermine his claims insofar as they show that he in fact continued to press his views on COVID during the WMC proceeding, and insofar as they show that any change in the content of his editorials was made at the direction of the newspaper's editor, without any prodding from Appellees. The remaining Appellants press either unadorned assertions of chill or, even less persuasively, hypothetical concerns about potential future investigations of unidentified doctors. None of these threadbare allegations show a concrete injury. Appellants' claims are thus constitutionally unripe.

Appellants claims are also prudentially unripe. To start, Appellants cannot show that their embryonic dispute with the Appellees is fit for judicial review in this

posture. Suits like this one, that aim to shut down ongoing investigative and enforcement proceedings, are paradigmatic examples of unripe claims because ongoing investigations are, by definition, non-final. There is thus no final agency action to challenge here. Even less so with respect to the hypothetical, future investigations Appellants purport to challenge. Moreover, because Drs. Eggleston and Siler are cloaked with a broad suite of due process protections and have a full opportunity to raise their constitutional objections in state court (if they ever need to), they cannot show that judicial review is necessary at this juncture to stave off some impending hardship. (And again, this is even more true with respect to potential investigations that may never occur.) By contrast, requiring the Executive Director of the WMC to litigate a collateral challenge to a WMC proceeding, while that proceeding is ongoing, is a hardship because it requires WMC to reveal and justify its ongoing decision-making or defend its proceedings in a vacuum. Moreover, Appellants' suit would open the door to parallel, federal litigation every time a state agency brought an investigation or enforcement proceeding with which the target disagrees.

Similar concerns support the district court's conclusion that Appellants' suit is barred by *Younger* abstention. First, as to Dr. Eggleston, there can be no doubt, because he already lost this issue in his first federal suit challenging WMC's investigation of him and is thus collaterally estopped from arguing otherwise.

Matters are equally clear as to the remaining Appellants: the sum and substance of Appellants' challenge is an effort to use a federal court to shut down ongoing state proceedings that touch on critical state interests in regulating the practice and quality of healthcare in Washington. Appellants mostly concede this but insist that *Younger* should not apply here because their claimed First Amendment interests are too great and the WMC has acted in bad faith in investigating the complaints brought against Drs. Eggleston and Siler. But Appellants do not offer any factual allegations to suggest Appellees acted in bad faith, nor can they show that it is necessary for this Court to disregard *Younger*, and the federalism concerns underpinning it, when they have ample opportunity to raise their constitutional arguments in Washington state court. *Younger* thus applies to bar their claims.

Finally, should this Court reach the merits, that would only provide yet another basis to affirm the district court. Appellants' as-applied First Amendment challenges to the WMC's ongoing disciplinary proceedings fail because the WMC regulates conduct, not speech. Appellants will be disciplined, if at all, because they engaged in unprofessional conduct—whether misrepresentation, fraud, or other unprofessional conduct—in spreading COVID misinformation and endangering the public. The fact that this conduct was carried out principally through speech does not forbid WMC from investigating the complaints against Drs. Eggleston or Siler, any more than the fact that discrimination is often carried out through speech forbids

the EEOC from investigating. Moreover, even if strict scrutiny did apply to Appellants' claims, Appellants cannot plausibly show that WMC should have imposed a lesser sanction when WMC has imposed no sanction at all. In the event WMC finds that Dr. Eggleston or Dr. Siler committed unprofessional conduct—which hasn't happened—WMC may elect to impose a broad range of sanctions, from license revocation to remedial education. At this stage, Appellants cannot show that any hypothetical discipline they may face is out of scope with WMC's compelling interest in protecting Washingtonians' health from a deadly disease.

Appellants' remaining challenges—a facial overbreadth challenge to Washington's definition of unprofessional conduct and a due process claim—are wholly meritless. Appellants' overbreadth challenge fails because they do not and cannot seriously contend that Washington's law forbids a broad range of protected conduct judged against its plainly legitimate sweep of regulating physician conduct. And Appellants' due process challenge fails because Appellants have a full opportunity to bring any and all constitutional arguments in Washington state court.

Because Appellants cannot show that the district court erred in any of its four bases for dismissing their complaint—and certainly cannot show it erred on *all four*—the district court's dismissal order should be affirmed.

V. STANDARD OF REVIEW

This Court "review[s] de novo whether the district court should have dismissed this case under Rule 12(b)(1)." *Banks v. N. Tr. Corp.*, 929 F.3d 1046, 1049 (9th Cir. 2019). Dismissal under Federal Rule of Civil Procedure 12(b)(1) is required where a federal court lacks jurisdiction. In the context of a Rule 12(b)(1) motion to dismiss, "[t]he party asserting federal subject matter jurisdiction bears the burden of proving its existence." *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (citation omitted). "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *See id.* (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)).

Motions to dismiss based on *Younger* abstention are also considered under Rule 12(b)(1). *See Younger*, 401 U.S. at 50-54; *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 at 96-100 (3d. ed. 2009).

The district court's dismissal under Rule 12(b)(6), for failure to state a claim, is also reviewed *de novo*. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 652 (9th Cir. 2019). On a Rule 12(b)(6) motion to dismiss, courts accept as true all factual allegations in the complaint but are "not bound to accept as true a legal conclusion couched as a factual allegation[.]" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint

may be dismissed under Rule 12(b)(6) for lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). "[T]he pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (cleaned up).

VI. ARGUMENT

A. The District Court Correctly Concluded Appellants Claims Are Not Ripe

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction[.]" *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (citation omitted). The "basic rationale" of ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" as well as "to protect [] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49 (1967). Constitutional issues raise particular ripeness concerns, as federal courts "cannot decide constitutional questions in a vacuum." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (dismissing First Amendment challenge to professional disciplinary standards on ripeness grounds) (citation omitted).

Ripeness has both "constitutional and prudential" components. *Twitter*, 56 F.4th at 1173. Appellants' claims are unripe under both. They (1) fail to allege a cognizable injury with concreteness and particularity, making this case constitutionally unripe; and (2) seek to enjoin non-final agency actions that are contingent upon future factual developments, making this case prudentially unripe.

1. Appellants' suit is not constitutionally ripe

"[T]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). "Whether framed as an issue of standing or ripeness," a party must show "an invasion of a legally protected interest that is (a) concrete and particularized[,] and (b) actual or imminent . . . ." *Twitter*, 56 F.4th at 1173 (quotation omitted). "A concrete injury need not be tangible but 'must actually exist.'" *Id.* at 1175 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). "In the First Amendment context, 'the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression.'" *Id.* at 1174 (quoting *Edgar v. Haines*, 2 F.4th 298, 310 (4th Cir. 2021)).

Appellants do not allege they have been punished for their speech. Nor could they, as Dr. Eggleston and Dr. Siler's WMC proceedings are unresolved. Instead, Appellants' theory of harm is that WMC's investigations and interpretation of the

law have chilled physicians' speech and limited the speech available to patients. But Appellants cannot plausibly establish a concrete injury by threadbare assertions that WMC proceedings against two doctors *might* chill their protected speech, chill the speech of other unidentified physicians, or limit patients' access to information about COVID. *See* ER-217-19 ¶¶ 10, 12-14; ER-220-21 ¶¶ 19-20.

A party's "naked assertion" that its speech was chilled is insufficient to establish injury. *Twitter*, 56 F.4th at 1174-75. This Court's recent decision in *Twitter* is dispositive. There, Twitter sought to enjoin the Texas Attorney General from investigating its content-moderation policies. *Id.* at 1172. Twitter alleged the investigation was unlawful retaliation for protected speech. *Id.* This Court held that the case was not ripe. *Id.* at 1173. Specifically, Twitter's assertions that the investigation "impeded" its ability to "freely make its own decisions[,]" "chill[ed] [its] speech," and "forced [it] to weigh the consequence[s] of a burdensome investigation" when making decisions, taken individually or collectively, did not satisfy Article III. *Id.* at 1175. Rather, these assertions were "vague" and referred only to "a general possibility of retaliation." *Id.* An employee declaration that the investigation would cause "significant diminishment of the willingness of Twitter employees to speak candidly and freely in internal content moderation decisions[]" was likewise insufficient: it was "highly speculative" and did not show the "[civil investigative demand] has actually chilled employees' speech or Twitter's content

moderation decisions; the employee only claims that it would 'if the CID and investigation were allowed to proceed.'" *Id.* (quoting *Spokeo*, 578 U.S. at 340).

Here, as in *Twitter*, Appellants make no concrete allegation that they have been punished for their speech or that any WMC proceeding has actually chilled their speech. Indeed, they offer little more than rote assertions that their speech is "under attack" or that other, unidentified (perhaps hypothetical) physicians' speech might be chilled to the Appellants' unspecified detriment. ER-217-19 ¶¶ 10, 12-14; ER-220-21 ¶¶ 19-20. These cursory allegations fall far short of a "concrete, particularized, and actual or imminent" injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted); *see also Second Amendment Found. v. Ferguson*, 2:23-cv-1554-MJP, 2024 WL 97349, at *4 (W.D. Wash. Jan. 9, 2024) (allegation that the Attorney General "hope[d] to chill Plaintiffs' First Amendment activity" with burdensome investigation "is not an allegation of actual, chilled speech, and it cannot support a finding of an injury in fact"); *Flaxman v. Ferguson*, 2:23-cv-01581-KKE, 2024 WL 623754, at *4 (W.D. Wash. Feb. 14, 2024) ("In the absence of . . . an allegation that any chilling . . . has occurred as a result of the potential fines, Plaintiffs have failed to plead the existence of a concrete injury, even under the less stringent ripeness standards that apply to First Amendment claims.").

Appellants try to distinguish *Twitter* (and the similar case of *Seattle Pacific University v. Ferguson*, 104 F.4th 50 (9th Cir. 2024)), by arguing that this Court's

holdings in those cases turned on the voluntary nature of the investigative devices at issue there, while this case concerns "coercive" statements of charges. *See* DktEntry 14-1 (Opening Br.) at 53. This argument confuses the facts of *Twitter* for the holding. Although this Court certainly highlighted the non-coercive nature of the civil investigative demand in *Twitter* and the letter at issue *Seattle Pacific University*, it did so primarily in response to different types of harm than Appellants here assert. In *Twitter*, for example, this Court rejected allegations of harm based on the cost of responding to a CID, noting that, because the CID was non-self-executing, "Twitter incurred these costs voluntarily[.]" *Twitter*, 56 F.4th at 1176. No similar allegations are made here.

As relevant here, *Twitter* held that a party's "naked assertion that its speech has been chilled is 'a bare legal conclusion' upon which it cannot rely to assert injury-in-fact." *Twitter*, 56 F.4th at 1175 (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011)). Rather, "the plaintiff must clearly allege facts demonstrating each element of standing." *Id.* (cleaned up).

This is what Appellants fail to do. Dr. Eggleston makes some effort, claiming that "after the Commission filed its statement of charges against him" in August 2022, the nature of his editorials changed. ER-225-26 ¶ 39. But the source he cites—the archive of his newspaper columns—shows the exact opposite. His November 2023 column, for example, contends that COVID vaccines are dangerous and do not

prevent the spread of COVID. *See* Richard Eggleston, *OPINION: About COVID-19 vaccinations: You should decide for yourself*, The Lewiston Tribune (Nov. 19, 2023), https://www.lmtribune.com/opinion/opinion-about-covid-19-vaccinations-you-should-decide-for-yourselfdd7b7aeb; *compare* ER-99 (WMC statement of charges alleging, *inter alia*, that Dr. Eggleston falsely claimed that COVID "vaccines are harmful and ineffective"). In fact, his most recent column, published just three days before the filing of this brief, calls COVID-19 vaccinations "ineffective and dangerous" and suggests that the risks of the vaccinations are being concealed. Richard Eggleston, *OPINION: A question: Can the radical left ever learn or admit to errors?*, The Lewiston Tribune (Oct. 27, 2024), https://www.lmtribune.com/opinion/a-question-can-the-radical-left-ever-learn-or-admit-to-errors-17950350. And Dr. Eggleston does not allege—because he cannot allege—that he has suffered *any* repercussions for continuing to publicize COVID misinformation. Thus, material incorporated into Dr. Eggleston's complaint shows he cannot plausibly allege any actual chill. *See Orellana v. Mayorkas*, 6 F.4th 1034, 1043 (9th Cir. 2021) (upholding dismissal "because the complaint itself undermines [plaintiff's] theory of the case"). And even if this material is not deemed incorporated in Appellants' complaint, the Court may consider it to evaluate Appellees' jurisdictional challenge. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Dr. Eggleston tries to paper over this failure with a declaration from the editor of the Lewiston Tribune, Butch Alford. Opening Br. at 36. But even ignoring the fact that Dr. Eggleston has continued to publish false statements about COVID, Mr. Alford's declaration does not show chilled speech. At most, it shows that Mr. Alford—not WMC—has exercised discretion about which of Dr. Eggleston's opinions he publishes. ER-22-23. This doesn't show chilled speech *by the Appellees*. *See Murthy v. Missouri*, 144 S. Ct. 1972, 1989, 219 L. Ed. 2d 604 (2024) (holding plaintiffs failed to concretely allege chilled speech by the government when their speech was limited by a private party, and "the plaintiffs cannot show that these restrictions were traceable to the" government).

Dr. Siler's efforts to demonstrate chill are similarly inadequate. He alleges—without any elaboration—that "[e]ven though [he] had more to say regarding the events of the COVID pandemic, [he] stopped writing in 2022 and awaited [WMC's] determination on [his] speech." Opening Br. at 50 (quoting ER-124). But this conclusory allegation lacks any substance. He fails to provide *any* concrete factual allegations of what speech was allegedly chilled, how that hypothetical speech possibly related to WMC's statement of charges, or how any hypothetical speech was allegedly chilled. His vague, threadbare allegations of chill do not suffice to demonstrate an injury under Article III.

Dr. Moynihan's allegations of injury are even less convincing. He is not under

investigation. He is not facing any consequences whatsoever for any alleged unprofessional conduct. Although he claims to fear WMC discipline if he shares his views about COVID, Opening Br. at 53, his "allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Clapper*, 568 U.S. at 418; *Cal. Pro-Life Council*, 328 F.3d at 1095 (rejecting proposition that "any plaintiff may challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute[]"). He cannot articulate any "actual or well-founded fear that the law will be enforced against" him. *Alaska Right to Life Pol. Action Comm.*, 504 F.3d at 851 (cleaned up); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur" (internal quotation marks omitted)).

Appellants next argue this case is "unlike . . . *Twitter*" because it "involves a statewide announced censorship program against a large class of people[.]" Opening Br. at 52. It doesn't. It involves an effort by Appellants to shut down two ongoing investigations, into Drs. Eggleston and Siler. Appellants' fearmongering about hypothetical potential future investigations of unknown and unnamed physicians does not give them a constitutionally ripe claim.

To the extent Appellants are implicitly trying to hinge a claim of hypothetical

future injury on WMC's adoption of a COVID-19 misinformation position statement, this argument would fail for two reasons. First, in the district court, Appellants explicitly disclaimed any challenge to the WMC position statement, ECF No. 20 at 6, 27-28, and they thus cannot raise that claim here. *See One Indus., LLC v. Jim O'Neal Distrib., Inc.*, 578 F.3d 1154, 1158 (9th Cir. 2009) ("A party normally may not press an argument on appeal that it failed to raise in the district court."). Second, as the district court found in rejecting Dr. Eggleston's first lawsuit, "[t]he Position Statement does not contain any enforcement mechanisms, nor does it describe any policies or implementation procedures regarding a law or regulation. Therefore, any claims purportedly arising under the Position Statement are not cognizable." *Wilkinson*, 2023 WL 2562387, at *2.

Appellants Eggleston and Siler next assert they "have a stake" in this case because they are the ones being investigated. Opening Br. at 51. But that's not the relevant question—after all, Twitter was the one being investigated, too. Instead, the relevant question is whether they have alleged any *actual* First Amendment injury—whether chill or some punishment. They have not. *Cf. Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 396 (2024) ("The 'assumption' that if these plaintiffs lack 'standing to sue, no one would have standing, is not a reason to find standing.'") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

Finally, Appellants argue that Appellants Stockton, Moynihan, and the Children's Health Defense Fund have standing based on a purported injury to their right to hear speech from Drs. Eggleston, Siler, and other hypothetical, unidentified physicians. Opening Br. at 54-59. This argument fails at the outset because Appellants cannot concretely allege that anyone's speech has actually been chilled. They thus cannot allege a derivative injury based on their right to listen. Moreover, just this term, the Supreme Court resoundingly rejected this "startlingly broad" theory of standing. *Murthy*, 144 S. Ct. at 1996. Simply put, an individual does not have "the right to sue over *someone else's* censorship" even when "they claim an interest in that person's speech." *Id.* (emphasis in original). Instead, a would-be listener must still allege a concrete, particularized harm. *Id.* Appellants have not done so here. Whatever interest Appellants might have in reading what Drs. Eggleston or Siler write is no different from the interest of the public at large. *See id.* (allegations that "hearing unfettered speech" was "critical" to plaintiffs' work as "scientists, pundits, and activists" did not demonstrate concrete, particularized injury); *see also All. for Hippocratic Med.*, 602 U.S. at 381 (to satisfy Article III standing requirements, an alleged "injury must affect 'the plaintiff in a personal and individual way' and not be a generalized grievance[]") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). This is particularly obvious in the case of hypothetical "physicians who[] in the future may be prosecuted." Opening Br. at 31.

Appellants cannot claim a concrete and particularized injury based on the hypothetical suppression of hypothetical speech from hypothetical speakers.

Recognizing the challenge posed by *Murthy's* holding, Appellants point to other language in the opinion in which the Court noted it had "identified a cognizable injury" based on a listener's "'First Amendment right to 'receive information and ideas' . . . only where the listener has a concrete, specific connection to the speaker[,]" such as when professors sought to "challeng[e] the visa denial of a person they had invited to speak at a conference[]" or when "prescription-drug consumers had an interest in challenging the prohibition on advertising the price of those drugs." *Murthy*, 144 S. Ct. at 1996 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) and citing *Mandel* and *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756-757 (1976)). But Appellants here simply do not allege a "concrete, specific connection" with any allegedly censored speaker. For example, Mr. Stockton claims "[h]e is an avid reader of Eggleston's posts," had him on his podcast, and helped him find attorneys for this case, Opening Br. at 56-57, but his esteem for Dr. Eggleston's work, no matter how sincere, is insufficient to establish a personal stake in this litigation. *All. for Hippocratic Med.*, 602 U.S. at 386 ("[G]eneral legal, moral, ideological, and policy concerns do not suffice on their own to confer Article III standing to sue in federal court."). Even if Dr. Eggleston could show actual chilled speech, Mr. Stockton's interest in reading what

Dr. Eggleston might write is no different from the interest of the public at large. *Id.* at 381. It is certainly no greater than the interests of the "scientists, pundits, and activists" whose claims the Court rejected in *Murthy*. 144 S. Ct. at 1996. Appellants who claim a right to listen are "mere bystander[s]" to this dispute. *All. for Hippocratic Med.*, 602 U.S. at 379. Because they have not identified a concrete, identifiable harm, their claims are not constitutionally ripe.

2. Appellants' suit is not prudentially ripe

Even if the district court erred in concluding that Appellants failed to allege a plausible Article III injury to support constitutional ripeness, the district court was still correct in dismissing the suit based on prudential ripeness grounds. Prudential ripeness turns on two factors: (1) "the fitness of the issues for judicial decision[,]" and (2) "the hardship to the parties of withholding court consideration." *Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 944 (9th Cir. 2021) (citation omitted). Here, both factors support dismissal of Appellants' challenges to non-final agency action.

Faced with suits by parties like Appellants who seek to terminate ongoing investigations, courts routinely dismiss these cases on prudential ripeness grounds. *See, e.g.*, *Ass'n of Am. Med. Colls.*, 217 F.3d at 781 ("[U]ncertainties" in whether an investigation will result in findings or enforcement "render plaintiffs' action unfit for judicial resolution at this time."); *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th

Cir. 2016) ("[N]either the issuance of the non-self-executing administrative subpoena nor the possibility of some future enforcement action created an imminent threat of irreparable injury ripe for adjudication."); *Ammex v. Michael A. Cox*, 351 F.3d 697, 709 (6th Circ. 2003) ("Enforcement of the [Michigan Consumer Protection Act] against [Plaintiff] is . . . tentative and subject to agency reconsideration"); *Cmty. Mental Health Servs. of Belmont v. Mental Health & Recovery Bd. Serving Belmont, Harrison & Monroe Cntys.*, 150 F. App'x 389, 397-98 (6th Cir. 2005) ("Without knowledge of what . . . form [any enforcement action] will be, this court does not have the concrete context necessary for judicial review."); *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 69 (3d Cir. 2003) (holding action to enjoin an investigation was not ripe because "an investigation is the beginning of a process that may or may not lead to an ultimate enforcement action[]"); *Portland Gen. Elec. Co. v. Myers*, No. 03-cv-1641-HA, 2004 WL 1722215, at *2 (D. Or. 2004); *Tex. State Troopers Ass'n*, No. A-13-CA-974-SS, 2014 WL 12479651, at *3 (W.D. Tex. Apr. 16, 2014); *CBA Pharma, Inc. v. Harvey*, No. 3:21-cv-00014-GFVT, 2022 WL 983143, at *3 (E.D. Ky. Mar. 30, 2022), *aff'd sub nom. CBA Pharma, Inc. v. Perry*, No. 22-5358, 2023 WL 129240 (6th Cir. Jan. 9, 2023). This case is no different.

As to the first ripeness factor, "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009)

(citation omitted). In challenging an ongoing WMC proceeding, Appellants asked the district court—and now this Court—to decide issues of fact before WMC has made a final enforcement determination and before any Appellant has been found to violate Wash. Rev. Code § 18.130.180(1) or (13) or been subject to any discipline whatsoever.[1] There is no final agency action to challenge. *See Ass'n of Am. Med. Colls.*, 217 F.3d at 781 ("An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action."); *CBA Pharma*, 2022 WL 983143, at *3 ("The investigation in this matter has not concluded, which means that the Department has not even decided whether it will, in fact, take any action[.]"). Instead, Appellants ask the Court to declare unconstitutional WMC's interpretation of the law as applied to specific, ongoing state investigations, effectively enjoining those proceedings and any similar, hypothetical future enforcement actions that may never happen. The Court should reject Appellants' attempt to short-circuit WMC proceedings before the WMC has reached any conclusion.

To meet the second ripeness requirement, Appellants must show that withholding judicial review would lead to "direct and immediate hardship" that will require "an immediate and significant change in the plaintiff['s] conduct of their

[1] Appellants' claim that they have been "prosecuted[] and sanctioned" is patently untrue. Opening Br. at 61. Dr. Siler and Eggleston's proceedings remain ongoing, and neither has been sanctioned (and may never be).

affairs with serious penalties attached to noncompliance." *Stormans*, 586 F.3d at 1126 (citation omitted). For the same reason they cannot establish injury, Appellants also cannot establish hardship. *Tex. State Troopers Ass'n*, 2014 WL 12479651, at *3 ("Plaintiffs cannot establish hardship because they have not alleged their conduct has changed, or will change, in any way as a result of the Attorney General's conduct."). Indeed, WMC might never sanction them. And even if it does, Appellants have alternative means to protect themselves: WAPA provides them a direct path to challenge those findings in state court, including the opportunity to raise any constitutional arguments. *See* Wash. Rev. Code § 34.05.570(4)(c).

Appellants' claim of an "immediate hardship" warranting this Court's premature intervention hinges entirely on their being required to participate in WMC proceedings. Opening Br. at 63. But just as being forced to answer a complaint doesn't amount to prejudice to the Attorney General's Office, so too responding to a disciplinary proceeding cannot be an "immediate hardship" for a board-licensed physician. *See, e.g.*, *Ass'n of Am. Med. Colleges*, 217 F.3d at 774 (finding challenge to audits under HHS' Physicians at Teaching Hospitals program unripe despite the compulsory nature of the audits); *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 239 (1980) ("The Commission's issuance of its complaint was not final agency action.") (quotation omitted). Rather than contest a sanction imposed by the WMC (should one ever be imposed), Appellants are attempting to use a federal court to

collaterally challenge and enjoin an ongoing state enforcement proceeding. Their claims are unripe.

Finally, courts consider the hardship to defendants resulting from having to litigate unripe claims. *See, e.g.*, *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000). Here, Appellants' lawsuit seeks to force the WMC to justify its ongoing proceedings, and to litigate issues substantially overlapping with the substance of those proceedings, before it has even had an opportunity to make final enforcement decisions. Litigating Appellants' case would require the WMC to reveal and justify its ongoing investigation and decision-making or suffer the disadvantage of "being forced to defend [the investigation] in a vacuum . . . ." *Id*. Moreover, allowing cases like this to proceed in federal court will make every WMC investigation (and broad classes of other State enforcement actions) susceptible to collateral attack—an untenable result that runs directly contrary to well-established law. This Court should dismiss Appellants' complaint on prudential ripeness grounds.[2]

Unable to satisfy this Court's well-established standard for prudential ripeness, Appellants half-heartedly ask this Court to overturn decades of prudential

[2] To the extent Appellants seek to enjoin hypothetical *future* investigations, those claims are even more unripe, constitutionally and prudentially, and Appellants make no showing that they have pre-enforcement standing to challenge such speculative investigations.

ripeness doctrine, or at least give them a pass on it, because that well-established doctrine is allegedly in tension with the Court's "virtually unflagging obligation" to hear cases before it. Opening Br. at 60 (quoting *Twitter*, 26 F.4th at 1123 n.1). But this Court, despite recognizing that the Supreme Court has "cast doubt on the prudential component of ripeness[,]" *Clark v. City of Seattle*, 899 F.3d 802, 809 n.4 (9th Cir. 2018), has continued to "apply it . . . regardless of any uncertainty about its life expectancy." *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 751 n.9 (9th Cir. 2020). *See also*, *e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1070 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023); *AMTAX Holdings 260, LLC v. Wash. State Hous. Fin. Comm'n*, No. 21-35789, 2022 WL 2953701, at *1-2 (9th Cir. July 26, 2022); *Shady Acres Homeowner's Ass'n v. Kittitas County*, 815 Fed. App'x 181, 182 (9th Cir. 2020); *Foster v. Cantil-Sakauye*, 744 Fed. App'x 469 (9th Cir. 2018). Nothing in Appellants' scant argument warrants reconsideration of that position.

Their claims are both prudentially and constitutionally unripe.

B. Even if Appellants' Suit Were Ripe, *Younger v. Harris* Requires Abstention

Even if this Court determines that the district court erred in finding Appellants' claims unripe, the Court should nevertheless affirm the district court's finding that abstention was necessary under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. This Court has already held that *Younger* requires it to abstain from

suits to block ongoing disciplinary proceedings before Washington's medical boards. *Alsager v. Bd. of Osteopathic Med. & Surgery*, 573 Fed. Appx. 619, 621 (9th Cir. 2014); *see also Amanatullah*, 187 F.3d at 1163-65. Indeed, Dr. Eggleston's previous federal suit was dismissed on *Younger* grounds, and he declined to appeal. *Wilkinson v. Rodgers*, 1:23-cv-3035-TOR, 2023 WL 4410936, at *2 (E.D. Wash. July 7, 2023). Dr. Eggleston is collaterally estopped from arguing otherwise. *See Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996).[3]

The *Younger* abstention doctrine requires federal courts to abstain from hearing federal claims for relief from various state proceedings, including civil enforcement proceedings. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (citing *Younger*, 401 U.S. at 43-44). These principles reflect comity and federalism interests, ensuring that federal courts do not interfere with ongoing state proceedings. *See Younger*, 401 U.S. at 43 (recognizing "a desire to permit state courts to try state cases free from interference by federal courts[]"); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (explaining that

[3] Appellants insist that Dr. Eggleston's claim is not barred by collateral estoppel because *Wilkinson* involved a "different" claim. Opening Br. at 69. This is nonsense. Both *Wilkinson* and this case are efforts to shut down ongoing WMC proceedings, involving the same conduct, on the ground that they violate the First Amendment. Whether *Younger* bars Dr. Eggleston from bringing such a challenge in federal court is the "identical" issue raised here, was "actually litigated" against Dr. Eggleston "in the prior litigation" and was "a critical and necessary part of" the *Wilkinson* court's dismissal. *Trevino*, 99 F.3d at 923 (quoting *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir.1993)).

Younger "and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.").

Whether *Younger* abstention is required does not depend on the specific allegations in a particular case but instead on whether the state proceeding at issue falls within a general class of state enforcement actions. *See Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737-38 (9th Cir. 2020) (rejecting plaintiff's invitation to probe into "the State's true motive in bringing the case[,]" and explaining that "[a] federal-court inquiry into why a state attorney general chose to pursue a particular case, or into the thoroughness of the State's pre-filing investigation, would be entirely at odds with *Younger*'s purpose of leaving state governments 'free to perform their separate functions in their separate ways[]'") (citation omitted). "*Younger* abstention applies to state civil proceedings when the proceeding: (1) is ongoing, (2) constitutes a quasi-criminal enforcement action, (3) implicates an important state interest, and (4) allows litigants to raise a federal challenge." *Citizens for Free Speech, LLC v. County of Alameda*, 953 F.3d 655, 657 (9th Cir. 2020) (citation omitted).

In the district court and again in their unsuccessful preliminary injunction motion in this Court, Appellants conceded that the *Younger* factors were met as to Drs. Eggleston and Siler, and merely argued that exceptions to *Younger* applied.

ECF No. 20 at 21-25; DktEntry 7.1 at 19-21. Now, however, they try to reverse course and challenge the third *Younger* factor, arguing that the investigations in Drs. Siler and Eggleston do not implicate an important state interest. They are flatly wrong: the *Younger* factors are all met here, and no exception applies.

In *Alsager*, this Court made crystal clear that *Younger* bars federal courts from enjoining proceedings of Washington's medical licensing boards. As it held, medical "disciplinary proceedings are . . . ongoing state proceeding for purposes of *Younger*[]" that "implicate important state interests" because "regulating physician conduct and licensing is one such interest." *Alsager*, 573 Fed. Appx. at 619-20 (9th Cir. 2014) (citing *Buckwalter v. Nevada Bd. of Med. Exam'rs,* 678 F.3d 737, 747 (9th Cir. 2012)). The *Alsager* court likewise held that these proceedings afford doctors "an adequate opportunity to raise [their] constitutional claims" because "Washington's disciplinary scheme provides for judicial review in state courts, and the reviewing courts are authorized to consider constitutional claims." *Id.* (citing Wash. Rev. Code § 18.130.140)). Following *Alsager*, the district court straightforwardly applied the *Younger* factors and correctly concluded they were met here.

Again, below, Drs. Eggleston and Siler conceded that the *Younger* factors were met as to them. But for the first time on appeal, they contend that the ongoing proceedings do not implicate an important state interest because "censoring

physicians' public speech" is not a legitimate interest. Opening Br. at 65. Should the Court choose to consider this argument, it may summarily reject it. "The importance of the interest is measured by considering its significance broadly, rather than by focusing on the state's interest in the resolution of an individual case." *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 618 (9th Cir. 2003). "Where the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 883-84 (9th Cir. 2011) (citations omitted). Here, there is no reasonable dispute that regulating the conduct of physicians and ensuring public confidence in the medical profession is a compelling state interest. *Buckwalter*, 678 F.3d at 747 ("It is self-evident that the Board's disciplinary proceedings implicate the important state interest of ensuring quality health care."); *Amanatullah*, 187 F.3d at 1164 ("[T]here is no question that the licensing and discipline of physicians involves important state interests[.]"). Appellants' disagreement with the merits of WMC's proceedings are irrelevant to this Court's *Younger* analysis.

Although the remaining Appellants are not subject to ongoing WMC proceedings, they are nonetheless asking this Court to terminate ongoing WMC proceedings (into Drs. Eggleston and Siler). Their claims, too, are barred by *Younger*.

First, Appellants contend that *Younger* does not apply insofar as they are seeking to enjoin hypothetical, future investigations, not ongoing ones. Opening Br.at 65. True enough, but that only highlights the ripeness problem: there is literally nothing to enjoin.

Second, Appellants contend that *Younger* does not apply because WMC allegedly brought its proceedings in bad faith. *Id.* at 66. While *Younger* acknowledges exceptional cases in which "substantial allegations" of bad faith or sustained harassment might amount to "irreparable injury[] above and beyond that associated with the defense of a single prosecution brought in good faith," *Younger*, 401 U.S. at 47, Appellants' threadbare accusations come nowhere near this. They offer no plausible, concrete allegations from which this Court can infer bad faith. *See Dombrowski v. Pfister*, 380 U.S. 479, 487-89 (1965) (state officials arrested plaintiffs, ransacked their offices, threatened baseless prosecutions even after a state judge suppressed illegally-seized evidence, and accused plaintiffs of being subversive Communists in retaliation for civil rights work); *Partington v. Gedan*, 961 F.2d 852, 862 (9th Cir. 1992) (finding no bad faith where there were "no allegation[s] of repeated harassment by enforcement authorities with no intention of securing a conclusive resolution by an administrative tribunal or the courts . . . or of pecuniary bias by the tribunal[]"); *Krahm v. Graham*, 461 F.2d 703, 705-706 (9th Cir. 1972) (finding bad faith where law enforcement brought over 100 obscenity

prosecutions, made defamatory public statements about the defendants, continued to bring prosecutions despite losing every case they tried, and seized materials in violation of court orders); *Lewellen v. Raff*, 843 F.2d 1103, 1109-10 (8th Cir. 1988) (finding bad faith where the plaintiff, a black attorney accused of witness tampering in defense of an unpopular client, presented detailed evidence that he was prosecuted because of his race and to hamper his political prospects); *cf. FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997) (a party contending an administrative subpoena is issued in bad faith must "present . . . specific evidence of improper intent[]"). At most, Appellants assert that courts have "told" Attorney General Ferguson things about the First Amendment (in cases presenting different issues), *e.g.*, Opening Br. at 20, 67, but they don't (and can't) allege General Ferguson was involved in WMC's decision to investigate or file charges against any doctor.[4] Thus, their claim against General Ferguson boils down to: as the State's top lawyer, he (or, more accurately, his office) should have advised a client differently. They offer no support for this theory of holding an agency's lawyer (or, more accurately, an agency's lawyer's boss's boss's boss) liable for an agency's investigation. Nor do they offer any allegation—not even an implausible one—to suggest bad faith on the part of Appellee Kyle Karinen.

[4] Nor, for that matter, do they allege General Ferguson was personally involved in *Tingley*. *Contra* Opening Br. at 20.

Lacking any allegation that any Appellee acted in bad faith, all Appellants can do is point to law they contend is in their favor and suggest WMC should have taken their view of the law. Opening Br. at 66-67. But *Younger* does not permit a court to analyze the underlying law, ask whether plaintiffs are likely to succeed on the merits, and only abstain if not. It prevents a court from reaching the merits in the first place where doing so would interfere with a state's sovereign prerogative. Here, there is no dispute that Appellants seek to do just that.

Appellants next argue that this Court should disregard *Younger* because of a "danger of irreparable loss" should proceedings continue in front of the WMC. Opening Br. at 67. Appellants do not actually say what "irreparable loss" they will supposedly suffer if this Court does not enjoin the Washington state proceedings, which is reason enough to disregard this argument. To the extent they ask this Court to find an irreparable loss from the (hypothetical) chilling of speech, *see id.* at 70-72, courts routinely apply *Younger* in First Amendment challenges to ongoing state proceedings—including in *Younger* itself. 401 U.S. 37, 38-39 (1971); *Citizens for Free Speech v. Cnty. of Alameda*, 953 F.3d 655, 657 (9th Cir. 2020); *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1096 (9th Cir. 2008) ("[P]olitical speech is vitally important. But the Supreme Court has never suggested that the importance of the interest asserted by a federal plaintiff affects the analysis of the *Younger* factors."). It is not clear why Appellants

contend this case presents a great and immediate irreparable injury that distinguishes it from the mine run of cases applying *Younger* in the First Amendment context.

Moreover, an allegedly irreparable injury only defeats *Younger* "when 'defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights[.]'" *Lewellen*, 843 F.2d at 1109 (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 485 (1965)). It is undeniable that Appellants may raise their claims in state court. *See Alsager*, 573 Fed. Appx. at 620-21 ("[J]udicial review of state agency decisions provides a sufficient opportunity to raise federal claims, even when the state agency may not consider those claims in the first instance."). Likewise, it is undeniable that state courts are, as a rule, qualified to hear and rule on the types of federal constitutional claims raised here. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997).

Finally, Appellants suggest that *Krahm v. Graham* creates a standalone exception, applicable only to overbreadth cases, in which the government uses "facially valid statutes to discourage protected activities." Opening Br. at 67-68 (capitalization omitted). Not quite. *Krahm* merely applied the irreparable loss and bad faith exceptions in circumstances markedly different from those here. *See* 461 F.2d at 707 (detailing long-running campaign of law enforcement harassment). In so doing, it sensibly rejected the defendants' suggestion that plaintiffs could not show bad faith because the statute being used to harass them was facially constitutional.

Id. But this, of course, does not mean that every case involving a facially constitutional statute is a get-out-of-*Younger*-free pass. Otherwise, the exception would swallow the rule.

Appellants' suit is a blatant effort to use federal courts to shut down ongoing state enforcement proceedings. This is the exact thing *Younger* is designed to prevent.

C. Appellants' Claims Fail on the Merits, Too

The Court need not—and should not—reach the merits of Appellants' claims because, as discussed above, the Court lacks jurisdiction. If the Court does reach the merits of Appellants' claims, it should reject their claims and affirm the district court's dismissal order.

1. WMC Investigations do not violate the First Amendment As Applied

a. WMC regulates professional conduct that only incidentally impacts speech

Appellants do not state a plausible as-applied First Amendment claim based on the WMC's investigations into any physicians. The Court should affirm the district court's dismissal of the Complaint and denial of the motion for preliminary injunction.

Initially, this case is unlike *NIFLA* or *Tingley*, where the state restricted or compelled a discrete category of speech/conduct. *Nat'l Inst. of Family & Life*

Advocates v. Becerra (NIFLA), 585 U.S. 755, 762 (2018); *Tingley*, 47 F.4th at 1063. Instead, Drs. Siler and Eggleston's claims arise from WMC's investigation of complaints alleging the doctors acted unprofessionally in leveraging their medical credentials to spread misinformation. Their cases are proceeding before WMC, where they have a full suite of due process protections and may present evidence and law demonstrating they did not act unprofessionally. *See* Wash. Rev. Code § 18.130.100. If, following a hearing, WMC finds that either doctor has committed unprofessional conduct—which has not happened yet—they may be subject to discipline ranging from remedial education to license revocation. Wash. Rev. Code §18.130.110, .160. Any physician can appeal a sanction to the superior court and raise whatever constitutional claims they may have. Wash. Rev. Code § 18.130.140.

In this posture, with WMC proceedings ongoing, Appellants' claim is that WMC is forbidden from even investigating their conduct or implementing *any* corrective action to ensure Drs. Eggleston and Siler do not harm the public. This is untenable. WMC's regulation of medical professionals who engage in professional misconduct does not violate the First Amendment. Conduct subject to regulation need not occur in the context of patient treatment and need not be directly related to the skills of the medical profession. *Haley v. Med. Disciplinary Bd.*, 818 P.2d 1062, 1068-69 (Wash. 1991). Instead, "conduct may indicate unfitness to practice medicine if it raises reasonable concerns that the individual[s] may abuse the status

of being a physician in such a way as to harm members of the public, or if it lowers the standing of the medical profession in the public's eyes." *Id.* And "[s]tates may regulate professional conduct" in this manner, "even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768; *see also Barsky v. Bd. of Regents of Univ. of State of New York*, 347 U.S. 442, 451 (1954) ("[P]ractice is a privilege granted by the State under its substantially plenary power to fix the terms of admission.").

WMC's investigation and regulation of medical professionals, including Drs. Siler and Eggleston, who allegedly engage in professional misconduct does not violate the First Amendment because they will be disciplined, if at all, not based on their speech (let alone the content of their speech), but only if the WMC determines they acted unprofessionally, endangering Washingtonians by spreading COVID misinformation. The fact that Drs. Siler and Eggleston are alleged to have acted unprofessionally through speech does not immunize their conduct. Indeed, "[w]ords can in some circumstances violate laws directed not against speech[,] but against conduct[.]" *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("The fact that [anti-discrimination laws] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."). This is because "it has never been deemed

an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (upholding state antitrust laws against First Amendment challenge).

This principle becomes evident when examining the legal basis for the proceedings against Drs. Siler and Eggleston. Under Washington law, conduct may serve as grounds for professional discipline if it is "related to" the practice of the profession, meaning that the conduct must "indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession." *Haley*, 818 P.2d at 1068-69. Conduct may indicate unfitness to practice a profession without being directly related to the specific skills needed for without the practice or having occurred during the actual exercise of professional skills. "This construction encompasses a wide variety of conduct, but the broad sweep serves a valuable purpose[:] . . . to protect the public, and to protect the standing of the medical profession in the eyes of the public." *Deatherage v. State, Examining Bd. of Psychology*, 948 P.2d 828, 832 (Wash. 1997).

Appellants argue that there is no "conduct" that their speech is incident to, making any investigation or eventual, hypothetical discipline violative of the First Amendment. Opening Br. at 36. But "[i]f a 'law's effect on speech is only incidental

to its primary effect on conduct,' there is no 'abridgement of freedom of speech'" simply because the regulated conduct is carried out through language. *Monarch Content Mgmt. LLC v. Ariz. Dept. of Gaming*, 971 F.3d 1021, 1029 (9th Cir. 2020) (quoting *Expression Hair Designs v. Schneiderman*, 581 U.S. 37, 47 (2017)).

For example, in *Expression Hair Designs v. Schneiderman*, the Supreme Court considered whether a state law that regulated how a business communicated their prices and extra charges for credit card transactions violated the First Amendment. 581 U.S. at 47-48. The Court compared the law at issue to a hypothetical law that instead regulated the amount a business could charge. *Id.* Although such a hypothetical law would necessarily involve a business's speech about prices, the primary regulation was of the business's conduct—how much they could charge customers. *Id.* Any impact on speech was incidental to the regulation of that conduct.

So too here. It is well settled that "states may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768. Washington law says nothing about what a medical professional may say. *See* Wash. Rev. Code § 18.130.080(1). Instead, it is concerned with how a medical professional *acts*, and whether that action indicates unfitness to practice medicine, either because it threatens public health or the standing of the medical profession. The WMC's

investigations into Drs. Siler and Eggleston for allegedly abusing their status as physicians to spread misinformation fit into this category.

By way of analogy, imagine a licensed attorney who made repeated, verifiably false statements in press conferences and similar forums insisting that the 2020 election was stolen via a campaign of massive fraud. Imagine further that these repeated misstatements harmed the public by undermining confidence in the election. Under Appellants' theory, the fact that the attorney acted by speaking would mean that he was completely immunized from any professional discipline. Thankfully, professional licensing officials' hands are not so tied. *See, e.g.*, *Matter of Giuliani*, 230 A.D.3d 101, 104-07, 114, 214 N.Y.S.3d 366 (N.Y. App. Div. 2024) (disbarring attorney based, in part, on respondent's repeated "false[] and dishonest[]" statements at press conferences related to the integrity of the 2020 presidential election).

Appellants cannot overcome this common-sense conclusion by claiming WMC investigations are impermissible content-based regulations. *Contra* Opening Br. at 23. Content-based restrictions are those that "target speech based on its communicative content" or "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also Holder v. Humanitarian Law Grp.*, 561 U.S. 1, 27 (2010) (material support statute, which on its face regulated conduct, was content-based

regulation of speech as-applied because it applied "depend[ing] on what [plaintiffs] say"). To be content-based, a restriction must "on its face draw[] distinctions based on the message a speaker conveys[,]" or be justifiable only by "the content of the regulated speech[]" or the government's "disagreement with the message [the speech] conveys[.]" *Reed*, 576 U.S. at 163-64 (cleaned up). But WMC's prohibition on unprofessional conduct "does not purport to outlaw a particular idea, topic, message, or viewpoint[,]" and so is content-neutral. *Olympus Spa v. Armstrong*, 675 F. Supp. 3d 1168, 1196 (W.D. Wash. 2023) (analyzing the Washington Law Against Discrimination). Nor do WMC's investigations into Drs. Siler or Eggleston stem from any desire to suppress or retaliate against heterodox views; rather, they are a response to complaints that they engaged in unprofessional conduct. They will be disciplined—if at all—based solely on whether the evidence demonstrates they acted unprofessionally, either because their conduct poses harm to the public or lowers the standing of the medical profession. Wash. Rev. Code § 19.130.180.

Because the investigations of Drs. Siler and Eggleston are regulations of professional conduct that only incidentally impact speech, they need only survive rational basis review to survive.

They plainly do. States have a compelling interest in assuring safe medical care for their citizens and regulating the practice of medicine within their borders. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). Moreover, "[s]temming

the spread of COVID-19[,]" including by combatting misinformation, "is unquestionably a compelling interest[.]" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020). Indeed, the deadly effects of COVID misinformation are well-documented. *See, e.g.*, Maria Mercedes Ferreira Caceres, *The Impact of Misinformation on the COVID-19 Pandemic*, 9 AIMS Public Heath, 262-77 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC9114791; Krutika Amin, *COVID-19 preventable mortality*, KFF (Apr. 21, 2022), https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-continues-to-be-a-leading-cause-of-death-in-the-u-s/ ("estimat[ing] that nationally at least 234,000 deaths from COVID-19 between June 2021 and March 2022 could have been prevented with a primary series of vaccinations"). And "misinformation spread by physicians may be particularly pernicious" because "[p]hysicians are often considered credible sources of medical and public health information, increasing the potential negative impact of physician-initiated misinformation." Sahana Sule, *Communication of COVID-19 Misinformation on Social Media by Physicians in the US*, JAMA Network Open. (2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2808358#google_vignette (citation omitted). Undoubtedly, WMC's investigation of physicians who endanger the public by spreading COVID-19 misinformation is rationally related to these interests.

b. In the alternative, WMC's investigations survive even strict scrutiny

Appellants broadly argue that WMC investigations must be justified under strict scrutiny because they target viewpoint and public speech. As discussed above, this is incorrect. But even if strict scrutiny did apply, WMC investigations would survive. Strict scrutiny requires that a restriction on speech further a compelling interest and be narrowly tailored to achieving that interest. *Reed.*, 576 U.S. at 171. As discussed above, States have a compelling interest in regulating the medical profession and protecting public health.

Moreover, WMC's investigations are narrowly tailored to focus on only providers who wielded their medical licenses to spread demonstrably false misstatements. WMC has not imposed a blanket prohibition on COVID-related speech with which it disagrees, or on all COVID-related speech broadly. And, by statute, WMC has provided physicians with a full suite of due process protections, including the right to a hearing and to appeal to the superior court. Wash. Rev. Code § 18.130; Wash. Rev. Code § 34.05. Moreover, if the WMC were to discipline a physician, it has a variety of possible sanctions at its disposal, ranging from remedial education to suspension. WMC's process is narrowly tailored to achieving the compelling government interest in regulating medical professionals and protecting public health.

In arguing that WMC has failed to meet this burden, Appellants turn First Amendment burden-shifting on its head. Appellants contend that the WMC must present actual evidence that less restrictive alternatives were considered and found to be less effective than the chosen restriction. But the cases Appellants rely upon state that this burden only becomes relevant when *the party challenging the restriction* proposes alternatives. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("respondents . . . must be deemed likely to prevail unless the Government has shown that *respondents' proposed less restrictive alternatives* are less effective") (cleaned up and emphasis added); *Ashcroft v. American Civ. Liberty Union*, 542 U.S. 656, 670 (2004) ("In the instant case, too, the Government has failed to show, at this point, that the *proposed less restrictive alternative* will be less effective.") (emphasis added); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative *is offered* to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.") (emphasis added).

Appellants do not and have not offered any alternatives to WMC investigations and hypothetical discipline of doctors who engage in professional misconduct. And for good reason—no sanctions have been imposed against either Drs. Eggleston or Siler, and they may never be. Appellants cannot show that a

hypothetical sanction that has not been issued is overbroad or overly restrictive. And they likewise cannot show that less restrictive alternatives were not considered when no final action has been taken. Indeed, Appellants may agree that whatever sanction is imposed (if any), could be the least restrictive sanction available. This only highlights the ripeness problem inherent in Appellants' case.

Finally, to the extent Appellants argue that the WMC must show that there were less restrictive alternatives than the WMC Position Statement itself, they again fall into the mistaken belief that they can challenge a non-binding, unenforceable policy statement—a statement they explicitly represented they were not challenging below. *Cf. Shell Gulf of Mexico, Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014) (holding that parties lacked "adverse legal interests" for purposes of Article III because they had no rights or obligations under the law that was the basis of plaintiff's declaratory judgment action). Simply put, at this juncture, facing no sanctions whatsoever, Appellants cannot plausibly carry their burden of showing a First Amendment violation.

c. WMC's investigations do not violate Appellants' right to hear speech

Appellants cursorily allege that the individual Appellants, Appellant CHD, and the public are likely to succeed on their challenge to WMC investigations because they have a right to receive and hear speech from physicians like Drs. Eggleston and Siler that challenges the mainstream COVID narrative. Opening

Br. at 44-45; *see also id*. at 54-59 (addressing standing to bring right-to-hear First Amendment claim). This claim fails for three reasons.

First, Appellants do not meaningfully brief the merits of their right-to-hear claim. Accordingly, the Court may disregard this claim entirely. *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988) (issues not briefed on appeal are waived).

Second, even if Appellants did adequately brief this claim, it fails on the merits. The Constitution protects the right to receive information and ideas as a corollary to freedom of speech; "where a speaker exists . . . the protection afforded is to the communication, to its source and its recipients both." *Virginia State Bd. of Pharmacy*, 425 U.S. at 756; *Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1245 (W.D. Wash. 2019), *aff'd* 978 F.3d 1092 (9th Cir. 2020). But just as WMC investigations do not impede speech, they do not restrict individuals' ability to receive Drs. Eggleston and Siler's message. In investigating professional misconduct, the WMC has not restricted any form of communication by physicians to listeners like Appellant Stockton, Moynihan, or Children Defense Fund's members; instead, as discussed above, the WMC investigates and regulates professional conduct. Indeed, nothing in the WMC's investigations prevents listeners from hearing Drs. Eggleston and Siler's message and deciding for themselves whether it is something they want to hear. Licensed physicians are free to express their views; what they may not do is

wield their state-issued licenses to spread demonstrably false and dangerous misinformation that endangers public health and the standing of the medical profession. Contrary to Appellants' contention, WMC investigations of professional misconduct do not constrain anyone's ability to receive information.

Third, as detailed above, the Supreme Court has rejected Appellants' "startlingly broad" theory of bystander injury. *Murthy*, 144 S. Ct. at 1996. To state a First Amendment claim because *someone else* is allegedly censored, a plaintiff must allege "a concrete, specific connection to the speaker." *Id.*; *see also Kleindienst*, 408 U.S. 753 (holding that professors had First Amendment interest in challenging the denial of a visa to a speaker whom they had specifically invited to speak at a conference); *Virginia Bd. of Pharmacy*, 425 U.S. 748 (holding that consumers had a First Amendment right to receive pricing information about products). Although Appellants try in vain to distinguish *Murthy*, Opening Br. at 55-59, their interests as generalized consumers of information are no different from the "scientists, pundits, and activists" whose claims the Court rejected in *Murthy.*

2. Appellants have not articulated a cognizable facial challenge.

Appellants' purported facial challenges to Wash. Rev. Code § 18.130.180(1) and Wash. Rev. Code § 18.130.180(13) are not actually facial challenges at all. *Contra* Opening Br. at 28-30. A facial challenge to a law "consider[s] only the text of the [law], not its application." *Calvary Chapel Bible Fellowship v. Cnty. of*

Riverside, 948 F.3d 1172, 1176 (9th Cir. 2020). Broadly speaking, facial challenges, which are by design "hard to win," must first "assess the state laws' scope[]" and then "decide which of the laws' applications violate the First Amendment, and [] measure them against the rest." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397, 2398 (2024). Rather than doing any of that, Appellants exclusively focus on Appellees' "interpretation" of these provisions as applying to COVID misinformation. Opening Br. at 28-3041-43; *see also* ER-232 (focusing on "Defendants' interpretation" of various provisions). This is a regurgitation of their as-applied challenge, not a facial challenge, and their claims should be rejected for that reason alone. *See Moody*, 144 S. Ct. at 2397-98 (overturning lower courts' analyses of First Amendment facial challenges focusing only on "certain heartland applications" of laws, which "did not address the full range of activities the laws cover[]" and treated the claims "more like as-applied claims than like facial ones[]").

Moreover, Appellants have not—and cannot—establish that either of these provisions is facially overbroad or vague. Quite the opposite, they concede that these provisions are "[f]acially [v]alid." Opening Br. at 67-68. To establish an overbreadth claim, Appellants have to show that "a substantial number" of the challenged provisions' "applications are unconstitutional, judged in relation to [their] plainly legitimate sweep." *Moody*, 144 S. Ct. at 2397 (cleaned up). Similarly, to succeed on their vagueness claim, they need to show that a challenged provision is unclear about

"what [it] proscribes in the vast majority of its intended applications." *Aargon Agency, Inc. v. O'Laughlin*, 70 F.4th 1224, 1231 (9th Cir. 2023) (cleaned up). Appellants do not seriously attempt to undertake these analyses or meet the heavy burden on them in doing so. *See generally,* Opening Br. at 28-30; ER-231-32.

Under the appropriate test, Section 18.130.180(1) is not facially overbroad or vague. It defines as unprofessional conduct "*any act* involving moral turpitude, dishonesty, or corruption relating to the practice of a person's profession . . . ." *Id.* (emphasis added). On its face, the provision regulates conduct, not speech. *See Roulette v. City of Seattle*, 97 F.3d 300, 303-04 (9th Cir. 1996) (holding that First Amendment facial challenges only lie against laws that "by their terms . . . regulate spoken words, or patently expressive or communicative conduct") (cleaned up). Without a doubt, "moral turpitude, dishonesty [and] corruption," relating to the practice of medicine, cover a broad range of misconduct WMC may legitimately regulate. For example, WMC and other professional boards have invoked this provision to regulate a refusal to consult with or accept transfers of patients within a physician's specialty, *Hung Dang, M.D. v. Washington State Department of Health, Medical Quality Assurance Commission*, 450 P.3d 1198, 1198-99 (Wash. App. 2019); substandard work as an expert witness, *Deatherage*, 948 P.2d at 832; sexual contact with patients, *Heinmiller v. Department of Health*, 903 P.2d 433, 438-39 (Wash. 1995); and unscrupulous prescribing, *Ancier v. Department of Health*, 166

P.3d 829, 831-32 (Wash. App. 2007). Moreover, Washington courts have long upheld this provision against vagueness challenges. *Haley*, 818 P.2d at 1072-75.

Section 18.130.180(13) also easily passes muster on an overbreadth or vagueness challenge. It defines as unprofessional conduct any "[m]isrepresentation or fraud in any aspect of the conduct of the business or profession[.]" It regulates fraud, which is a "traditional limitation[]" on speech that has "never been thought to raise any Constitutional problem." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (cleaned up). It also regulates misrepresentations in commercial speech, such as advertising, which, again, are "not protected by the First Amendment." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). Moreover, to the extent the provision applies to non-commercial misrepresentations—such as COVID-19 misinformation—Appellants have not shown that constitutes a substantial number of its applications and, in any case, it is a constitutional application, as detailed above. *Supra* at 44-51.

The district court correctly dismissed Appellants' facial challenges, and this Court should affirm.

3. Appellants have not stated viable due process claims

Appellants' due process claims also lack merit. They assert that it violates their procedural and substantive due process rights that: (1) they cannot raise a constitutional challenge to WMC's disciplinary rules until a state court reviews the

proceedings; and (2) state courts have declined to enjoin their disciplinary proceedings. ER-232-34. As this Court has noted, these arguments are foreclosed because "judicial review of state agency decisions provides a sufficient opportunity to raise federal claims, even when the state agency may not consider those claims in the first instance." *Alsager*, 573 Fed. Appx. at 620-21; *see also Teitelbaum v. Health Care Fin. Admin.*, 32 Fed. Appx. 865, 866 (9th Cir. 2002) (holding requirement to exhaust administrative remedies in licensure action prior to federal suit did not violate due process).

Applying this principle, this Court has already held that a disciplinary proceeding under Washington's UDA—like the WMC proceedings at issue here—provides adequate process to protect a plaintiff's constitutional interests. *Alsager*, 573 Fed. Appx. at 620-21. In *Alsager*, the plaintiff claimed—similar to Appellants here—that Washington's disciplinary scheme for medical professionals was "insufficient to protect his constitutional interests, because it requires him to provide information to the Board (which he contends would violate his constitutional rights) or risk penalties for noncompliance." *Id.* at 620. This Court rejected that argument, observing that he could raise constitutional challenges on review of the agency's decision and seek a stay to litigate those claims before an adverse administrative decision took effect. *Id.* at 621. The same logic applies to the due process claims here. *See Buckwalter,* 678 F.3d at 747-48 (holding that ability to raise federal

constitutional challenges on appeal of a medical board disciplinary hearing in state court provided an "adequate opportunity" to raise those challenges).

Axon Enterprises v. FTC, 598 U.S. 175 (2023) does not, as Appellants insist, provide the "best analogy" to the due process claims in this case. *Contra* Opening Br. at 44. That case held that the "special statutory review scheme[s]" of the Federal Trade Commission Act and the Securities Exchange Act did not preclude a federal court from hearing constitutional challenges to the decision-making structure of the corresponding federal agencies. 598 U.S. at 180-85. It concerned "challenges . . . to the structure or very existence of an agency[,]" not a due process challenge to having to raise constitutional claims through an administrative proceeding. *Id.* at 189. *Axon* had a limited application and was not intended to broaden judicial review prior to agency adjudication. *See id.* at 190 n.2 (reaffirming that "adequate judicial review does not usually demand a district court's involvement[]" before an agency administrative hearing and that the Court's holding did not "portend[] newfound enthusiasm for interlocutory review[]"). It does not change the equation here.

D. Even if Appellants Were Likely to Succeed on the Merits of their Claims, They Are Not Entitled to a Preliminary Injunction

Because Appellants are unlikely to succeed on the merits, the Court need not proceed further before affirming the district court and dispensing with this appeal. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). But Appellants utterly fail to address the non-merits *Winter* factors. They do not show they are suffering

irreparable harm. And they are not suffering any, since no Appellant has suffered any punishment for their speech or established actual chill. *Supra* at pp. 19-29; *Twitter*, 56 F.4th at 1174-75. Nor do they show that the public interest or equities are advanced by broadly forbidding WMC from investigating medical providers who spread dangerous misinformation and endanger the public. Instead, they rely on a supposedly conclusive presumption in favor of an injunction whenever First Amendment rights are at issue. Opening Br. at 45. Any presumption is unavailing here because Appellants' claims are non-justiciable and meritless. Moreover, any presumption that might apply is overcome here, where "Plaintiffs[‘] likely . . . loss of some First Amendment freedoms . . . would be modest," and "Defendants . . . have established that there is a strong public interest in providing" accurate information to the public. *No on E v. Chiu,* 85 F.4th 493, 511 (9th Cir. 2023) (en banc).

The spread of COVID misinformation has had widespread harmful consequences in dissuading people from getting life-saving vaccines or taking other measures to avoid or treat a deadly disease. *Supra* at 50-51. Spreading COVID misinformation is literally deadly. Granting Appellants' requested injunction would handcuff WMC's ability to investigate claims of unprofessional conduct that harm the public. Denying it would merely require two physicians to continue their disciplinary proceedings, with full opportunities to defend themselves and to appeal

an adverse ruling to superior court. The balance of equities favors denying Appellants' injunction.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Appellants' Amended Complaint and denial of their Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED this 30th day of October 2024.

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