No. 24-3777

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Stockton, et al.,

Plaintiffs-Appellants,

v.

Ferguson, et al.,

Defendants-Appellees

Appeal from the Final Judgment Dismissing the Case and Denial of Preliminary Injunction
United States District Court for the Eastern District of Washington
Case No. 2:24-cv-00071-TOR
Honorable Thomas O. Rice, District Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Since September 2021, Appellees have engaged in a statewide campaign to silence Washington physicians who publicly question the government COVID-19 narrative and policies. Instead of addressing dissent through open debate, they have recast public speech as professional misconduct, transforming First Amendment-protected expression into grounds for discipline. The district court endorsed this unconstitutional approach by reframing the case as a mere regulation of professional conduct, despite the Supreme Court's rejection of such categorical transformations in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 766-67 (2018) (*NIFLA*).

Appellees claim their enforcement actions serve a compelling state interest in protecting healthcare, but Washington law defines healthcare as limited to patient treatment, not public discourse. By targeting physicians' public statements rather than actual patient care, the government's enforcement program is not only unconstitutional but is entirely untethered from its asserted justification.

Physicians like Appellants Eggleston and Siler are actively facing disciplinary charges for their speech, while others—like Appellant Moynihan—are self-censoring to avoid investigation. This Court should reject Appellees' attempts to evade review through threshold doctrines like ripeness and abstention. When state enforcement actions systematically suppress speech, federal courts must

intervene. *Younger*[1] abstention does not apply because the enforcement program lacks a legitimate state interest, provides no adequate forum for First Amendment claims, and meets the exceptions for bad faith and extraordinary circumstances. As a matter of law, there is concrete injury and harm arising from the Appellees' ongoing disciplinary actions.

This case is not a routine regulatory dispute. It is a state-led program of viewpoint discrimination that threatens the free speech rights of all Washington physicians. The district court's decision must be reversed.

APPELLEES' MISSTATEMENTS AND FLAWED LEGAL THEORY

Appellees falsely claim that "no physician is being investigated or disciplined based on statements against the 'mainstream COVID-19 narrative." (Answering Brief ("AB") at 2.) The Commission is prosecuting physicians for their public speech, not patient care. Appellant Eggleston faces disciplinary charges for writing in July 2021 that COVID-19 vaccines provide only short-term immunity and do not stop transmission—statements now widely recognized as true. (ER_99.) He was also charged for mentioning the co-inventor of the PCR test's skepticism about its reliability for diagnosing COVID-19. Rather than disputing the accuracy of these statements, the Commission claims they are

[1] *Younger v. Harris*, 401 U.S. 37 (1971).

"harmful to the public" (ER_98), confirming that its enforcement actions target viewpoints, not objective falsehoods.

Appellees' claim that the Commission received "numerous complaints" about COVID-19 misinformation (AB at 6) is irrelevant. The First Amendment does not permit government censorship in response to public pressure. Speech is not unprotected simply because it is controversial or unpopular.

Appellees assert that Dr. Siler was investigated solely for "demonstrably false and dangerous" statements (AB at 8), but the Commission has produced no evidence that his public speech harmed any patient. Expressing skepticism about COVID-19 policies in non-clinical settings is fully protected speech.

Appellees claim physicians are "free to express their views" but cannot use their licenses to "spread demonstrably false and dangerous misinformation" (AB at 53-54). This contradicts binding precedent. The Ninth Circuit has held that a physician's public speech, even if controversial, receives robust First Amendment protection. *Pickup v. Brown*, 740 F.3d 1208, 1227-28 (9th Cir. 2014), *abrogated on other grounds by NIFLA*, 585 U.S. at 767; *Tingley v Ferguson*, 47 F.4th 1055 (9th Cir. 2022).

ARGUMENT

I. THRESHOLD ISSUES

A. This Case is Constitutionally Ripe

Appellees claim this case is unripe because no final sanctions have been imposed. But the law is clear: enforcement actions targeting speech create an immediate First Amendment injury.

1. The Commission's Disciplinary Proceedings Create Immediate Constitutional Injury

The Supreme Court has held that enforcement actions against protected speech create an immediate injury, even if no final punishment is imposed. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the Court explained, "The chilling effect…may derive from the fact of the prosecution itself, even if…not finally successful." *Id.* at 482-83. The Court further emphasized that "The threat of sanctions may deter [speech] almost as potently as the actual application of sanctions." *Id.* at 486-87.

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158-59 (2014) reaffirms this principle, holding that the injury-in-fact requirement is satisfied when there is a credible threat of enforcement, even before penalties are imposed, as does *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), holding that plaintiffs need not "await and undergo a criminal prosecution as the sole

means of seeking relief," and *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("It is not necessary that petitioner first exposed himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

The Commission's prosecution of Drs. Eggleston and Siler exemplifies this doctrine. These are not speculative or hypothetical concerns—they are active enforcement actions that have forced physicians across the state to self-censor. Dr. Moynihan, for example, has refrained from speaking publicly about COVID-19 for fear of becoming the next target. Moynihan Decl. ER_128 ¶ 9; ER_129 ¶ 13. The First Amendment does not require speakers to wait for punishment before challenging an unconstitutional restriction.

2. Appellees' Reliance on Inapposite Cases

Appellees sidestep controlling precedent by relying on cases that involved no enforcement action at all. Their primary authority, *Twitter v. Paxton*, 56 F.4th 1170 (9th Cir. 2022), underscores why this case is ripe.

In *Twitter*, the Court dismissed a First Amendment claim because the Attorney General's civil investigative demand (CID) was non-self-executing and carried no imminent threat of enforcement. Twitter was not facing penalties, so its chilling claims were deemed speculative. *Id.* at 1174-75.

This case is different. The Commission has already initiated disciplinary proceedings, beginning a formal process that could result in sanctions. Unlike in *Twitter*, Appellants are actively defending against charges that could strip them of their medical licenses. *Twitter* does not support dismissal, if anything, it confirms this case is ripe.

Appellees cite *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), *Flaxman v. Ferguson*, No. 2:23-cv-01581-KKE, 2024 WL 623754 (W.D. Wash. Feb. 14, 2024), *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), and *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016). But in all of those cases, plaintiffs had not yet been subject to enforcement action, making their claims speculative and unripe. *Clapper*, 568 U.S. at 410-11 (no evidence that plaintiffs had been or would be targeted by surveillance program); *Flaxman*, 2024 WL 623754 at *4 (no allegations of actual enforcement or chilling effect); *Safe Air*, 373 F.3d at 1038 (no enforcement proceedings were pending); *Google*, 822 F.3d at 225-26 (non-self-executing subpoena was not a cognizable injury). This difference makes these cases inapposite.

B. The Case is Prudentially Ripe

Appellees argue this case is prudentially unripe because the Commission's proceedings are ongoing, factual development is incomplete, and Appellants face no immediate hardship. (AB at 28-33.) But this argument falls apart for a simple

reason: the core issue here is legal, not factual, and the ongoing enforcement actions are already harming Appellants.

1. The Issues Are Purely Legal and Require No Further Development

The prudential ripeness doctrine considers (1) whether the issues presented are fit for judicial review and (2) whether withholding review would impose hardship on the parties. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780-81 (9th Cir. 2000).

This case is ready for review now. The primary issue — whether the Commission's enforcement program targeting physicians' public speech violates the First Amendment — does not depend on further factual findings. Courts routinely review pre-enforcement constitutional challenges where, as here, a regulatory scheme is already being enforced against specific individuals. *Driehaus*, 573 U.S. at 167-68 (finding pre-enforcement challenge to speech restrictions justiciable because the legal issues did not require further factual development). The government's policy is set, the enforcement has begun, and the constitutional harm is happening now.

2. The Harm is Already Occurring—Delaying Review Only Makes It Worse

Prudential ripeness also considers whether withholding judicial review would impose a real, immediate hardship on the parties. *Ass'n of Am. Med. Colls.*,

217 F.3d at 781. A law or enforcement action need not impose final punishment, it is enough that it forces speakers to self-censor, change behavior, or face professional uncertainty. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009).

That's exactly what is happening here. Dr. Siler stopped writing for *American Thinker* once the Commission began investigating him. (Siler Decl. ER_124 ln. 22.) Dr. Moynihan no longer speaks publicly about COVID-19 out of fear of being the next target. (Moynihan Decl. ER_128 ¶¶ 9, 12; ER_129 ¶ 13.) The Lewiston Tribune altered its approach to publishing Dr. Eggleston's work because of the Commission's actions. (Alford Decl. ER_22 ¶ 4.) These are not hypothetical injuries—they are ongoing, concrete harms caused by the Commission's unconstitutional enforcement.

Appellees want this Court to wait years while physicians across Washington continue to self-censor or risk discipline. The Supreme Court has repeatedly rejected the idea that speakers must suffer full punishment before challenging a law's constitutionality. *Driehaus*, 573 U.S. at 158 (plaintiffs "should not be required to await and undergo an enforcement proceeding before seeking relief"). The cost of waiting is not just delay—it is the continued suppression of protected speech.

3. Appellees' Reliance on the Same Inapposite Cases—and Two More That Don't Help Them

Appellees recycle many of the same cases that they cited in their constitutional ripeness argument, including *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), *Flaxman v. Ferguson*, No. 2:23-cv-01581-KKE, 2024 WL 623754 (W.D. Wash. Feb. 14, 2024), *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), and *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016). As already explained, those cases involved plaintiffs who had not yet been subject to any enforcement action, making them irrelevant.

Appellees cite two new cases: *Texas State Troopers Ass'n v. Morales*, No. A-13-CA-974-SS, 2014 WL 12479651 (W.D. Tex. Apr. 16, 2014), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). But neither supports their argument.

The plaintiffs in *Stormans* had not yet faced enforcement, meaning their claims were speculative. *Stormans*, 586 F.3d at 1123. Here, enforcement has already begun, and Appellants are self-censoring to avoid it. The plaintiffs in *Texas State Troopers Ass'n* failed to show any real-world harm or change in behavior as a result of the challenged law. *Texas State Troopers Ass'n*, 2014 WL 12479651 at *4. That is the opposite of this case, where Appellants have already altered their speech and actions due to the Commission's prosecutions.

Appellees are out of cases. None of their cited authorities suggest this case is prudentially unripe. The legal issues are fit for review, and delaying review will only exacerbate ongoing constitutional violations.

C. *Younger* Abstention Does Not Apply

Younger abstention is a narrow exception, not a get-out-of-litigation free card for government enforcers who violate the First Amendment. Federal courts must intervene when state proceedings are being used not to regulate conduct, but to systematically silence speech.

1. *Younger* Does Not Apply to Future Enforcement Actions

Younger applies only to ongoing state proceedings, not to future enforcement actions. Appellees claim *Younger* bars all claims, but the Supreme Court says otherwise. *See Wooley v. Maynard*, 430 U.S. 705, 709-11 (1977) (*Younger* does not apply when plaintiffs seek protection from future prosecutions).

The first claim seeks to prevent future speech-based prosecutions, a category of claims *Younger* does not cover. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (limiting *Younger* to three narrow categories, none of which apply to the first claim in this case).

2. Washington Has No Legitimate State Interest in Punishing Public Speech

Younger abstention only applies if the state has identified an important state interest. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Appellees argue and the lower court identified that interest as "ensuring adequate healthcare…." (Decision ER_14, lns. 12-13.)

Washington law defines "health care" as proving medical care *to a patient*.[2] Therefore, the interest identified by the lower court and argued by the Appellees is inconsistent with Washington law. Accordingly, the Court should conclude that this requisite element of *Younger* abstention has not been satisfied.

3. The Commission's Process is Not an Adequate Forum for First Amendment Claims

Younger also requires that state proceedings provide a fair and adequate forum for constitutional challenges. *Gibson v. Berryhill*, 411 U.S. 564, 577-78 (1973). That does not exist here. The Washington disciplinary process does not allow physicians to challenge the constitutionality of their prosecutions. The Commission lacks jurisdiction over First Amendment claims, forcing physicians to

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[2] RCW 70.02.010(15), defines "health care" as:

> Any care, service, or procedure provided by a health care provider:
> (a) To diagnose, treat, or maintain a patient's physical or mental condition; or
> (b) That affects the structure or any function of the human body.

wait years for administrative proceedings to conclude before seeking relief in state court.

This is precisely the type of delayed judicial review the Supreme Court has rejected in First Amendment cases like *Driehaus*, 573 U.S. at 158 (plaintiffs should not be forced to "await and undergo an enforcement proceeding" before challenging an unconstitutional restriction). Federal intervention is needed now.

4. The Bad Faith Exception to *Younger* Abstention Applies

Even if *Younger* applied, the bad faith exception bars abstention. *Dombrowski* holds that *Younger* does not apply when enforcement is used as a pretext to suppress speech. That is exactly what is happening here. The Commission has selectively prosecuted only those physicians who challenge government narratives on COVID-19, while ignoring others who have made demonstrably false statements in support of government policies. That is not neutral enforcement—that is ideological censorship. *Dombrowski*, 380 U.S. at 490-91 (holding that bad faith exists where enforcement is "used as a tool for suppressing speech rather than neutrally regulating conduct").

5. The Extraordinary Circumstances Exception Also Applies

When state enforcement mechanisms themselves violate the Constitution, federal courts must step in. *Dombrowski*, 380 U.S. at 486. The Commission's statewide censorship program is creating a chilling effect on all Washington

physicians, making them choose between silence and punishment. This is not a routine professional discipline case—this is systematic speech suppression that demands immediate relief.

In short, this is exactly the kind of case where federal courts must intervene. Washington's enforcement program is not regulating medicine—it is silencing dissent. The district court's abstention ruling must be reversed.

D. *Wilkinson v. Rodgers* Does Not Support Collateral Estoppel

Appellees argue that *Wilkinson v. Rodgers*, 2023 WL 4410936 (E.D. Wash. July 7, 2023) bars this case under collateral estoppel. That argument fails because *Wilkinson* involved only Dr. Eggleston, while this case includes new plaintiffs asserting their own constitutional rights, including the right to hear his speech. Collateral estoppel applies only to parties who had a full and fair opportunity to litigate. *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008). Because the additional plaintiffs were not part of *Wilkinson*, their claims including the claim to stop the Commission's prosecution of Appellant Eggleston cannot be precluded.

Moreover, *Wilkinson* addressed only a narrow challenge to the September 2021 policy statement, holding that it was not subject to attack as a non-binding statement. This case is broader, challenging the Commission's enforcement practices and their unconstitutional suppression of speech. A fundamentally different legal claim and new enforcement actions constitute a change in

circumstances, making issue preclusion improper. *Montana v. United States*, 440 U.S. 147, 159 (1979); *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004).

II. APPELLANTS' FIRST AMENDMENT CLAIMS STATE VALID CLAIMS FOR RELIEF

Appellees attempt to justify the Commission's actions by mischaracterizing binding precedent and citing inapposite cases. The law is clear: the government cannot regulate or punish the public speech of licensed professionals under the guise of professional discipline. From *Thomas v. Collins*, 323 U.S. 516 (1945), to *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), the courts have consistently stated that when professionals speak to the public on matters of public concern, they are entitled to full ("robust") First Amendment protection.

The Commission is not regulating medical practice—it is censoring public speech. That is viewpoint-based discrimination, which is presumptively unconstitutional and subject to strict scrutiny. No appellate court has ever upheld the government's authority to discipline a physician for publicly expressing views outside the professional-patient relationship.

Appellees' reliance on cases involving commercial speech, fraud, or conduct-based regulations is misplaced. This case does not involve misleading advertisements, patient treatment, or any professional-client relationship. It involves physicians speaking in public as private citizens on a matter of public

debate—the exact speech the First Amendment protects most. There is no evidence in the record that the Commission has ever disciplined a physician for expressing government-aligned views, which proved to be mistaken, confirming that its enforcement is viewpoint-based.

Strict scrutiny applies, and the Commission has offered no evidence that its censorship program is narrowly tailored and the least restrictive means to advance a compelling interest. The district court failed to recognize the overwhelming precedent protecting public speech by licensed professionals, and its ruling should be reversed.

A. The Commission's Actions Regulate Speech, Not Conduct

Appellees argue that the Commission is merely regulating professional conduct, not speech. (AB at 42.) That argument misstates both the record and binding First Amendment precedent. The Commission is prosecuting physicians for their public speech, not patient care. Its enforcement actions target specific viewpoints under the guise of professional discipline.

Appellees claim *NIFLA* and *Pickup* were limited to a specific category of speech. (AB at 42-43.) That is incorrect. First Amendment analysis turns on whether a restriction is content-based or viewpoint-based. If it is, strict scrutiny applies. *NIFLA*, 585 U.S. at 767-68; *Tingley*, 47 F.4th at 1072-73.

Appellees claim they may sanction physicians for speech they deem harmful. (AB at 43.) That is exactly what this Court rejected in *Pickup* and *Tingley*. *Tingley* held that a state cannot punish a licensed professional's speech simply because it believes the speech is harmful or dangerous. *Tingley*, 47 F.4th at 1082. The same principle applies here.

Appellees rely on inapposite cases to justify transforming public speech into professional conduct. *Haley v. Med. Disciplinary Bd.*, 818 P.2d 1062 (Wash. 1991) upheld the discipline of a physician for his sexual relationship with a minor former patient, which is not speech, let alone protected speech. *Deatherage v. State Exam'g Bd. of Psych.*, 948 P.2d 828 (Wash. 1997) involved expert witness testimony in a court proceeding—speech made in a professional service capacity, not public discourse. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017) involved commercial speech, which receives less protection than public expressive speech.

Appellees' comparison to Rudy Giuliani's disbarment is misplaced. (AB at 47.) Giuliani was representing a client in ongoing litigation and speaking to the public as part of his legal representation, which is completely different from what the Appellant retired physicians did in this case.

Appellees cite *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47 (2006), and *Giboney v. Empire*

Storage & Ice Co., 336 U.S. 490 (1949), to argue that conduct incidental to speech can be regulated (AB at 44-45). But none of those cases support reclassifying pure expressive speech as professional conduct.

Appellees assert that investigations into Drs. Eggleston and Siler stem from public complaints about unprofessional conduct, not speech (AB at 48). But a complaint from a member of the public claiming that speech is conduct does not make it so. It is still public viewpoint expressive speech, and it is still fully protected.

Appellees cite *NIFLA* to claim that speech incidental to conduct can be regulated (AB at 49). But what medical conduct is Eggleston or Siler engaging in? They are retired. Their speech is not incidental to patient care—it is pure expressive speech. *Pickup* and *Tingley* explicitly rejected the government's power to reclassify protected speech as professional conduct simply by labeling it so.

Appellees argue that regulating speech protects public health and the reputation of the medical profession (AB at 48-49). But *Pickup* and *Tingley* do not permit the government to target speech just because it believes it is false or dangerous. And Washington law itself defines healthcare as limited to patient care—not public speech. RCW 70.02.010(15). (Footnote 2, page 11 *supra*.)

Appellees miscite *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) for the proposition that "combating misinformation" is a compelling interest

(AB at 48-49). *Cuomo* said no such thing. It addressed COVID-19 restrictions on religious services, not speech regulation. Appellees inserted "including combating misinformation" into their sentence quoting *Cuomo*'s language, thereby transforming their argument into Supreme Court principle.

Appellees cite non-record articles to justify censorship. (AB at 49.) These speculative sources, and speculations about the counterfactual, hypothetical effect of increased Covid shots have no evidentiary value under FRAP 28. By contrast, the Verma Declaration (ER_138-178) provides detailed, sourced, vouched for evidence showing that much information contrary to the public health narrative is accurate.

Appellees cannot be allowed to transform protected public speech into punishable conduct simply by calling it so. The district court erred in accepting this argument, and its ruling should be reversed.

B. Appellees Have Failed to Meet Their Strict Scrutiny Burden

Strict scrutiny requires the government to prove a compelling state interest, that its regulation is narrowly tailored to that interest, and that it is the least restrictive means available. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015); *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). The burden is on the government—not Appellants—to provide specific evidence that no less restrictive means exist. Appellees fail to meet that burden.

Rather than presenting actual evidence to satisfy strict scrutiny, Appellees argue that Appellants failed to propose alternative restrictions. (AB at 51.) That argument misstates strict scrutiny. Plaintiffs are not required to propose alternatives—the government must prove it seriously considered less restrictive means and that none would serve its interest. *McCullen*, 573 U.S. at 494 (government must show it "seriously undertook to address the problem with less intrusive tools" and "considered different methods that other jurisdictions have found effective").

This Court has repeatedly struck down speech restrictions where the government failed to consider less restrictive alternatives. In *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1123 (9th Cir. 2020), the Court invalidated a California law restricting speech because the state had not even considered less restrictive means. Similarly, in *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018), the Court rejected the government's argument that its restriction was necessary because it failed to provide actual evidence supporting that claim.

Appellees provide no evidence that they considered less restrictive alternatives. The only documents they cite are the Federation's press release (ER_134-135), the Commission's adoption statement (ER_137), and the Farrell declaration (ER_94-109), and none of them contain any discussion of less restrictive means. That failure alone is fatal under strict scrutiny.

Beyond their failure to consider less restrictive alternatives, Appellees' arguments fail strict scrutiny for three additional reasons. First, there is no connection between the government's asserted interest and its chosen means. The district court identified "ensuring adequate healthcare" as the state's interest (Decision, ER_14), but Washington law defines "healthcare" as patient care—not public speech. RCW 70.02.010(15). (*See* page 11 footnote 2 for the definition.) The Commission is not disciplining physicians for harming patients, it is punishing them for public statements. If the means are not connected to and do not serve the asserted interest, they cannot be "narrowly tailored."

Second, strict scrutiny demands actual proof that the speech restriction is necessary. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (government must prove "direct causal link" between speech and harm). Appellees cite no record evidence proving that disciplining physicians for their public speech protects patients' health. Instead, they rely on speculative articles that are not part of the record and have no evidentiary value under FRAP 28. Without actual evidence, strict scrutiny fails. *United States v. Playboy Ent. Grp. Inc.*, 529 U.S. 803, 817 (2000) ("[T]he Government must present more than anecdote and supposition").

In contrast, the Verma Declaration (ER_138-178) provides extensive record evidence contradicting Appellees' claims, citing numerous peer-reviewed studies

demonstrating evolving scientific consensus on COVID-19 measures. The Commission's reliance on dehors the record materials rather than evidence properly before the Court further underscores the absence of any legitimate justification for its policy.

Third, viewpoint discrimination is the most egregious form of content-based regulation and is presumptively unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). The Commission does not regulate "misinformation" as a general category. Rather, it selectively punishes only viewpoints that contradict government-approved narratives on COVID-19, while allowing equally unverified or evolving statements that align with state orthodoxy. The First Amendment does not permit the government to act as the sole arbiter of medical truth, nor to penalize dissenting perspectives under the pretext of professionalism. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) (rejecting the idea that the government can suppress speech based solely on its determination of falsity).

The answering brief fails to refute this selective enforcement. There is no evidence in the record of a single instance where the Commission has investigated or sanctioned a physician for making public health statements later proven incorrect if those statements aligned with state-endorsed views. The Commission's enforcement scheme is not viewpoint-neutral; it is an ideological litmus test that

determines who may speak and what may be said. That is precisely the unconstitutional government control over discourse the Supreme Court has repeatedly struck down.

In short, Appellees have failed to meet their strict scrutiny burden because they never considered less restrictive means, provide no evidence that their speech restrictions protect patient health, and enforce a policy that is viewpoint-based and unrelated to actual patient care. The district court erred in accepting their unsubstantiated claims, and its ruling should be reversed.

C. Appellants Have Stated and Adequately Briefed a Right to Listen Claim

The First Amendment protects not only the right to speak but also the right to receive information. The first claim in this case asserts the right of listeners, including Appellant Children's Health Defense ("CHD") on behalf of its members and John Stockton, to hear and receive the protected speech of physicians like Appellants Eggleston, Siler, and Moynihan. *See* Complaint, ER_227-228.

The Supreme Court recognizes that the right to receive information is a necessary corollary to the right to speak. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists, … the protection afforded is to the communication, to its source and to its recipients both."); *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972)

(holding that a group of professors had standing to assert a First Amendment right to hear a foreign speaker whose visa had been denied). The opening brief (at pages 31-32) cites these and other cases recognizing the right to receive information, and Appellees do not meaningfully contest the existence of this right.

Appellees instead argue that listeners have no claim because "physicians are free to express their views" but "cannot use their licenses to spread demonstrably false and dangerous misinformation." (AB at 53-54.) However, this self-contradictory statement highlights the exact constitutional violation at issue. Appellees claim that physicians can speak freely—except that if they say something the government deems "misinformation," they will be sanctioned. This is not free speech. This is the government punishing speech based on its content and viewpoint, a clear violation of the First Amendment, as established in *Rosenberger*, 515 U.S. at 829 ("The government may not regulate speech based on its substantive content or the message it conveys.").

Moreover, Appellees fail to address CHD's role in asserting the right to listen for its members and Stockton's direct, personal relationship with Eggleston as a listener of his speech. CHD represents thousands of Washington residents, including physicians and parents who rely on dissenting medical speech to make informed decisions. CHD's mission explicitly includes "the individual's right to receive the best information available based on a physician's best judgment."

ER_220. This is not a general claim about public discourse. Rather, CHD is asserting a specific right on behalf of members who seek and rely on the speech that the Commission is suppressing.

Stockton likewise has a direct, ongoing relationship with Eggleston as a listener. He is an avid reader of Eggleston's opinion pieces, has hosted him on his podcast, and has actively supported Eggleston in his legal defense. *See* Stockton Supplemental Declaration attached to Appellants' Motion to Supplement the Record at page 2 para. 3 to the end. The connection between Stockton and Eggleston is precisely the kind of direct listener-speaker relationship the Supreme Court has recognized in *Mandel* and *Virginia State Bd. of Pharmacy*. Appellees' answering brief ignores this connection entirely, failing to provide any rebuttal.

Appellees misread *Murthy v. Missouri*, 603 U.S. 43 (2024). *Murthy* did not reject listener standing, it clarified that a concrete, specific connection between the speaker and the listener is required. *Murthy* reaffirmed *Virginia State Bd. of Pharmacy* and *Mandel*, recognizing that the right to receive information is an essential corollary to the right to speak. The plaintiffs in *Murthy* lacked standing because they had no personal link to the censored speakers and could not show a direct, particularized injury. *Murthy*, 603 U.S. at 74-75.

CHD and Stockton satisfy *Murthy's* test. CHD represents members who rely on the speech of censored physicians, just as the consumer plaintiffs in *Virginia*

State Bd. of Pharmacy relied on pharmacists' pricing information. Stockton's connection to Eggleston—through his engagement with Eggleston's writings, podcast appearances, and advocacy—is precisely the kind of direct listener-speaker relationship recognized in *Mandel*. Unlike *Murthy*, where plaintiffs sought to challenge general online censorship, this case presents specific, ongoing suppression of speech critical to CHD's members and Stockton as an engaged listener.

Finally, Appellees argue that this issue was not adequately briefed. (AB at 52-53.) However, the opening brief (pages 40-45) contains an extensive discussion of *Murthy* and how the record evidence in this case establishes Appellants' right to bring this claim. The Court should reject Appellees' attempt to avoid the merits by reframing this as a procedural deficiency.

Appellees' argument rests on the erroneous assumption that only direct speech restrictions implicate the First Amendment. But where the government punishes speech through professional sanctions, both the speaker and listener suffer a constitutional injury. The right to receive speech is not an abstraction; it is directly burdened when the government chills speech through enforcement actions. Because the right to listen claim is firmly grounded in precedent and fully briefed, Appellees' arguments should be rejected.

D. This Case Challenges the Commission's Enforcement Policies, Not Merely an As-Applied Challenge to RCW 18.130.180

This case does not challenge the neutral text of RCW 18.130.180, but rather the Commission's unconstitutional enforcement of it. The Commission's enforcement policy systematically investigates, prosecutes, and sanctions physicians for expressing dissenting views on COVID-19, violating both the physicians' right to speak and the public's right to hear that speech. The first and second claims specifically challenge these enforcement actions—not the statute's wording itself. *See* Complaint, ER_227-228, ¶ 49 and ER_228, ¶ 53.

Constitutional challenges to government actions extend beyond statutory text to include unconstitutional enforcement policies. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court struck down governmental efforts to pressure booksellers into suppressing controversial publications, despite no formal legal prohibition. Likewise, in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Court held that regulatory schemes granting discretionary power to suppress specific viewpoints violate the First Amendment.

Appellees attempt to characterize this as an as-applied challenge to avoid acknowledging that the case targets a statewide policy affecting all Washington physicians. The Supreme Court's decision in *National Rifle Association of America, Inc. v. Vullo*, 602 U.S. 175 (2024) is directly on point. There, the Court held that the government cannot use its regulatory authority to suppress or

intimidate certain viewpoints under the pretense of neutrality. The Commission's enforcement actions threatening speech track the unconstitutional coercion struck down in *Vullo*, where regulatory authority was weaponized to silence disfavored viewpoints under the guise of neutrality.

This Court has also recognized that constitutional scrutiny applies not only to statutes but also to the way they are enforced. In *Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172 (9th Cir. 2020), the Court held that when enforcement policies chill protected speech, they are subject to First Amendment scrutiny even if the statute itself is facially neutral.

Appellees misinterpret *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) to suggest that facial challenges must be directed at statutory text rather than its enforcement. But *Moody* concerned statutory interpretation, not unconstitutional enforcement practices. Nothing in *Moody* precludes a challenge to the way a government agency selectively enforces a neutral statute to suppress disfavored viewpoints.

In sum, this case challenges the unconstitutional manner in which the Commission applies RCW 18.130.180 to its licensees. By selectively investigating and disciplining physicians for expressing dissenting views on COVID-19, the Commission is engaging in viewpoint-based suppression of speech. Supreme Court and Ninth Circuit precedent confirm that viewpoint-discriminatory enforcement is

subject to strict scrutiny. This Court should reject Appellees' attempt to shield their unconstitutional practices from judicial review.

E. The Challenge Based on Overbreadth and Vagueness Is Cognizable

The third claim challenges RCW 18.130.180(1) and (13) as unconstitutionally overbroad and vague in its enforcement. The Commission has interpreted and applied these provisions expansively to reach a vast amount of fully protected speech—specifically, the public speech of Washington-licensed physicians. This unconstitutional enforcement scheme chills speech by forcing physicians to self-censor out of fear that their opinions, if deemed "false or dangerous" by the government, could result in professional sanctions.

Appellees attempt to recast their enforcement policy as a regulation of professional conduct, but they offer no limiting principle to distinguish public speech from professional regulation. Their position, taken to its logical conclusion, asserts the authority to sanction any public statement by a physician that they deem "false and dangerous." This sweeping power is not only overbroad but unconstitutionally vague, leaving physicians to guess what speech might trigger punishment. The First Amendment does not tolerate such an arbitrary and subjective standard for regulating core speech.

1. The Statute Is Overbroad Because It Restricts Substantial Amounts of Protected Speech

A law is unconstitutionally overbroad if a "substantial number" of its applications infringe on protected speech in relation to its legitimate scope. *United States v. Stevens*, 559 U.S. 460, 473 (2010). The Commission's enforcement policy stretches RCW 18.130.180(1) far beyond its legitimate function of preventing fraud or dishonesty in direct patient care, sweeping in constitutionally protected public discourse instead.

This Court has recognized that public speech by licensed professionals is fully protected by the First Amendment. *See Pickup*, 740 F.3d at 1227-28; *Tingley*, 47 F.4th at 1082. As previously discussed, the state may regulate professional conduct, but it cannot impose viewpoint-based restrictions on public speech under the guise of professional regulation. The Commission's enforcement actions do exactly that—disciplining physicians not for fraud or patient harm, but for publicly expressing medical opinions the government disfavors.

2. The Statute Is Unconstitutionally Vague Because It Fails to Provide Clear Standards

A law is unconstitutionally vague when it fails to provide clear enforcement standards and leaves individuals guessing whether their conduct is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Appellees argue that Washington courts have clarified how RCW 18.130.180 applies, but after-the-fact

judicial interpretations do not cure a law's vagueness if the enforcement standard remains unclear at the time of speech. The First Amendment demands precise, objective criteria, particularly when speech is at stake. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (striking down a vague indecency policy that failed to provide adequate notice).

The Commission's enforcement is not just vague—it is standardless and selectively applied, creating a moving target that forces physicians to self-censor. It punishes speech based on undefined concepts like "moral turpitude" and "unprofessional conduct," yet offers no clear guidance on what medical opinions qualify. This lack of objective standards compels silence, violating the First Amendment's prohibition against vague laws that chill speech.

The Commission defines "misinformation" not by any objective legal standard but by whatever contradicts the CDC or public health authorities at a given time. This means enforcement is based entirely on shifting government determinations rather than any fixed statutory criteria, giving the Commission unlimited discretion to punish dissenting views. A vague law that allows officials to arbitrarily decide when speech is punishable—and who will be punished—violates the First Amendment. *See City of Lakewood*, 486 U.S. at 757 ("[T]he absence of express standards makes it difficult to distinguish between a licensor's

legitimate denial … and an unconstitutional, viewpoint-based suppression of speech.").

Even if Washington courts have ruled on some applications of RCW 18.130.180, that does not resolve the vagueness problem when applied to public speech on contested scientific topics. The Supreme Court has repeatedly rejected the argument that unclear laws become constitutional simply because some enforcement history exists. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (invalidating a statute despite previous judicial interpretations because it still lacked clear enforcement standards). The vagueness problem here is even more acute: the Commission has wielded RCW 18.130.180 selectively, suppressing dissenting medical views while allowing similar statements from physicians whose speech aligns with official narratives.

Laws that chill protected expression due to fear of arbitrary enforcement are presumptively unconstitutional. *Stevens*, 559 U.S. at 473. The Commission's vague and shifting enforcement standards fail this test, leaving physicians to navigate an undefined, ever-changing speech code at the risk of professional ruin. The First Amendment does not permit such uncertainty.

3. Appellees' Attempts to Reframe the Challenge Are Meritless

Appellees attempt to sidestep the First Amendment by framing RCW 18.130.180(1) as a regulation of professional conduct rather than speech. But the Ninth Circuit has already rejected this argument when the state attempts to punish professionals for their public speech, not their direct patient care. In *Pickup*, the court made clear that speech occurring outside the professional-client relationship receives the highest level of First Amendment protection. *Pickup*, 740 F.3d at 1227-28.

Similarly, *Tingley* confirmed that the state cannot restrict speech just because it deems it "harmful" or "incorrect." *Tingley*, 47 F.4th at 1082. That is precisely what the Commission is attempting here—punishing licensed professionals for expressing views the government disapproves of, while allowing speech that aligns with state-approved narratives.

Appellees also argue that overbreadth and vagueness challenges are disfavored and require an extraordinary showing. But this is incorrect in the First Amendment context, where courts recognize that even the potential chilling of protected speech is a sufficient basis for invalidation. *Stevens*, 559 U.S. at 473. The Commission's policy creates precisely this chilling effect, forcing physicians to self-censor out of fear that their medical opinions could later be deemed "false and dangerous" by shifting government standards.

The First Amendment forbids vague and overbroad enforcement schemes that chill protected speech. The Commission's expansive interpretation of RCW 18.130.180(1) and (13) punishes physicians for expressing dissenting medical opinions, creating precisely the kind of regulatory uncertainty that the Supreme Court has repeatedly struck down. This Court should not allow government officials to wield vague laws as a tool for viewpoint-based suppression of medical discourse.

III. APPELLANTS ARE ENTITLED TO A PRELIMINARY INJUNCTION

The district court wrongly denied a preliminary injunction by failing to apply the First Amendment's presumption of irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This presumption applies even before a speaker is formally punished because the mere risk of enforcement chills protected speech. *See Dombrowski*, 380 U.S. at 487-89; *Driehaus*, 573 U.S. at 161-67.

A. The Commission's Actions Have Already Caused Irreparable Harm

Appellees claim that because no final discipline has been imposed, there is no irreparable injury. (AB at 59.) But the enforcement process chills speech. Appellants Eggleston and Siler have already self-censored, with Eggleston limiting

his public commentary and Siler stopping entirely. (ER_225-226.) Moynihan, fearing he will be next, has refrained from speaking publicly about COVID-19. (Moynihan Decl. ER_128 ¶ 9; ER_129 ¶ 13.) This self-censorship is irreparable harm under *Elrod* and *Dombrowski*.

Appellees again cite *Twitter*, but again, *Twitter* is irrelevant because the Commission is not merely investigating—it has filed formal disciplinary charges that threaten Appellants' licenses. This Court has held that active enforcement chills speech and triggers First Amendment protections. *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010).

B. The Balance of Equities and Public Interest Strongly Favor Injunction

The public has no interest in enforcing unconstitutional laws. *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003). The state's regulatory interest is weakest when it targets viewpoint-based public speech rather than patient care. In *Pickup* and *Tingley*, the Ninth Circuit recognized that while states may regulate professional conduct, they cannot suppress public speech by professionals. The Commission's enforcement program does precisely that—it targets physicians' public speech on controversial issues, not their patient care.

The district court's denial of a preliminary injunction was based on legal errors and a misapplication of First Amendment principles. The presumption of

irreparable harm applies, Appellants have already suffered actual chilling effects, and the balance of equities favors protecting constitutional rights. This Court should reverse and grant the injunction.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of this case and its denial of a preliminary injunction, and order the entry of a preliminary injunction.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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