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' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT (FRAP 26.1(A))

Non-profit corporate Appellant Children's Health Defense is not owned in whole or in part by any public or other corporate entity. The Fed. R. App. P. 26.1(a) disclosure requirement does not apply to the individually named Appellants.

Dated: August 28, 2024

Respectfully submitted,

RICHARD JAFFE

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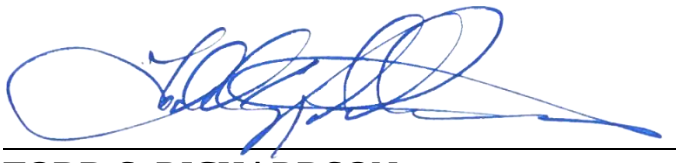

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JURISDICTION STATEMENT

The district court had federal question jurisdiction and subject matter jurisdiction under 28 U.S.C. § 1331, and 42 U.S.C. § 1983, based on Plaintiffs' First and Fifth Amendment claims.

This Court has jurisdiction under 28 U.S.C. § 1291, as the lower court denied the Appellants' request for a preliminary injunction and dismissed the case with prejudice.

The lower court's order and final judgment was issued May 22, 2024. The Notice of Appeal was filed with the district court on June 11, 2024, which makes this appeal timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Have the Appellants demonstrated that Appellees' enforcement program targeting physicians for their public viewpoint speech is likely unconstitutional as a matter of law, or alternatively, based on the record, because of Appellees' failure to satisfy strict scrutiny?
2. Did the lower court err in failing to find that the Appellees' use of RCW 18.130.180 (1) and (13) as the statutory basis for targeting physicians for their public viewpoint speech is likely unconstitutionally overbroad, facially defective, and/or vague?
3. Did the lower court err in dismissing the due process claim?

4. Did the lower court err in failing to find that Appellants satisfied the modified *Winter* factors of irreparable injury and the public interest favoring the injunction?

5. Did the lower court err in failing to conclude that at least one Appellant had a likelihood of standing on each of the four claims?

6. Should the Court disavow the doctrine of prudential ripeness?

7. Did the lower court err in finding that the four claims were not prudentially ripe because the case presents a legal issue and Appellees' actions are coercive?

8. Did the lower court err in abstaining under *Younger*[1] on the first claim because it sought relief only against Appellees' future actions?

9. Did the lower court err in dismissing under *Younger* abstention the second, third, and fourth claims based on Appellees' failure to prove that censoring protected speech is an important state interest, and that abstention is otherwise inappropriate under case law and the three *Younger* exceptions?

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

STANDARD OF REVIEW

This Court has *de novo* review of the lower court's dismissal for lack of standing (*Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 57 (9th Cir. 2024)), abstention (*id*. at 63), ripeness (*Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010)), and collateral estoppel (*McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004).

In a multiparty, multiclaim suit, a finding for standing of one party for a claim allows that claim to go forward. *Murthy v. Missouri*, 144 S. Ct. 1972, 1985-1986 (2024).

Standing to bring First Amendment claims, "in no way depends on the merits" of those claims. *Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022), citing *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). However, the Supreme Court has recently discussed standing in the context of the granting of a preliminary injunction. The Court held that "the plaintiff must make a 'clear showing' that she is 'likely' to establish each element of standing." *Murthy*, 144 S.Ct at 1986. The import and application of these two cases might be that the merits of Appellants' claims are not relevant to the lower court's dismissal for standing, but since Appellants sought and seek a preliminary injunction, they must show a likelihood of success of each element of standing to obtain the affirmative relief sought.

In general, this Court reviews the denial of a preliminary injunction under an abuse of discretion standard. *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). However, legal rulings have *de novo* review, and findings of fact are reviewed for clear error. *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017).

The four factor *Winter* preliminary injunction test[2] is substantially modified in First Amendment cases. For irreparable injury, " '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Elrod* was recently applied during the Covid pandemic in *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020).

When the state is the defendant, the last two factors merge because in the balance of equities, the government's interest is the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As to these merged elements, there is not public interest in the enforcement of an unconstitutional law. *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003). "[B]y establishing a likelihood that [the challenged law] violates the U.S. Constitution, [p]laintiffs have also established that both the public

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[2] The four *Winter* factors are 1) likelihood of success on the merits, 2) irreparable injury, 3) balance of equities tips in plaintiff's favor, and 4) the public interest favors the injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

In short, since likelihood of success is a legal question for which this Court has *de novo* review, in this First Amendment appeal, the Court should employ *de novo* review of the lower court's denial of the requested preliminary injunction.

The standard for this Court's granting Appellants' request to order the lower court to issue a preliminary injunction is the same *Winter* test used by district courts. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

STATEMENT OF THE CASE

A. The Origin and Implementation of Appellees' Enforcement Program against Physicians' Soapbox Speech

In July 2021, the Federation of State Medical Boards (the "Federation"), a private, not-for-profit organization "representing the state medical and osteopathic medical boards" issued a press release recommending that its state member boards sanction their licensees for spreading "Covid misinformation" to the public and to patients.[3] There was no analysis released with the press release indicating that it was First Amendment constitutional for a medical board to sanction physicians for

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[3] The Federation's representational statement is quoted and the URL is cited in the First Amended Complaint (hereinafter the "Complaint") at ER_223, footnote 7. The relevant text of the press release is quoted in the Complaint at ER_222 para. 29 continuing to ER_207. A copy of the press release is attached to the Runnells' Declaration at Exhibit A, ER_ 134-135.

their public/soapbox speech, perhaps because for almost eighty years, all judicial authority has recognized this speech to be fully protected and beyond government control. Complaint, at ER_223 para. 30.

The Washington Medical Commission (the "Commission") adopted the Federation's press release on September 22, 2021, after a half hour public meeting. Complaint at ER_ 224 paras. 31-32. A copy of the adoption statement is attached to the Runnells' Declaration at Exhibit B, ER_137.[4] Appellants are unaware of any other public or published information about the Commission's process or considerations in deciding to adopt the Federation's press release. Complaint, ER_223 para. 30.[5]

Thus, for a strict scrutiny analysis, there is no evidence in the record that the Commission discussed or considered options less restrictive than targeting and sanctioning the public viewpoint speech of its licensees. That would include prior

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[4] The Commission's adoption statement seems to reach public speech deemed misinformation on any subject. *See* Exhibit B to Runnells' Declaration ER_137, first two paragraphs.

[5] In early 2022, the California Assembly introduced AB 2098 which would have implemented the Federation's press release, sanctioning physicians for Covid misinformation. However, the Legislature quickly realized that it would be unconstitutional for the bill to follow the Federation's call for sanctioning physicians' public speech. As a result, the final bill which went into effect limited the scope to communications between a doctor and patient. *See* the Declaration of Gregory J. Glaser for the details, ER_179-198. California's experience is argued to be relevant to demonstrating the exceptions to *Younger* abstention and the merits.

to the Commission's adoption of the policy/position statement on September 22, 2021, or even after this Court specifically told Appellee Ferguson that the public speech of Washington state health care licensees is subject to "robust" protection in *Tingley*, 47 F.4th at 1072-73.[6]

Commission Attorney Farrell explains that complaints against licensees are reviewed by three Commission members. After an investigation by staff, the three decide whether to issue a statement of charges and if so, the file is sent to an Assistant Attorney General who reviews it and signs the statement of charges. Farrell Declaration, ER_ 86 para. 5 to ER_88 para. 12.

According to Mr. Farrell, the Commission only charges physicians for Covid-19 misinformation "when two conditions are met: 1. the complained-of misinformation was demonstratively factually untrue, and 2. the practitioner identified themselves as a licensed physician or physician assistant when making the misstatement to give those misstatements the imprimatur of medical authority." Farrell Declaration, ER_89 lns. 13-16.

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[6] "[In *Pickup v. Brown*,] [w]e held that 'public dialogue' by a professional is at one end of the continuum and receives the greatest First Amendment protection. To illustrate, we explained that even though a state can regulate the practice of medicine, a doctor who *publicly* advocates for a position that the medical establishment considers outside the mainstream would still receive 'robust protection' from the First Amendment." *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (italics in the original).

However, Appellants Eggleston and Siler never publicly identified themselves as Washington (or any state) licensed physicians, or that they practice or practiced in the State of Washington. All the relevant articles from both Appellants are attached to the Richardson Declaration at ER_27-85. The basis of the Board's actions against them is a statutory inference based on the use of the "M.D." designation after their names. Still, the only way a reader of the *Lewiston Tribune* or the *American Thinker* would know they are licensed in Washington State would be to search the Commission's website. [7] [8]

Appellants are aware of at least ten investigations of physicians and other Commission regulated practitioners for Covid misinformation to the public. *See* the Farrell Declaration at ER_89-93, and the Serrano Declaration at ER_ 199-200.)[9] Attorney Farrell's declaration only discusses Commission sanctioning cases and

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[7] The below the line editorial note indicating that Eggleston is an MD also states that he is a "retired ophthalmologist." *See*, *e.g.*, ER_39, which of course implies that he is no longer a practicing physician.

[8] Appellants also dispute that Appellees' stated requirement that the misinformation be demonstratively factually untrue. *See infra* at pages 32-34 for charged misinformation which turned out to be true.

[9] Mr. Serrano indicates that he has represented eight physicians and one physician's assistant (also regulated by the Commission) in cases involving Covid misinformation. Mr. Serrano does not represent Dr. Siler which brings the total of physicians to nine plus one physician's assistant. Serrano's declaration attaches an excerpt of a transcript of testimony from a Commission investigator which may suggest that the Commission has investigated more practitioners. *See* ER_206 ln. 10 to ER_ 207 ln.7.

does not state the number of investigations the Commission has opened and closed, (other than the investigation of Appellant Moynihan, *see* ER_89-93). Therefore, the record is unclear as to how many more investigations the Commission has undertaken and have been closed, or are still open but have not yet resulted in a statement of charges being filed.

Accordingly, Appellants have established as a matter of fact that the Commission has implemented a Covid misinformation enforcement program by the actions directed, supervised, and controlled by Appellees in their official capacities, or by subordinates under their control, and that policy and the implementation thereof has resulted in the investigation, prosecution and sanctioning of physicians for so-called "Covid misinformation" to the public.

B. The Appellants, their Interests, and Standing

1. John Stockton

Appellant John Stockon is a long-time Washington resident who has had a storied NBA basketball career. Complaint, ER_ 217 para 9. He has a deep interest in the information which is the subject of this lawsuit. He co-hosts a podcast which has covered Covid related issues and relates information of the type presented by Appellants Eggleston and Siler. *See* Stockton Declaration, ER_112 para. 9 to ER_113 para. 14. He asserts his direct First Amendment rights to access the information of Washington licensed physicians who dissent from the mainstream

Covid narrative, and alleges that his First Amendment rights to hear such information is being infringed upon by Appellees' actions. *Id.* at para. 14, *see also* Complaint at ER_ 217-218 para 10. Finally, Appellant Stockton has known Appellant Eggleston for several years, avidly reads his opinion pieces, had the doctor on his podcast once, strongly agrees with "Doc" Eggleston's positions on Covid-19, and has indirectly helped defend the doctor in this First Amendment battle, up to and including agreeing to be the lead plaintiff in this case. *See* Appellant Stockton's Supplemental Declaration attached to Appellants' Rule 10(e)(2) Motion to Supplement the Record at page 2 para. 3 to page 3 para 7.

2. Richard Eggleston, M.D.

At all relevant times, Appellant Eggleston has been a retired licensed physician (ophthalmologist) and the subject of a Commission administrative proceeding. Complaint, ER_218 para. 11. Appellees filed a statement of charges against him in 2022 relating to his opinion pieces he wrote in the *Lewiston Tribune* in 2021. *Id.* at ER_225 para. 38. The statement of charges is attached to the Farrell declaration at ER-96-104. The statutory bases of the charges are RCW 18.130.180 (1), an act of "moral turpitude, dishonesty, or corruption relating to the person's

profession…" and (13) "Misrepresentation of fraud in any aspect of the conduct of the business or profession." [10] [11]

As a result of the Commission's prosecution for his public viewpoint speech, Eggleston and the paper's publisher decided that Eggleston would only respond to Covid-19 related articles published in the newspaper, until his Commission problem is resolved. Complaint, ER_225 para. 39, continuing to ER_226, and Alford Declaration at ER_22 para 4. Accordingly, the Commission's prosecution of him is directly limiting his First Amendment right to speak out in public about matters of public interest. Complaint, ER_226 para. 40. The requested relief would resolve the problem. Alford Declaration at ER_22 para 4. Further information

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[10] He was also charged with (18) "interference with an investigation or disciplinary authority or its authorized representative…." This charge is based on his response to the Commission's request that he provide a response and the basis of the statements in his articles. *Id.* at ER_225 lns. 10-14. In other words, because the Commission did not agree with his justification of his continued disagreement with the consensus/medical establishment views, they charged him with obstruction for explaining his positions to the Commission, as directed by the Commission to do so.

[11] Appellant Eggleston, along with two other physicians, previously filed a federal action asserting a claim that the Commission's position statement was unconstitutional and illegally enacted. The case is referenced in the lower court's decision, and discussed hereinafter in the *Younger* abstention section. He also filed a state court case claiming a violation of his state constitutional free speech rights in Asotin County. That case is still pending and the procedural posture is set out in the Complaint (ER_225 footnote 8) and updated in counsel's declaration in Appellants' Motion for a Preliminary Injunction. Dkt. #7.2.

supporting Appellant Eggleston's standing and the specific viewpoint information he wishes to share with the public is found in his Declaration. ER_115-117.

3. Thomas T. Siler, M.D.

Appellant Siler is a retired licensed physician who from February to October 2021 wrote several posts about Covid-19 against the mainstream Covid narrative in a group discussion forum, AmericanThinker.com. Complaint, ER_226 paras. 41-42. Not long after he was informed that he was being investigated for Covid misinformation to the public, he stopped writing the posts and "… awaited their determination on my speech." Siler Declaration, ER_124 ln. 22. Appellees' investigation of him for his protected speech has therefore caused him to self-censor, pending a determination of the core issue in this case.

A statement of charges was filed in late 2023, and the case is still pending. Copies of the offending posts are attached to the Richardson Declaration at ER_66-84. The statement of charges against him is reproduced at ER_107-109.

Appellant Siler's declaration explains the evolution of his thinking about Covid-19 from his initial cautiously optimistic view about the mRNA vaccines to increased concern about them, about the lockdowns, and the use of Ivermectin and Hydroxychloroquine, the actual dangers of Covid-19 to different population subsets, none of which views fit the prevailing medical establishment views. Siler Declaration, ER_ 123 para. 3 to ER_125 para. 18. This is some of the information

he would share, but is awaiting the resolution of this case. Siler's speech is therefore being chilled by Appellees' action, which would be redressed by the requested injunctive relief.

4. Daniel Moynihan, M.D.

Appellant Moynihan is a Washington State licensed retired physician and is a member and volunteer of Appellant Children's Health Defense, Washington Chapter. Complaint ER_218-219 para. 14. He is not currently being investigated for Covid misinformation to the public *Id*. However, he had previously been investigated for Covid misinformation to a patient, but no charges were filed against him. Moynihan Declaration, ER_128 para. 8.

Appellant Moynihan makes clear that he would like to express his dissenting opinions to the mainstream Covid narrative, but fears doing so based on the Appellees' actions against Appellants Eggleston, Siler and the many other physicians investigated and prosecuted for Covid misinformation. Complaint, ER_218 para. 14, continuing to ER_219. He explains that "based on the Commission's Covid policy statement, prosecutions of physicians for alleged Covid misinformation to the public, and the fact that I am on the Commission's radar screen, I am reluctant to speak out in public about my beliefs…." (Moynihan Declaration, ER_128 para. 9; *see also id*. at para. 12, and ER_129 para. 13). Appellant Moynihan's speech is being chilled. He has set out some of the

information he would like to convey to the public, and an injunction would redress the problem.

5. John and Jane Does, M.D.

The Complaint alleges that there are other Washington State licensed physicians who are being investigated or prosecuted in whole or in part for public Covid misinformation. Complaint, ER_ 219 para 15. The evidence adduced below confirms at least nine physicians and one physician assistant have been investigated. However, based on the testimony of a board investigator there may be or may have been other investigations. Serrano Declaration, transcript exhibit at ER_206 ln. 15 to ER_207 ln. 10. The Farrell declaration does not contain information of the total number of investigations (as opposed to prosecutions) which the Commission has undertaken, or how many investigations are still pending. Farrell Declaration, ER_89-93.

6. Children's Health Defense

Appellant Children's Health Defense ("CHD") is a not-for-profit corporation whose mission includes "the individual's right to receive the best information available based on a physician's best judgment. Complaint, ER_220, lns. 1-2. It educates the public about the negative risk benefit profile for healthy children based on published scientific evidence from around the world. *Id*. at ER_220 para. 17. It is "actively involved in protecting the rights of physicians to speak out

against the approved Covid narrative. It has weekly meetings and interfaces with physicians under attack and their attorneys." *Id*. at ER_221 para. 20. Its 2000 Washington State members include Washington licensed physicians like Appellant Moynihan who wish to speak out in public about Covid related matters, and Washington parents who wish to receive this information from Appellant physicians and other like-minded physicians. *Id*. at ER_ 220 para.18; *see also* Runnells' Declaration, ER_131-132.

C. The Claims for Relief

The first claim seeks declaratory and injunctive relief against any future action by the Appellees to investigate, prosecute, or sanction Washington licensed physicians for speaking out against the mainstream Covid narrative. Complaint, ER_ 227-228, and ER_234-235 no. 1. All Appellants sue based on their right to receive and hear the fully protected speech of the physicians. The physicians are being targeted by the Appellees pursuant to the Commission's policy, practice, or enforcement program as set out in detail in the Complaint. ER_222 para. 29 continuing; s*ee also* Serrano Declaration, ER_200, and the Farrell Declaration, ER_89-93, for more specifics about the enforcement program.

The second claim seeks to stop all current investigations and prosecutions by the Appellees targeting the public speech of physicians. Complaint, ER_228-231 para. 2, and all the previous sources listed for the first claim. Appellants Eggleston

and Siler assert their constitutional right to speak. The other Appellants claim their right to hear the information of these and other physicians under attack.

The third claim asserts the due process rights violations of all Appellants under three separate but overlapping theories: overbreadth, vagueness, and a recognized subset of facial challenge. Appellees are targeting physicians' public speech under their purported authority in RCW 18.130.180 (1) which makes disciplinable an act of "moral turpitude, dishonesty, or corruption relating to the person's profession…" and (13) "Misrepresentation or fraud in any aspect of the conduct of the business or profession." Complaint, ER_ 231-232, 235 para 3 and all the references cited in discussion of the first claim.

The fourth claim asserted by the three physician Appellants assert due process violations arising from the Appellees' interpretation of their statutes which requires Appellants to go through an administrative process prior to the determination of their fundamental threshold constitutional rights. Complaint, ER_232-233, 235 para. 4.

SUMMARY OF ARGUMENT

The likely dispositive issue in this case is whether the Appellees' enforcement program targeting the public viewpoint speech of its licensees is unconstitutional as a matter of law. Or alternatively, whether it is unconstitutional on the record because of Appellees' failure to meet their strict scrutiny burden

showing a compelling state interest, that the least restrictive means were used, and a lack of actual, specific evidence that they considered and rejected less intrusive means before deciding to target the "robustly" protected speech of their licensees.

Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), *abrogated on other grounds by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA"*), and *Tingley* strongly support both conclusions. The lower court failed to follow the holding of these two cases by recharacterizing physicians' public viewpoint speech as conduct and Covid misinformation, over which the Appellees' purportedly have regulatory authority. Thus, they reargue the professional speech exception which the Supreme Court rejected for content-based speech to patients in *NIFLA*. That makes the lower court's decision upholding the enforcement program targeting public viewpoint speech far beyond the pale of what the Supreme Court has already rejected, and further highlights the lower court's legal error.

Appellees' application of its statutory authority to sanction robustly protected speech for moral turpitude, misrepresentation, and obstruction under RCW 18.130.180 (1), (13), and (18) renders the statute overbroad, vague, or facially unconstitutional under Ninth Circuit authority, as alleged in the third claim. The lower court's failure to so find was legal error.

Having established the likelihood of success on the merits, the lower court was required to issue the preliminary injunction under the modified *Winter* test,

because irreparable injury is presumed and it is never in the public's interest to allow the government to violate the constitutional rights of its citizens.

In addition to denying the preliminary injunction, the lower court also dismissed the case with prejudice for three threshold issues: standing/constitutional ripeness, prudential ripeness and *Younger* abstention. However, since this case challenges the constitutionality of Appellees' public viewpoint speech enforcement program, and Appellants demonstrated the manifest unconstitutionality of that program, reversal is required on all three threshold issues.

Appellees are prosecuting Eggleston and Siler because of, and in retaliation for, their fully protected speech which constitutes injury-in-fact. In addition, these Appellants have also shown that they have self-censored, as a result of Appellees' retaliatory actions, per the Complaint and the Declarations of Appellants Eggleston, Siler, and Lewiston Tribune publisher Alford. Thus, causation is established. This evidence also demonstrated that injunctive relief would solve and redress the problem. Accordingly, Appellants have established standing on the second, third and fourth direct claims, which allows the claims to go forward for all Appellants under circuit and Supreme Court authority.

All Appellants assert their right to receive information from physicians whom in the future may be prosecuted under Appellees' enforcement program. Standing is established on this claim based on *Murthy*'s requirement that a

"cognizable injury" requires "a concrete specific connection to the speaker." *Murthy*, 144 S. Ct. at 1996. Appellants satisfy both a specific connection to speaker per *Murthy*'s first example, *Kleindienst. v. Mandel*, 408 U.S. 753 762 (1972), because of the connection between Appellants Stockton and Eggleston, and between Appellants Moynihan and CHD.

The individual Appellants and CHD also satisfy *Murthy*'s second example of a cognizable injury, *Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). As listeners, they have the same cognizable injury as members of the consumer organization who challenged the Virginia pharmacy board's attempt to sanction pharmacists for advertising prescription drug prices.

Assuming prudential ripeness is still viable doctrine (and Appellants ask this Court to disavow it), the case is ripe. First, since this case is a legal challenge to the constitutional authority of the Appellees to regulate public viewpoint speech, completion of an administrative hearing to determine the merits of Appellees' statement of charges is irrelevant. There are no facts which could be adduced which would impact the core constitutional question. Second, Appellants Eggleston and Siler are required to participate in the Commission's proceeding on pain of discipline. Plus, the instant case alleges that the injury commenced when the Appellees' sent coercive investigatory letters requesting a response to complaints against their fully protected speech. That established the two requisite

elements of prudential ripeness.

Younger abstention does not apply to the first claim because it seeks injunctive relief against Appellees' future investigations, prosecutions, and sanctioning. As to the remaining claims, suppressing protected speech is not a legal state interest, so it is certainly not an important state interest, making *Younger* inapplicable to any of the claims.

The demonstrated flagrant unconstitutionality of the enforcement program satisfies all three *Younger* exceptions. We learn from *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965) that abstention is not appropriate because no single administrative proceeding (or judicial review of those proceedings) will adequately protect the rights of physicians. Collateral estoppel does not bar any relief concerning Appellant Eggleston's speech because none of the other Appellants who seek to hear his speech were parties to any other lawsuit, and because of the changed circumstances exception to collateral estoppel.

ARGUMENT

I. APPELLEES' ENFORCEMENT PROGRAM TARGETING PHYSICIANS' VIEWPOINT PUBLIC SPEECH IS FIRST AMENDMENT AND FIFTH AMENDMENT UNCONSTITUTIONAL, DAMAGES PUBLIC DISCOURSE, AND SHOULD BE ENJOINED BY THIS COURT

A. The Commission's Enforcement Program is Unconstitutional as a Matter of Law

The Appellees' enforcement program is a clear and flagrant violation of the First Amendment as a matter of law, based on *Pickup*, *NIFLA*, and *Tingley*, The on-point language from *Pickup* could not be clearer and is worth repeating in full:

> At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine. *See Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring) ("Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law ... abridging the freedom of speech, or of the press.' "); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L.Rev. 939, 949 (2007) ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."); *cf. Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.*, 952 P.2d 768, 773 (Colo. Ct. App. 1997) (holding that the First Amendment does not permit a court to

> hold a dentist liable for statements published in a book or made during a news program, even when those statements are contrary to the opinion of the medical establishment). That principle makes sense because communicating to the *public* on matters of *public concern* lies at the core of First Amendment values. *See, e.g.*, *Snyder v. Phelps*, — – U.S. ——, 131 S.Ct. 1207, 1215, 179 L.Ed.2d 172 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection." (internal quotation markets, brackets, and ellipsis omitted)). Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.

Pickup, 740 F.3d at 1227-28. Although *Pickup* characterized the protection as "robust," every authority it cites explicitly stated that the First Amendment protection accorded to physicians' public advocacy was absolute. If this was a statute, under *ejusdem generis*, the "robust" protection in *Pickup* (and restated as *Pickup*'s holding in *Tingley*, 47 F.4th at 1067-68) would mean that as a matter of law, Appellees cannot regulate the public speech of Washington physicians, despite their contention that the speech is false and dangerous to the public.

These judicial statements are consistent with and supported by the principle that pure speech does not lose its protection on the allegation or proof that it is false. *See United States v. Alvarez*, 567 U.S. 709 (2012) (statute criminalizing false stolen valor claims that a person was awarded the medal of honor struck down on First Amendment grounds).

Furthermore, beyond the authority referenced in *Pickup*, the Supreme Court has said more generally that "The "point of the First Amendment," however, 'is

that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Also, "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

At Appellees' behest, the lower court disregarded *Pickup* and *Tingley*'s direct and specific admonition prohibiting the Appellees' public speech enforcement program. Decision, ER_15-17. It is hard to image a more flagrant rejection of authority than the lower court's refusal to apply the holdings of *Pickup* and *Tingley*.

The lower court then misinterpreted *Tingley*'s holding by quoting the true but irrelevant statement that speech which is incidental to conduct can be regulated. *Id*. But what is retired physicians Eggleston and Siler's conduct, separate and other than their writing and conveying information and their opinions in a public forum? What is their speech incidental to?

The lower court then cited *Haley v. Medical Disciplinary Board*, 117 Wn. 2d 720 (Wash. 1991) in support of its position that public speech is regulatable conduct. Decision, ER_16. In *Haley*, the medical board disciplined a surgeon for

having an ongoing sexual relationship with a high school girl on whom he had operated. Sexual relations with a former and minor patient is not speech. Whatever incidental speech there was to the sexual conduct was certainly not constitutionally protected. Therefore, neither *Haley*, nor any other Washington case which deals with actual medical conduct or inappropriate sexual actions by physicians to their patients, have any relevance to the robustly protected speech which is the subject of this lawsuit.

But perhaps we bury the lead. The more fundamental problem with the lower court's recharacterization of protected public speech into regulatable misconduct is that it disregarded *NIFLA*'s rejection of exactly that recharacterization, when attempted by this and two other circuits. The Supreme Court's clear and extensive language is worth repeating:

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. See, e.g., *King v. Governor of New Jersey*, 767 F.3d 216, 232 (C.A.3 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (C.A.9 2014); *Moore–King v. County of Chesterfield*, 708 F.3d 560, 568–570 (C.A.4 2013). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime. [citations omitted.] "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," *King*, *supra*, at 232, or that is "within the confines of [the] professional relationship," *Pickup*, *supra*, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. See *King, supra*, at 232; *Pickup, supra*, at 1253–1256; *Moore–King*, *supra*, at 569.

> But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals."

NIFLA, 585 U.S. at 767.

Appellees convinced the lower court to revive the professional speech category on unprotected speech, and will now ask this Court to do the same. *NIFLA* involved content, but not the more protected subcategory of viewpoint speech[12] to patients. *A fortiori*, (times 2), the regulation/censorship of the subcategory of professional *public* viewpoint would surely raise even more ire than it did in *NIFLA*.

Based on *Pickup, NIFLA* and *Tingley,* this Court should conclude that Appellees' enforcement program violates the First Amendment and hence satisfies the likelihood of success on the merits part of the *Winter* test.

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[12] *See Matal v. Tam*, 582 U.S. 218 (2017); *Rosenberg v. Visitors of Univ. of Va.*, 515 U.S. 819 (1995). The Eleventh Circuit has stated that there is an argument to be made that the Supreme Court implied that viewpoint regulation is a *per se* violation of the First Amendment. *Otto v City of Boca Ratan,* 981 F.3d 854, 864 (11th Cir. 2020). While *Otto's* holding about unconstitutionality of a sexual orientation change therapy is inconsistent with the law in this Circuit per *Tingley*, the Court might well use *Otto*'s viewpoint discussion, its *Pickup* discussion on physicians' soapbox speech, plus *NIFLA's* rejection of recharacterizing protected speech as conduct to tell the Appellees more forcefully than it did in *Tingley* that physicians' soapbox speech if off limits, and that they cannot target, investigate, prosecute, or sanction physicians for their public speech as a matter of law.

B. The Appellees Cannot Satisfy their Strict Scrutiny Burden Based on their Record

At an absolute minimum, *Pickup* and *Tingley* must be read to require this Court to review Appellees' enforcement program under very strict scrutiny since it targets both viewpoint and public speech. "Robust" First Amendment protection requires nothing less.

Strict scrutiny means that the Appellees must *prove* a compelling state interest, and they also must *prove* that the means chosen were narrowly tailored such that the least restrictive means possible were used. *South Bay Pentecostal Church v. Newsom*, 141 S.Ct. 716, 718-19 (2021); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

Strict scrutiny also requires actual evidence that less restrictive alternatives were considered and found to be less effective than the statutory solution. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *see also Gonzalez v. O Centro Espirita Beneficent Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *United States v. Playboy Ent Grp. Inc*. 529 U.S. 803, 817 (2000) (Strict scrutiny requires the government provide evidence that other alternatives that do not involve restricting protected speech would not have been effective to achieve the compelling state interest); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (to satisfy strict scrutiny "[the] State must specifically identify an 'actual problem' in need of solving [Citation], and the curtailment of free speech must be actually necessary to

the solution…." Under strict scrutiny the state "bears the risk of uncertainty" and "ambiguous proof will not suffice," as well as a "direct causal link" between the targeted information and the harm. *Id*.) "Furthermore, the Department must provide *actual evidence*, not just conjecture, demonstrating that the regulatory framework in question is, in fact, the least restrictive means. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475-76 (5th Cir. 2014), *citing Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (italics in original).

The only substantive evidence by the Appellees in this case comes from the Farrell declaration and it contains no evidence relevant to Appellees' strict scrutiny burden justifying their targeting fully protected speech. *See* Farrell Declaration, ER_85-109 Where is the proof that the Commission considered other less restrictive means and found those other means insufficient? It certainly does not come from the one-page September 22, 2021 Covid misinformation policy statement (ER_137) which is based on the three-paragraph July 2021 press release issued by the Federation. ER_134-135. If there is hard, actual evidence, it is not apparent in the relevant record in this case.

In the absence of actual evidence that the Commission considered less restrictive means before embarking on its enforcement program targeting the fully protected speech of its licensees, the Court must conclude that their program fails

strict scrutiny. Appellants have met their burden establishing the likelihood of success on the merits.

C. There is a Likelihood of Success on the Merits of Appellants' Facial/Overbreadth/Vagueness Challenge

Appellees claim to have the statutory authority to regulate physicians' pure/soapbox speech based on RCW 18.130.180 (1) which makes disciplinable an act of "moral turpitude, dishonesty, or corruption relating to the person's profession…"; (13) "Misrepresentation or fraud in any aspect of the conduct of the business or profession"; and (18) "interference with an investigation or disciplinary authority or its authorized representative…."

Defendants' interpretation of RCW 18.130.180 is unconstitutional based on overlapping constitutional theories. First, "In the First Amendment context, facial vagueness challenges are appropriate if the statute clearly implicates free speech rights." *California Teachers Ass'n v. St. Bd. of Educ*, 271 F.3d 1141, 1149 (9th Cir. 2001), *citing Foti v. City of Menlo Park*, 146 F.3d 629, 639 n.10 (9th Cir. 1998) and *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996).

Foti puts it slightly differently: one kind of a facial unconstitutionality is if "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad," *Id*. at 635, *quoting Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984).

This species of facial unconstitutionality/overbreadth/vagueness was more recently discussed in *Wash. State Grange v. Wa. State Repub. Party*, 552 U.S. 442, 450 n.6 (2008),

> cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a "substantial number" of its applications are unconstitutional, " 'judged in relation to the statute's plainly legitimate sweep.' " *New York v. Ferber*, 458 U.S. 747, 769-771 (1982) (quoting *Broadrick v. Oklahoma*, 413 U. S. 601, 615 (1973)). We generally do not apply the " 'strong medicine' " of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law. See *New York State Club Assn., Inc. v. City of New York*, 487 U. S. 1, 14 (1988).

Appellants have described in detail the content (Covid-19), the viewpoint (contrary to the mainstream Covid narrative as defined in the Complaint ER-216 ln. 1 to ER-217) and have given many pages of specific information which Appellees could sanction based on its overbroad reading of RCW 18.130.180 (1) and (13). S*ee e.g.*, the Verma Declaration, ER_138-178. This detailed information justifies the "strong medicine" of applying the overbreadth doctrine to Appellees' enforcement program.

Differences in terminology aside, the Appellees' interpretation of this statute which reaches every physician who opens his/her mouth in public, or writes anything published in any form, (or responds to request for explanation of their non-mainstream views) reaches a vast swath of constitutionally protected speech.

Appellees interpretation is therefore facially unconstitutional, overbroad, and vague under applicable authorities.

D. Appellants Have Stated a Viable Due Process Claim

The fourth claim alleges that the Appellees' interpretation of Washington law which denies the physician Appellants a pre-administrative hearing recourse to challenge the flagrantly unconstitutional enforcement program violates their due process rights. Complaint, ER_232-234. The lower could held that this did not state a valid claim for relief because post hearing judicial review for constitutional claims is available which satisfies due process, citing *Alsager v. Bd. of Osteopathic Med. & Surgery*, 573 Fed. App. 619, 620-21 (9th Cir. 2014). ER_17 lns. 6-18.

Alsager is an abstention case, holding that *Younger*'s third requirement of an adequate state court remedy was satisfied. *Alsager* is yet another case involving alleged sexual misconduct by a physician and personal threats and even some attempted fraud. *Alsager*, 945 F. Supp. 2d at 1193. The doctor made a variety of all but frivolous constitutional claims. The district court dismissed the claims, based on sovereign immunity and *Younger* abstention. This Court affirmed, stating that the doctor could raise his constitutional claims on judicial review. Neither this case nor any of the supporting cases involve an alleged systematic enforcement program against a class of people whose constitutional rights were being flagrantly violated.

Appellants maintain that *Axon Enterprises v. FTC*, 143 S. Ct. 890, 903-04 (2023) provides the best analogy and analytic tool to view the due process claim. The Supreme Court allowed two parties to federal administrative cases to pursue due process claims in federal court, ultimately because "A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful." *Id*.

This case involves perhaps the most important part of the free speech part of the First Amendment. It potentially targets many physicians. Although *Axon* involved federal administrative agencies and a structural claim, the lesson of *Axon* is directly relevant to this case on a due process analysis because of the clear and flagrant violation of fundamental rights. The lower court erred in dismissing this claim.

E. The First Amendment Protects the Right to Hear the Information and Opinions of Physicians

The first claim asserts the right of the individual Appellants, members of Appellant CHD, as well as the public's right to receive and hear the message of physicians like doctors Eggleston and Siler, which message challenges the mainstream Covid narrative. The right to receive medical information was specifically acknowledged by the Ninth Circuit in *Conant v. Walters*, 309 F.3d 629

(2002) and *Pickup*, 740 F.3d at 1232 n.9, *citing and quoting Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998).[13]

F. Other *Winter* Preliminary Injunction Factors Are Presumed or Weigh in Favor of Reversing the Lower Court's Denial of the Preliminary Injunction and Enjoining Appellees' Enforcement Program

The *Winter* First Amendment modified preliminary injunction standard is clear that a likelihood of success establishes irreparable injury, and satisfies the public interest test because it is never in the public's interest to allow the government to violate the First Amendment rights of its citizens. (*See* page 4 *supra*.) However, some facts, when viewed through the lens of professional soapbox speech further demonstrate the harm to the public and public discourse caused by the Appellees' attempt to stifle dissenting opinions during an evolving public health crisis.

Let us focus on two specific examples of the information and opinions Appellees are attempting to sanction. The Commission claims that Appellant Eggleston is guilty of "moral turpitude" for his July 11, 2021 opinion article because he wrote:

> As with the evil of Stockholm Syndrome, sign of submission to COVID-19 fear include: Taking vaccines that only provide short-term

[13] Standing limitations on asserting this right under *Murthy* are discussed on pages 41-46 *infra*.

> immunity and don't stop transmission of COVID, but at least 600 vaccine deaths have occurred.

Eggleston Statement of Charges, ER_99 para. 1.12. The Appellees go on to explain the technical aspects which 'prove' that the Covid shots confer "*long-term immunity*." *Id.* at para. 1.14 (emphasis added).

Of course, we now know the Covid shots provided no immunity (*i.e.*, people got infected with Covid despite having taken the recommended shots and boosters), or at best, short-term immunity (as stated by Eggleston), and that the shots never did stop the transmission of COVID, even if the CDC and medical authorities "hoped" that it might stop transmission. *See, e.g.*, the Congressional testimony of Deborah Birx, where she admitted that there was no evidence that the shots would stop transmission but it was their "hope." [14]

The Appellees also charge Eggleston for moral turpitude for pointing out that the inventors of the PCR tests have stated that the "PCR is not an appropriate tool for diagnosing COVID-19 infection, especially when done inaccurately, causing the PCR to [*sic*]'95 percent erroneous for Covid-19. Even the New York Times states that the PCR is '79 percent false." *Id*. at page ER_98 para 1.8.

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[14] *Dr. Birx Says She Knew of Natural COVID-19 Reinfections as Early as December 2020*, Clip Of House Hearing on Trump Administration's COVID-19 Response, C-SPAN.ORG (Jun. 23, 2022), available at https://www.c-span.org/video/?c5021092/dr-birx-knew-natural-covid-19-reinfections-early-december-2020 (starting at around 4:00 minutes).

Significantly, the Appellees do not claim that Eggleston has falsely represented the PCR co-founders' views, or that the New York Times said what he quoted it as saying. Rather, the contention is that "This statement is harmful to the public …" *id*. and counters that the test "has been extensively [*sic*] been extensively evaluated and it has shown to be accurate…." *Id.* at para. 1.9.

Every public statement by a physician against the prevailing medical view can be said to harm the public and be false. In terms of the First Amendment modified *Winter* factors of the public interest, the record in this motion and case law provides relevant considerations. Throughout the pandemic, the CDC has been repeatedly required to apologize for misleading the public. *See* Complaint, ER_216 n.3 for the titles and URLs of some of its reported apology requests. This argues for protecting the right of physicians to disagree in public with the prevailing government view.

First Amendment jurisprudence manifests a deep skepticism of the government's attempt to control the viewpoint communications of physicians, the strongest expression might come from Judge Prior's concurring opinion in *Wollschlaeger v. Governor of Florida,* 848 F.3d 1293, 1328 (11th Cir. 2017) *(en banc*) which was quoted in full in *NIFLA*, 585 U.S. at 771, which relates historical examples from Communist China, the Soviet Union, and the Third Reich as unsavory precedent for governments' attempts to compel physicians to convey the

party-line message to patients. A similar, if not greater skepticism is warranted towards the Commission's ongoing enforcement program to suppress its licensees' public viewpoint speech.

Finally, the very fact of a government investigation of a physician can have adverse consequences on a physician's practice,

> Physicians are particularly easily deterred by the threat of governmental investigation and/or sanction from engaging in conduct that is entirely lawful and medically appropriate. . . . [A] physician's practice is particularly dependent upon the physician's maintaining a reputation of unimpeachable integrity. A physician's career can be effectively destroyed merely by the fact that a governmental body has investigated his or her practice. . . .

Conant, 309 F.3d at 640, n.2 (Kosinski, J. concurring). By chilling professional speech in a time of an evolving public health crisis, Appellees are acting against the public's interest for a vigorous debate about public and private health policy during times when the debate is most needed.

II. APPELLANTS HAVE ESTABLISHED STANDING / CONSTITUTIONAL RIPENESS ON ALL FOUR CLAIMS

Appellants represent every conceivable type of party with an interest in challenging Appellees' enforcement program against physicians' public viewpoint speech. And somehow, according to the lower court, none of them have standing to assert any of the claims in this case because their injury is speculative or non-existent. (Decision, ER_11-12.) However, the undisputed facts and the law say

different. At least one Appellant has standing to assert each of the claims set out in the Complaint.

A. Appellants Have Standing on the Direct Claims Against Appellees' Current Enforcement Activities (the second, third and fourth claims for relief)

The second, third, and fourth claims involve the actual, direct, and specific actions of the Appellees in "retaliation" against Appellants Eggleston and Siler's speech. Standing is found on these claims if either have alleged (1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174 (9th Cir. 2022), *quoting Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014).

1. Appellants Eggleston and Siler are Self-Censoring, Because of Appellees' actions, and the Requested Injunction Will Resolve the Problem

Twitter and other cases state that an injury-in-fact in First Amendment cases is often shown through "self-censorship, which occurs when a claimant is chilled from exercising his rights to free speech." *Id*. The lower court simply disregarded the facts in the record which prove that Eggleston and Siler were self-censoring.

The Complaint specifically alleges that after the statement of charges were filed, Eggleston and the publisher agreed that Eggleston would limit his articles to rebuttals to other editorials about Covid. Complaint, ER_225-226 para 39; *see also*

Publisher Alford's declaration, ER_22-23 paras. 3-4. These facts establish that Appellant Eggleston in not free to express his opinion when he wants because of Appellees' actions.

Appellant Siler stated that after being notified that he was under investigation for spreading Covid misinformation to the public, he wrote one more post, but then "Even though I had more to say regarding the events of the COVID pandemic, I stopped writing in 2022 and awaited their determination on my speech." Siler Declaration, ER_124 lns. 20-22.

These specific unrebutted facts show self-censorship, not the kind of general "bare legal conclusions" alleged by Twitter which were held to be insufficient. *See Twitter,* 56 F.4th at 1175. These facts also demonstrate that the injury was caused by Appellees' enforcement program targeting Appellants' protected speech.

Finally, injunctive relief stopping the Appellees from continuing their prosecution of Appellants would fully redress/resolve their problem. Accordingly, Appellants Eggleston and Siler have standing to pursue the second, third, and fourth claims, which requires the reversal of the lower court on its lack of standing determination, and establishes standing for preliminary injunction purposes per *Murthy*. *See* discussion of *Murthy* at page 3 *supra*.

2. Appellants Eggleston and Siler have Suffered Other Redressable Injury

Chilled speech is not the only way to establish direct standing. "Article III's standing requirement centers 'on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.' " *Twitter,* 56 F.4th at 1174, *citing and quoting Davis v. FEC*, 554 U.S. 724, 734 (2008).

It is obvious beyond peradventure that Appellants Eggleston and Siler, who claim that the Appellees' prosecution of them is First Amendment and Fifth Amendment unconstitutional, and who seek preliminary and permanent injunctive relief stopping these prosecutions, have a stake in this litigation, without regard to any chilling effect. The alleged injury is Appellees' investigation and prosecution of them. This is forcing them to defend their public speech, which according to the authorities cited in *Pickup* cannot be the subject of government regulation, even if it is alleged to be false and harmful to the public according to the "medical establishment." Having to defend against unlawful government infringement of protected speech, as Appellants Eggleston and Siler are doing is a non-speculative, cognizable injury. *Tingley*, 47 F.4th at 1176, n.1. Further support for the injury resulting from being the subject of a disciplinary action comes from Judge Kozinski's concurring opinion in *Conant*. *See* page 35 *supra*.

Finally, there is no possible party who would have more of an interest, and hence a better case for direct standing to stop these two prosecutions, than these two

Appellants. As per the above, Appellees' disciplinary action is the direct cause of the alleged First Amendment injury. The injury would obviously be redressed by the granting of the requested injunctive relief for each of the second, third, and fourth claims. That constitutes standing on the second, third, and fourth claims for relief for both Appellants Eggleston and Siler.

3. The Lower Court Misapplied *Twitter*

In finding that the Appellants do not have standing, the lower court misapplied the factual context of *Twitter* to this case, and this critical factual difference was made clear in *Seattle Pacific University v. Ferguson* ("*SPU*"), 104 F.4th 50 (9th Cir. 2024). Both *Twitter* and *Seattle Pac. Univ*. involved First Amendment challenges to attorney general civil investigative demands ("CID").

This Court upheld the dismissal of the direct claim based on the CID, because a CID is not self-executing, coercive, has no consequences, and thus did not constitute injury-in-fact. *SPU*, 104 F.4th at 57. This is completely different from the instant case because two Appellants are being prosecuted. They were not free to disregard the statement of charges which is coercive. RCW 18.130.090. Because of this material difference, *Twitter*, does not support the lower court's standing ruling.

Further, unlike *SPU* and *Twitter*, this case involves a statewide announced censorship program against a large class of people (physicians), where the

Appellees have already sanctioned and continue to prosecute physicians for their protected speech. This is dispositively different from *Twitter* or *SPU*, meaning that the *Twitter* result does not apply to this case.

4. Appellant Moynihan has Standing on the Second and Third Claims

Although perhaps unnecessary because Appellants Eggleston and Siler have standing to bring the latter three claims, Appellant Moynihan also has standing because he would speak out in public if a court declares it legal for him to do so, and he relates some of the information he would like to convey to the public. Complaint, ER_202-203 para. 14; Moynihan Declaration, ER_127 para. 6 to ER_129. These allegations establish injury-in-fact.

Moynihan's speaking out against the mainstream Covid narrative appears to be prohibited by Appellees' program. Strong evidence of the threat of enforcement comes from Appellees' refusal to disavow future investigations. This satisfies pre-enforcement standing, per S*eattle Pac. Univ.*,104 F.4th at 59-60 and *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) ("plaintiffs may carry their burden of establishing injury in fact when they provide adequate details about their intended speech").

In short, the clear and specific facts alleged in the Complaint plus the facts set out in the declaration of the parties establish the requisite injury-in-fact, caused

by Appellees' actions which will be remedied by the Court's granting of the relief requested in the preliminary injunction motion and in this appeal on the latter three claims in the Complaint.

B. Appellants Have Demonstrated Standing on the Right to Hear Information Asserted in the First Two Claims Based on *Murthy v. Missouri*

Murthy, 144 S. Ct. 1972 is the starting point (and arguably the ending point) in the analysis of Appellants' standing to assert the right to hear the speech of physicians in the first two claims. *Murthy* strongly supports a finding of standing.

In *Murthy*, two states and various private parties sued President Biden and executive agency department heads for allegedly coercing social media companies to remove and censor Covid information contrary to the mainstream Covid narrative. The theory of the case was that government officials were coercing the social media companies to do the censoring, and the requested relief was injunctive relief stopping the government's pressure tactics. Critically, none of the social media companies doing the censoring were named as defendants.

The Supreme Court reversed the Fifth Circuit's affirmance of the district court's preliminary injunction, holding that none of the plaintiffs had standing. The basic problem according to the Supreme Court was that the plaintiffs did not sue any of the social media companies who were doing the censoring.

The two primary grounds for the Supreme Court's denial of standing were lack of causation, in large part because of clear evidence that the social media platforms were censoring plaintiffs prior to the commencement of the government's pressure tactics. *Murthy*, 144 S. Ct. at 1987-88. The second and related problem was redressability. Since the parties doing the censoring were not before the court, it was not clear that injunctive relief could solve the plaintiffs' problem. *Id*. at 1995-96. Either of these grounds would have been enough to support the Court's result.

At the end of the decision, the Court discussed plaintiffs' right to listen theory stating that, "While we have recognized a 'First Amendment right to receive information and ideas' we have identified a cognizable injury only when the listener has a concrete specific connection to the speaker." *Id.* at 1996. Highly significant to our standing analysis, the Court cited two of its quite different prior cases as examples of what constitutes a "concrete specific connection to the speaker." *Id*.

The first example is *Kleindienst. v. Mandel*, 408 U.S. 753, 762 (1972), wherein the Supreme Court held that a group of professors had standing to challenge the denial of a visa to a person they had invited to speak at a conference. *Mandel* teaches that a personal connection between the speaker and the party creates standing in the listener on a right to listen First Amendment claim.

Appellants meet the *Mandel* standing fact pattern based on two separate personal connections between the Appellants. Appellant physician Moynihan's speech is being chilled by the Appellees' Covid misinformation enforcement program. *See* pages 13- 14 *supra* for the record references setting out Moynihan's information, including the chilling of his speech. He is a member and volunteers for Appellant Children's Health Defense. *Id*. Appellants, including members of Children's Health Defense, desire to hear the information which Moynihan wishes to speak. *Id*.; *see also* the first claim for relief, ER_227 para. 47, to ER_228 para. 50.

The connection between Appellants Moynihan and CHD satisfies the *Mandel* personal connection for the first claim because Moynihan is not currently a subject of a Commission investigation or prosecution and the first claim seeks to stop future investigations and prosecutions. In fact, Appellants have a better case for standing than the plaintiffs in *Mandel* since Moynihan, the identified speaker with a connection to Appellant/plaintiff CHD, is also a party to the case, unlike the invited lecturer/speaker in *Mandel*. Thus, Appellants have both speaker and listener standing. (*See* section II C *infra*, dealing with Appellant Moynihan's pre-enforcement standing.)

Appellant John Stockton has a strong personal connection with Appellant Eggleston. He is an avid reader of Eggleston's posts, had him on his podcast, and

has been helpful to Eggleston in his defense of the Commission's case against him. (Stockton Supplemental Declaration attached to Appellants' Motion to Supplement to Record at page 2 para. 3 to the end.) These personal connections satisfy *Mandel*. Since Eggleston is currently the subject of a Commission prosecution, Stockton's personal connection to him establishes *Mandel* personal connection standing on the second claim seeking to stop all current Commission investigations and prosecutions. And like with Appellant Moynihan, Appellants have both the listener (Stockton) and the speaker (Eggleston) as plaintiffs in this case, which is more standing than in *Mandel*.

Murthy's second example is *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). *Murthy*, 144 S. Ct. at 1996. This example strongly supports Appellants right to listen/hear the protected speech of physicians because of the factual similarities in the two cases.[15] [16] In that case, an amendment

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[15] In the medical information context, there is ample precedent supporting the standing for prospective patients challenging government restrictions on physicians' speech. *See Conant*, 309 F.3d 629, a case which included a patient group, and *Tingley*, 47 F.4d at 1069, wherein this Court held that the practitioner did not have standing to assert the right of prospective patients because of the absence of proof of their inability to assert their direct claim; *see also Forbes v. Napolitano*, 236 F.3d 1009, 1010 (9th Cir. 2000), *amended*, 247 F.3d 903 (9th Cir. 2001) (prospective patients had standing to bring vagueness challenge to statute criminalizing a medical procedure).

[16] In case it is an issue, organizational Appellant Children's Health Defense asserts the rights and interests of itself and its members and to demonstrate

to the Virginia Pharmacy Board's definition of "unprofessional conduct" to include advertising prescription prices was struck down in a lawsuit brough by an organization consisting of consumers of prescription drugs.

There was no reference that any member of the plaintiff's group had a personal connection to any specific pharmacy. Standing was based on plaintiff organization's interest in the information or content of pharmacists' message, to wit, prescription drug prices. That is important because the consumer organization was recognized by the *Murthy* court to have a "concrete, specific connection to the speaker") and hence a "cognizable injury" sufficient for standing. *Missouri v. Murthy*, 144 S. Ct. at 1996.

The instant case includes consumers (all individual Appellants are alleged to be consumers of information in the first claim), as well as an organization consisting of consumers of content specific information (and viewpoint specific information as well). In both cases, the consumer organizations are suing a health care board for rendering content public speech sanctionable as unprofessional conduct. The content and viewpoint which is the target of the disciplinable conduct

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standing must show ".... that its members would have individual standing, the issues are germane to the organization's purpose, and neither the claim nor the requested relief requires individual participation." *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 825, 831 (9th Cir. 2021). The allegations establishing the above factors are set forth at pages 14-15 *supra*.

in the instant case is set out in detail in the Complaint and the declarations of the parties and other declarants.[17]

Thus, Appellant Children's Health Defense and the individual Appellants have the same concrete injury and standing as the Supreme Court in *Murthy* said of the plaintiff organization in *Virginia Bd. of Pharmacy*. Accordingly, Appellants as consumers of specified content (and viewpoint) information as alleged in the first two claims have standing to assert their First Amendment rights to hear/listen to the content and viewpoint information of Washington licensed physicians like Appellant physicians (and other like-minded physicians) under Virginia *Bd. of Pharmacy*, as endorsed by *Murthy*.

III. PRUDENTIAL RIPENESS

The lower court erred in holding that the case was not prudentially ripe, relying on the fact that Appellants Eggleston and Siler's administrative cases have not been resolved. Decision, ER_10 ln. 13, to ER_11 ln. 2.)

[17] *See* the Complaint, ER_219 para. 16, to ER-220 para 18. The declaration of Sanjay Verma, MD (ER_138-178) contains 40 pages of content and viewpoint information. Other Appellant declarants discuss similar content, as previously cited, all of which bring this case within the *Murphy* requirement that standing requires that the content be identified.

A. This Court Should Reject the Prudential Ripeness Doctrine

As this Court stated in *Twitter*:

> The Supreme Court has questioned the continued validity of the prudential ripeness doctrine because it "is in some tension with [the Court's] recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)).

Twitter, 26 F.4th at 1123 n.1; *see also Mickey Fowler v. Tracy Guerin*, 899 F.3d 1112 (9th Cir. 2018) ("… prudential ripeness is a disfavored judge-made doctrine…." [citing the same two cases cited in *Twitter*]).

This Court in *Twitter* did not reject prudential ripeness because the parties did not ask it to do so. The lower court specifically found that this case was not prudentially ripe, which makes the doctrine suitable (ripe) for review by this Court. Accordingly, for the reasons set forth in *Twitter* and *Mickey Fowler*, Appellants request that the Court reject the prudential ripeness doctrine.

B. Assuming Prudential Ripeness is Still Viable, Appellants' Claims are Prudentially Ripe

Prudential ripeness requires the court to:

> "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (citation omitted). 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. (citation omitted) On the hardship prong, we consider whether the action "requires an immediate and significant change in

> the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." (citation omitted)

Twitter, 26 F.4th at 1123.

1. The Issue in this Case/Appeal is Legal/Constitutional, Does not Require Further Factual Development, and the Challenged Action is Final

This lawsuit raises a fundamental and dispositive legal issue; whether the Appellees' investigation, prosecution, and sanctioning of licensed physicians for their public speech is First Amendment unconstitutional. All the facts necessary to decide this legal issue are known and not subject to dispute. Appellants have established as a matter of fact that Appellees have investigated, prosecuted, and sanctioned physicians in whole or in part based on their public speech, including two of the Appellants. *See* pages 6-9 *supra*.

That the Eggleston and Siler Commission administrative cases are still pending is irrelevant to this fundamental and dispositive overreaching constitutional issue. There is no evidence which could be adduced in an administrative hearing which would be relevant to, let alone justify, the alleged infringement on Appellant physicians' fundamental right to speak out in public.

Further, the importance of this issue transcends the parties to this case, and has national implications. The Commission's enforcement program is based on the Federation's July 2021 press release which encouraged all state medical boards to

sanction their licensees for so-called Covid misinformation to the public. Plus, as indicated, the Commission seems to think it can target its licensees' public speech about any subject and viewpoint, not just Covid. *See* footnote 4 at page 6 *supra*.

Moreover, Eggleston and Siler's possible vindication by the Commission (or by the state courts on appeal) is also irrelevant because as stated, the alleged violation commenced with the investigation and continues with the initiation of Appellees' prosecution of these Appellants (and other physicians) for their fully protected speech. The truth or falsity of the specific charged statements are irrelevant to this fundamental constitutional issue under *Tingley*, *Pickup*, and the authorities cited therein. *See* pages 21-23 *supra*.

And unlike in *Twitter*, where the Attorney General had not alleged any misconduct, in this case, the Appellees have already sanctioned physicians for public speech which they cannot constitutionally reach. They have alleged/charged Appellants Eggleston and Siler with misconduct which *NIFLA* holds is not conduct, but protected speech.

Further, *Twitter* involved commercial speech which is subject to government restrictions, like the government's power to prevent false and misleading information. This case involves pure/soapbox speech which, according to all current appellate and supreme court authority, cannot be regulated.

Accordingly, because this case raises the purely legal question of Appellees' constitutional authority to sanction physicians' public speech, Appellants have satisfied the first part of the prudential ripeness test.

2. There are Obvious Serious Consequences for Non-Compliance

Physicians who fail to cooperate with a Commission's investigation face discipline under RCW 18.130.450 (8). *See also Alsager*, 573 Fed. App. at 620-21 (osteopathic medical board investigation is compulsory and is the start of the disciplinary process).

As with any respondent in a license disciplinary action, Appellants (and other physicians against whom statement of charges have been filed) are required to answer and defend (*i.e.*, request a hearing) or face sanction by default. *See* RCW 18.130.090. The coercive nature of these administrative proceeding, starting with the Commission's requests for an answer to a filed complaint, dispositively distinguishes what Appellees are doing compared to what the Texas Attorney General's office did in *Twitter* in issuing non-coercive, non-self-executing civil investigative demands. *See Twitter*, 26 F.4th at 1124. Accordingly, and without more, Appellants have satisfied the hardship prong of prudential standing.

In short, this case was ripe at the time the complaint was filed because physicians had been investigated and sanctioned for public speech even before this

case was filed. However, it certainly was ripe upon filing, as two of the Appellants had been charged with misconduct for their protected speech, which *NIFLA* said is not conduct.

IV. *YOUNGER* ABSTENTION

Younger abstention is a narrow exception to the rule that federal courts must decide justiciable cases that come before them. Federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S.Ct. 584, 590 (2013) (quoting *Cohens v. Virginia*, 19 U.S. 264 (1821)). Where a federal court has jurisdiction, its "'obligation to 'hear and decide a case is virtually unflagging.'" *Id.* at 591 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).[18]

A. Younger Abstention does not Apply to The First Claim which seeks only prospective relief from future Investigations and Prosecutions

Younger abstention requires that the federal claim relates to an ongoing state proceeding. *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727-28 (9th

[18] The four required elements of *Younger* abstention are 1. An ongoing state judicial proceeding, 2. The proceeding implicates important state interests, 3. An adequate opportunity to raise the federal claim in the state proceeding, and 4. The relief requested has the practical effect of enjoining the ongoing state proceeding. Decision, at ER_13 lns. 9-11, citing *Page v. King*, 932 F.3d 898, 901-02 (9th Cir. 2019).

Cir. 2017). Appellants' first claim seeks declaratory and injunctive relief enjoining the Appellees from starting any new investigation or prosecutions against any physician for their public speech. *See* Complaint, ER_228 para. 50 and ER_234, number 1. Therefore, the Court should reverse the lower court abstention ruling regarding the first claim. *See Wooley v. Maynard*, 430 U.S. 705, 709-11 (1977).

B. The Proceedings against Appellants Eggleston, Siler and other Physicians does not implicate a legitimate, let alone an "important state interest"

Abstention under *Younger* requires a finding that the ongoing proceeding "implicates important state interests." Decision at ER_13, citing *Page*, 932 F.3d at 901-02. The lower court found the important state interests to be "the regulation of medical practice." (*Id.* at ER_14 lns. 5-6.) Appellants concede that the regulation of medical practice is an important state issue. However, Appellees' enforcement program censoring physicians' public speech does not implicate "medical practice." Protected speech cannot simply be transformed into conduct, by the wave of the government's wand, at least not according to *NIFLA. Pickup* and *Tingley* establish that the Appellees cannot regulate the physicians' public speech, at least not on the record before this Court.

Accordingly, the lower court has misidentified the actual state interest in this case. The actual interest Appellees are protecting is their authority to suppress fully protected speech. That interest cannot be important because it is unconstitutional.

Accordingly, as a matter of law, the Court should find that the *Younger* abstention does not apply to any of the claims because of the Appellees' failure to prove that its prosecution of physicians' public speech serves an important state interest.

C. The Court should find that the *Bishop* Bad Faith Exception Applies

The Fifth Circuit has recognized a variation of the bad faith exception to *Younger* "when a state commences a prosecution or proceeding to retaliate for or to deter constitutionally protected conduct." *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984) (multiple citations omitted). This rule was followed by the Eighth Circuit in *Lewellen v. Raff*, 843 F.2d 1103, 1109-10 (8th Cir. 1988) ("A showing that a prosecution was brought in retaliation for or to discourage the exercise of constitutional rights 'will justify an injunction *regardless* of whether valid convictions' can be achieved").

It is undeniable that the Defendants have brought all these Covid misinformation public speech prosecutions to retaliate and deter constitutionally protected speech. Based on the *Bishop* line of cases, the Court should find that the "bad faith" exception to *Younger* applies.

D. The *Younger* Extraordinary Circumstances/Irreparable Loss Exception Applies

This exception requires the existence of:

> "extraordinary circumstances" that present a "danger of irreparable loss [that] is both great and immediate." *Younger*, 401 U.S. at 45, . " '[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.' " *Moore v. Sims*, 442 U.S. 415, 433, (1979) (quoting *Kugler v. Helfant*, 421 U.S. 117, (1975)).

Applied Underwriters, Inc. v. Lara, 530 F. Supp. 3d 914, 938-39 (E.D. Cal. 2021).

Appellants contend that this case presents extraordinary circumstances which weigh in favor of a decision on the merits. Appellants have created and are implementing an enforcement program which intimidates and threatens physicians with disciplinary action for exercising their fully protected speech, despite judges rejecting government authority over public speech for the past eighty years. It is hard to imagine circumstances which would be more extraordinary than the circumstances presented in this case, especially since this Court told the lead Appellee this very thing not two years ago.

E. *Younger* Abstention does not Apply Because Appellees are using Facially Valid Statutes to Discourage Protected Activities

In *Krahm v. Graham*, 461 F.2d 703, 707-08 (9th Cir. 1972), this Court specifically addressed abstention in an overbreadth case:

> In the vital area of First Amendment rights it is just as easy to discourage exercise of them by abusing a valid statute as by using an

> invalid one. The fact was recognized by the Supreme Court as long ago as 1896, in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 [(1886)]. *See also Dombrowski, supra*, 380 U.S. at 489-490, 85 S.Ct. at 1122: "We hold that the abstention doctrine is inappropriate for cases … where … statutes are justifiably attacked … as applied for the purpose of discouraging protected activities."

Appellees' use of valid statutes (RCW 18.130.180 (1), (13), and (18) to unconstitutionally target robustly protected pure speech is an on-point application of *Krahm.* Appellees' use of these statutes is intended to and is having the effect of discouraging fully protected speech. (See the chilling effect of Appellees' enforcement program on Appellants Eggleston and Siler, at pages 36-37 *supra*, and Appellant Moynihan on pages 40-41 *supra*.) *Krahm* supports the reversal of the lower court's *Younger* abstention finding for all four claims.

F. Collateral Estoppel Does Not Bar Any Claim in the Complaint

The lower court erred in finding that collateral estoppel barred Eggleston from asserting the claims in this case. Decision, ER_15 lns. 4-10. First, none of the other four Appellants were parties in the *Wilkinson*[19] case. Therefore, collateral estoppel would not apply to their assertion of any of the claims in this case. *See e.g.*, *McQuillion*, 369 F.3d at 1096 (one of the requirements being "(2) the issue must have been actually litigated [by the party against whom preclusion is

[19] *Wilkinson v. Rodgers*, 2023 WL 4410936 (E.D. Wash. No. 1:23-CV-3035-TOR, July 7, 2023).

asserted] in the prior litigation," *quoting Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996)).

That would include the four Appellants' assertion of the second claim, includes the right of the four other Appellants to receive the information from Appellant Eggleston. That issue was not litigated in *Wilkinson.* Therefore, this Court should reverse the lower court's collateral estoppel finding.

In addition, the claims are different. *Wilkinson* was a direct constitutional challenge to the Commission's policy statement.[20] This is a challenge to the policy and practice or enforcement program against numerous health care practitioners, brought by both physicians and consumers of information. This difference in claims is another reason the Court should reverse the lower court on this issue.

Finally, changed controlling facts, legal principles or other special circumstances can render collateral estoppel inapplicable. *Richey v. U.S.I.R.S*, 9 F.3d 1407, 1410 (9th Cir. 1993), quoting *Montana v. United States*, 440 U.S. 147, 155 (1979).

As indicated, this is a case brought by every conceivable type of plaintiff, to wit, physicians being targeted, a physician not currently being targeted but whose

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[20] "Plaintiffs purport to challenge a Position Statement, which is neither law nor regulation" (*Wilkinson v. Rodgers*, 2023 WL 4410936 at *2 (E.D. Wash. No. 1:23-CV-3035-TOR, July 7, 2023)), and there was no specific claim by consumers of information to hear the protected speech of physicians like Appellants Eggleston.

speech is being chilled, and an individual and organization representing both Washington physicians and consumers of information, seeking to protect the rights of physicians to speak and the right of Appellants and the public to hear specifically identified information.

That is significantly different from *Wilkinson*. In addition, Eggleston's role is different in this case as a result of a change /clarification in the standing law occasioned by *Murthy*. Eggleston supports standing on the first claim because of his connection with Stockton, the receiver of the information. These different or changed circumstances constitute special circumstances rendering collateral estoppel inapplicable to Appellant Eggleston's participation in this case. The Court should reverse the lower court's ruling on collateral estoppel.

G. The Court Should Not Abstain from Any of the Claims Because this Case involves the Appellees' Direct, Explicit, Systematic and Intentional Suppression of Fundamental First Amendment Rights

The Federation's July 29 Covid misinformation press release and its adoption statement by the Commission in September are literal, direct threats to doctors to stop their public speech criticizing the CDC or mainstream Covid narrative on pain of adverse board action. *Younger* abstention was never intended to bar this kind of intentional, systematic state unconstitutional action against a class of people. *Younger* itself recognized that abstention does not apply when the defense of an individual prosecution:

> will not assure adequate vindication of constitutional rights.*** [and where there is] a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. [such] allegations, if true, clearly show irreparable injury.

Younger v. Harris, 401 U.S. 37, 48-49 (1971), quoting and discussing *Dombrowski v. Pfister*, 380 U.S. at 485-86 (cleaned up).

Appellants meet this *Younger/Dombrowski* exclusion standard. The evidence show the chilling effect of Appellees' prosecution on:

- Appellant Eggleston (his speech is being restricted because of Defendants' prosecution of him, per A.L. Alford Jr.'s Declaration, ER_21-23); same with Appellant Siler. ER_124, para. 12;
- The speech of Appellant Moynihan is being chilled by these prosecutions (Complaint, ER_218-219 lns. 28- 2; Moynihan Declaration, ER_128-129 paras. 7-14);
- Appellants right to hear protected speech is being impaired. Complaint, ER_217 para. 10, ER_218 paras. 12 and 13, ER_218-219 para. 14, ER_220 paras. 17-19.

These facts show a substantial loss or impairment of freedoms of expression resulting from prosecutions based on the Commission's policy statement which regulates an "excessively broad" range of conduct. S*ee Dombrowski*, 380 U.S. at

485-89, where the very purpose of the policy is "discouraging protected activities." *Id.* at 489-94.

There is another difference in this case versus cases involving individual state actions against defendants: Appellants Stockton and CHD's lay members are not and could not be parties to the Commission's administrative proceedings because they are not physicians. However, their access to information is adversely affected by the Commission's investigation and prosecution of Appellants Eggleston, Siler, and other physicians. That argues for the irreparable injury exception to *Younger* abstention. Accordingly, on this *de novo* review, the Court should reverse the lower court's dismissal under *Younger* abstention.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's dismissal of this case on standing, prudential ripeness, and abstention grounds, hold that Appellees' enforcement program is First Amendment unconstitutional as a matter of law, or alternatively, that based on the record, Appellees have failed to meet their strict scrutiny burden, and issue a preliminary injunction prohibiting Appellees from continuing to investigate or prosecute physicians (including Appellants Eggleston and Siler).

Dated: August 28, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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