No. 24-

In the Supreme Court of the United States

JOHN STOCKTON, RICHARD EGGLESTON, M.D., THOMAS T. SILER, M.D., DANIEL MOYNIHAN, M.D., CHILDREN'S HEALTH DEFENSE, a not-for-profit corporation, AND JOHN AND JANE DOES, M.Ds 1-50,

Applicants,

v.

ROBERT FERGUSON, in his official capacity as Attorney General of the State of Washington, AND KYLE S. KARINEN, in his official capacity as Executive Director of the Washington Medical Commission

Respondents

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

Application for Injunction

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QUESTIONS PRESENTED

1. Is Respondents' enforcement program of investigating, prosecuting, and sanctioning Washington physicians for their public speech on COVID-19 patently unconstitutional, either as a matter of law or because it fails strict scrutiny on the preliminary injunction record?

2. Given the nationwide scope of efforts to discipline physicians for protected speech, and the impact of such efforts on the public's right to hear divergent viewpoints, should this Court intervene before the Ninth Circuit renders a decision to provide urgently needed constitutional guidance?

3. Should this Court convert this application into a petition for certiorari to provide a definitive nationwide ruling on whether physicians' public speech is fully protected by the First Amendment, and requires the government to meet its strict scrutiny burden?

4. Do threshold issues such as standing, prudential ripeness, or *Younger* abstention preclude this Court from issuing an injunction, even though this case demonstrates that there is an ongoing nationwide campaign to censor dissenting speech? (*Younger v. Harris*, 401 U.S. 37, 48-49 (1971).)

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Applicants in this proceeding were the plaintiffs in the Washington district court case, and the appellants in the pending Ninth Circuit appeal. They are individuals John Stockton, Richard Eggleston MD, Thomas T. Siler MD, Daniel Moynihan MD, Children's Health Defense, a domestic not-for-profit corporation incorporated under the laws of California (which does not have a parent corporation, or issue stock). The First Amended Complaint ("Complaint") also names John and Jane Does 1 through 50 being other physicians who are currently being subjected to investigation or prosecution by the Respondents.

Respondents were the defendants in the district court case and the appellees in the Ninth Circuit appeal. They are Robert Ferguson in his official capacity as the Washington State Attorney General, and Kyle S. Karinen, in his official capacity as Executive Director of the Washington Medical Commission. Respondents Ferguson and Karinen are jointly represented.

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APPLICATION

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rules 20, 22 and 23 of the Rules of this Court, and 28 U.S.C. section 1651, Applicants are submitting this request for an injunction stopping Respondents from continuing their enforcement program targeting Washington licensed physicians' public viewpoint speech pending the disposition of Applicants' appeal of the district court's denial of their motion for preliminary injunction and the dismissal of their case.

Applicants are requesting that this Honorable Justice refer this matter to the entire court, so that it can reiterate the bedrock First Amendment principle that the viewpoint public/soapbox speech of physicians, and the public's right to hear that speech, is accorded "robust" protection by the First Amendment, and that any government attempt to restrict, censor or sanction such speech is subject to strict scrutiny. Applicants are also requesting that the Court specifically reject the notion that the government's characterization of speech as "misinformation" strips physicians' public viewpoint speech of its First Amendment protection, which result appears to be required under *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018), and the opinion of every appellate judge and Supreme Court justice who has spoken to this issue.

Alternatively, or in addition, Applicants are requesting that the Court issue a stay of all proceedings in this case, and all Washington Medical Commission cases

predicated on the public speech of Washington licensed physicians, and convert this application into a petition for a writ of certiorari.

DECISIONS BELOW AND PROCEDURAL POSTURE

The decisions below are styled as *John Stockton et al. v. Robert Ferguson et al.*

On May 22, 2024, the U.S. District Court for the Eastern District of Washington denied Applicants' motion for a preliminary injunction and dismissed the case. The district court's decision is reproduced in Appendix 2. (Case No. 2:24-cv-00071-TOR.)

The appeal before the Ninth Circuit (Case No. 24-3777) is pending, with briefing scheduled to conclude between November and December 2024. On September 3, 2024, the Ninth Circuit denied Applicants FRAP Rule 8 motion for an injunction pending appeal, reproduced in Appendix 1.

JURISDICTION

This Court has jurisdiction to issue an injunction pursuant to 28 U.S.C. § 1651 (the All-Writs Act) and 28 U.S.C. § 1254(1). Applicants timely filed their appeal in the Ninth Circuit under 28 U.S.C. § 1291, challenging the district court's dismissal of their case and denial of a preliminary injunction.

This application is filed in response to the Ninth Circuit's denial of Applicants' Rule 8 motion for preliminary relief. Given the ongoing chilling effect of Respondents' actions, and the imminent harm to protected speech, Applicants seek relief from this Court.

THE RELEVANT STATUTE

U.S. Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE STANDARD OF REVIEW

Different justices have articulated different formulations of what is required to issue an injunction pending appellate court review under the All-Writs Act, 28 U.S.C. § 1651(a). However, the common elements seem to be that the legal rights are "indisputably clear" (*Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted), and that the *Winter* factors are satisfied. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020), *citing Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

INTRODUCTION

This application challenges Respondents' enforcement program which investigates and sanctions Washington-licensed physicians for expressing public views on COVID-19 that diverge from prevailing orthodoxy. They justify the program by calling the viewpoint, public speech "misinformation," and assert their authority to regulate this speech by recharacterizing it as conduct or incidental to conduct.

This is exactly what this Court in *NIFLA*[1] said the government cannot do. The enforcement program also runs afoul of close to eighty years of judicial authority on this precise issue. Applicants—physicians and members of the public—seek an injunction to halt these unconstitutional actions pending appeal, or alternatively, a stay, and conversion of this application into a petition for certiorari. Immediate intervention by this Court is warranted to protect the First Amendment rights of both speakers and listeners.

Non state actors and parts of the media have been cajoling medical boards throughout the country to bring more disciplinary cases against physicians for their dissident public speech, and are thus themselves disseminating a false national narrative that the public viewpoint speech of physicians is unprotected by the Constitution. As a result, a decision on the merits in the pending appeal in the Ninth Circuit will not resolve this national affront to the Constitution. And that is the primary reason for this application to this Court.

The Court should speak clearly and decisively to state actors, professional organizations, other non-state actors, and the national media: Public speech does not lose its constitutional protection from government action simply because it is uttered by a healthcare professional, even if it is at odds with medical orthodoxy. Without immediate relief, this national misconception of the governments' power to suppress dissenting views will continue unchecked, harming both speakers and the

[1] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 767 (2018).

public, undermining the marketplace of ideas, and chilling vital public discourse at a time when it is most needed.

STATEMENT OF THE CASE

A. What the Respondents Are Doing

In July 2021, the Federation of State Medical Boards (the "Federation") issued a brief press release warning physicians nationwide that expressing public views diverging from mainstream COVID-19 narratives could result in disciplinary action. The Federation characterized such statements as "vaccine misinformation or disinformation," claiming they "threaten to erode public trust in the medical profession and put patients at risk" (Press Release, App. 69–70).

Following the Federation's lead, the Washington Medical Commission ("the Commission") adopted this policy in September 2021 (App. 72). Since adopting the policy, the Commission has actively enforced it, initiating or pursuing disciplinary actions against at least ten healthcare practitioners for public speech critical of COVID-19 policies (Serrano Decl., App. 135 ¶ 2; Farrell Decl., App. 216–20). However, the full extent of these investigations remains unclear, as some physicians under scrutiny may not have as yet been formally charged. The justifications offered in the preliminary injunction record for these enforcement actions rely solely on:

- The Federation's July 2021 press release (App. 69–70),
- The Commission's adoption statement (App. 72), and
- The Farrell Declaration (App. 212).

This limited evidence fails to meet the burden under strict scrutiny. Specifically, the Respondents offer no proof that less restrictive alternatives were considered, nor that their enforcement program was narrowly tailored to meet a compelling state interest. Thus, no further factual development is necessary for this Court to issue interim relief.

The enforcement actions are directly suppressing Applicants' public speech and limiting the public's access to critical information on COVID-19.

B. The Applicants

The Applicants include both individuals and organizations with standing to challenge the Commission's unconstitutional conduct.

Dr. Richard Eggleston and Dr. Thomas T. Siler are being prosecuted by the Commission for opinion articles criticizing COVID-19 policies. Eggleston's article appeared in the *Lewiston Tribune*, and Siler's in the *American Thinker* (Compl., App. 31–35 ¶¶ 34–43). Copies of these articles are part of the record (App. 154–211).

Dr. Daniel Moynihan, who has previously faced investigation for Covid misinformation, remains fearful of future investigation and proceedings, deterring him from further expressing his views (Compl., App. 25–26 ¶ 14; Moynihan Decl., App. 63 ¶¶ 8–9).

Additionally, the Applicants include listeners whose rights to receive information are impaired by the Commission's enforcement actions and specifically:

John Stockton and Children's Health Defense (CHD), a non-profit organization, claim the right to access and disseminate information from

dissenting physicians. Stockton has actively supported Eggleston's defense by featuring him on a podcast and assisting with legal efforts (Stockton Decl., App. 238-239 ¶¶ 3–7). CHD has Washington state physician and public members, and is actively involved in advocacy and protecting freedom of speech and Covid vaccine related issues and educates the public on these issues. (Compl., App. 26–28 ¶¶ 16-24).

Together, these Applicants assert the rights of both speakers and listeners, presenting a comprehensive challenge to the Commission's enforcement program.

C. The Claims for Relief

The complaint asserts four claims for relief, but this application focuses on the two First Amendment claims:

First Claim: The Applicants assert their right to hear and disseminate fully protected speech from physicians targeted under the Commission's enforcement program. They allege that the Respondents are violating the First Amendment by punishing physicians who express dissenting views on COVID-19 (Compl., App. 34–35; Serrano Decl., App. 134–47; Farrell Decl., App. 212–36). The Applicants argue that their standing is supported by *Murthy v. Missouri*, 144 S. Ct. 1972 (2024).

Second Claim: This claim seeks to halt the Commission's current investigations and prosecutions targeting physicians' public speech. Applicants Eggleston and Siler assert their right to speak freely, while other

Applicants assert their right to hear and receive information from these and other targeted physicians (Compl., App. 35–38).

The enforcement actions not only chill speech but also deprive the public of critical viewpoints necessary for informed debate, especially during a public health crisis.

D. The Media's Role and Judicial Notice Request

The Federation's July 2021 press release not only spurred state-level enforcement actions, but also catalyzed a media campaign that pressures medical boards to take action against dissenting physicians. Several national media outlets have reported on the issue, lamenting what they see as a lack of consequences for doctors spreading what they label COVID-19 misinformation.

For instance, the Washington Post published a report titled "*Doctors Who Put Lives at Risk with COVID Misinformation Rarely Punished*" on July 26, 2023 (App. 240). The article criticized that there are so few disciplinary actions taken against doctors who challenge mainstream COVID-19 policies. Similarly, on August 8, 2023, PBS News aired a segment titled "*Investigation Reveals Lack of Consequences for Doctors Spreading COVID Misinformation,*" reinforcing the narrative that stricter enforcement is necessary (App. 251).

Other media reports continue the trend of calling for more robust sanctions. For example, the Center for Infectious Disease Research and Policy (CIDRAP) published an article on August 16, 2023, titled "*Report Spotlights 52 US Doctors Who Posted Potentially Harmful COVID Misinformation Online*" (App. 256).

Additionally, JAMA Network published a report titled "*When Physicians Spread Unscientific Information About COVID-19*" on February 16, 2022, raising similar concerns (App. 260). Even universities are addressing the topic: on September 20, 2024, Case Western Reserve University published "*Physicians Spreading Medical Misinformation: The Suitability of Regulation.*" (App. 276).[2]

This, despite the fact that for nearly 80 years, judicial precedent has recognized that public speech by professionals is entitled to robust First Amendment protection.

REASONS FOR GRANTING THIS APPLICATION

I. PHYSICIANS' PUBLIC VIEWPOINT SPEECH IS FULLY PROTECTED BY THE FIRST AMENDMENT, SUBJECT TO STRICT SCRUTINY AND THE RECORD REQUIRES THE GRANTING OF THE REQUESTED INJUNCTIVE RELIEF

A. Professional Soapbox Speech is Robustly Protected

The bedrock constitutional principle that a professional's public speech is essentially off-limits to government control was first articulated by Justice Jackson in his concurring opinion in *Thomas v. Collins*, 323 U.S. 516, 545-46, (1945).

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[2] These newspaper articles and reports are judicially noticeable. *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (citing cases stating that courts take judicial notice of news articles in newspapers) Applicants obviously do not agree with the opinions expressed therein that medical boards should discipline more physicians for their dissident public speech about Covid, but these articles do show that some media outlets – like many medical boards – are unaware that physicians' public speech is robustly protected. They further show that some media outlets are cajoling the medical boards directly or through the public to have medical boards continue and expand their efforts to censor this robustly protected speech.

Although, Justice Jackson recognized the right of the state to regulate the practice of a profession, he stated that the state does not have right to protect against "false doctrine."[3] Justice White restated Justice Jackson's view in his concurring opinion in *Lowe v. SEC*, 472 U.S. 181, 232 (1985).

The Ninth Circuit elaborated on this principle in *Pickup v. Brown*. 740 F.3d 1208, 1227-28 (9th Cir. 2014), *abrogated on other grounds, Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 767 (2018), highlighting the abundance of authority supporting this bedrock principle and underscoring that the public speech of professionals remains constitutionally protected, even when controverial.[4]

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[3] Justice Jackson's clear and elegant words are worth repeating in full.

> [I]t is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom. * * *
>
> This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.

[4] 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

In *Tingley v. Ferguson*, 47 F.4th 1055, 1072-73 (9th Cir. 2022), the Ninth Circuit stated that *Pickup* held that physicians' public speech is "robustly protected."[5]

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.

[5] We held [in *Pickup*] that "public dialogue" by a professional is at one end of the continuum and receives the greatest First Amendment protection. *Id.* 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. *Id.*

Ironically, during the same period in which Respondent Washington Attorney General Ferguson—the defendant in *Tingley*—was prosecuting physicians for their speech in the present case, the Ninth Circuit was affirming that the physician speech he was prosecuting is entitled to robust constitutional protection.

In short, from *Thomas v. Collins* through *Tingley*, courts have consistently confirmed that professional public speech is either beyond government regulation or subject to strict scrutiny, demonstrating that physicians' public speech does not forfeit its robust First Amendment protection because of a government license.

B. The Lower Court's Decision is Inconsistent with *NIFLA*

Not only did the district court disregard 79 years of judicial authority on professionals' public speech, it misinterpreted *Tingley*'s holding by quoting the true but irrelevant statement that speech which is incidental to conduct can be regulated. Decision, App. 15-16. 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? Characterizing physicians' public speech as incidental to conduct is inconsistent with *NIFLA* because as this Court stated:

> 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 (emphasis added).

By calling physicians' public speech incidental to conduct, the district court is reasserting the professional speech doctrine, which the *NIFLA* court has rejected.

C. The Respondents' Enforcement Program Fails Strict Scrutiny

At a minimum, under all existing appellate and Supreme Court statements, the Respondents' enforcement program is subject to 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, App. 212. 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 (App. 71) which is based on the three-paragraph July 2021 press release issued by the Federation. App. 69-70. 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.

D. Applicants are Entitled to a Preliminary Injunction or Stay of Enforcement of Commission cases to the Extent They Involve Fully Protected Speech

Contrary to the Ninth Circuit's order (App. 1), Applicants have satisfied the four-part Winter test[6] as modified.

1. The Modified *Winter* Test

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 Covid in *Roman Catholic Diocese v. Cuomo*, 592 U.S. at 19.

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

[6] 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. at 20.

n.11 (3d Cir. 2003). In short, "[B]y establishing a likelihood that [the challenged law] violates the U.S. Constitution, [p]laintiffs have also established that both the public 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, in this type of fundamental constitutional challenge, the courts focus on the likelihood of success on the merits, which has been demonstrated above. That all being said, the public has a strong interest in permitting physicians to speak their mind and disagree with the prevailing medical view, in general but more so during the pandemic.

2. Examples of the Public Speech Being Targeted by the Respondents which Show the Public's Interest in Protecting Dissident Speech about Covid-19

The Commission claims that Appellant Eggleston is guilty of "moral turpitude" for his July 11, 2021 opinion article by writing that:

> As with the evil of Stockholm Syndrome, sign of submission to COVID-19 fear include: Taking vaccines that only provide short-term immunity and don't stop transmission of COVID, but at least 600 vaccine deaths have occurred.

Eggleston Statement of Charges, Farrell Declaration, App. 226, para. 1.12. The Respondents go on to explain the technical aspects which 'prove' that the Covid shots confer "long-term immunity." (*Id.* para. 1.14.). Of course, we now know the Covid shots provided either limited or 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 Brix at https://www.c-span.org/video/?c5021092/dr-birx-knew-natural-covid-19-reinfections-early-december-2020 (starting at around 4:00 minutes) where she admitted that there was no evidence that the shots would stop transmission but it was their "hope."

The Respondents also charge Eggleston with 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 '95 percent erroneous for Covid-19. Even the New York Times states that the PCR is '79 percent false." (*Id.* at App. 225, para 1.8.) 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 claim is that "This statement is harmful to the public… and counters that the test "has been extensively been extensively evaluated and it has shown to be accurate…." *Id.*

The Commission was dead wrong in its scientific gobbledygook explanation about how the vaccines confer long term immunity, prevent infection and transmission. Further, the public has a right to know that the inventors of the PCR test stated that it is not an effective tool for diagnosing COVID-19.

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 v Walters, 309 F.3d 629, 640, n.2 (9th Cir. 2002) (Kosinski, J. concurring). By chilling professional speech in a time of an evolving public health crisis, Respondents 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.

E. Supreme Court Intervention Is Warranted to Address National Misconceptions About Constitutional Protections for Physicians' Speech

There is a growing misconception, promoted by non-state actors and the media, that physicians' dissenting speech on COVID-19 can be punished to protect public health without regard to constitutional protection accorded this speech. The

Federation of State Medical Boards has called on state medical boards to sanction physicians for expressing views labeled as "misinformation." Media outlets, including the Washington Post, have lamented the lack of enforcement actions against physicians, pressuring boards to pursue more investigations and sanctions.

State medical boards, operating under pressure from non-state actors, are exceeding their constitutional authority by pursuing actions that stifle public discourse. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court struck down indirect censorship efforts by government actors—efforts analogous to the pressures now placed on physicians who express dissenting views. This case demonstrates the Court's essential role in ensuring that public discourse is not suppressed, directly or indirectly.

The fragmented regulation of the protection of professional speech across jurisdictions creates uncertainty that only this Court can resolve. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Loving v. Virginia*, 388 U.S. 1 (1967), wherein the Court ensured that fundamental rights were uniformly recognized. Without the Court's guidance, the piecemeal regulation of professional speech will result in unequal protection of First Amendment rights. Professionals in one state will face sanctions for speech that remains protected in another, leaving both speakers and listeners unsure of their rights. The patchwork regulation of professional speech creates uncertainty that only this Court can resolve.

This case also presents an opportunity to resolve the circuit split on the regulation of professional speech. The Ninth Circuit in *Tingley v. Ferguson*, 47 F.4th

1055 (9th Cir. 2022) held that speech which was the treatment is regulatable conduct. However, the Eleventh Circuit in *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020), ruled that such speech is entitled to full First Amendment protection under *NIFLA*. Although this Court declined to hear *Tingley* in No. 22-942 (Dec. 11, 2023), the divergence between circuits on professional speech is yet another reason justifying this Court's immediate attention.

By affirming the protection of public speech by professionals, the Court will ensure that the public has access to diverse viewpoints essential to democratic debate, especially during times of public health crises.

II. THE APPLICANTS HAVE STANDING

Applicants have standing under both the First Amendment's right-to-hear doctrine and the well-established principle that chilled speech constitutes an injury-in-fact. Each applicant satisfies standing by demonstrating a concrete connection to the targeted speech, a real and imminent injury, and the inability to effectively vindicate their rights without this Court's intervention.

A. Physicians' Standing to Challenge Respondents' Enforcement Actions

Physicians Richard Eggleston, M.D., and Thomas T. Siler, M.D. are actively being prosecuted by the Washington Medical Commission for expressing opinions in public forums—opinions Respondents label as "misinformation." Compl., App. 31-34 ¶¶ 34-43. Both physicians face professional sanctions for publishing opinion pieces critical of COVID-19 policies, with Dr. Eggleston charged for a newspaper column questioning vaccine efficacy and Dr. Siler sanctioned for articles on *American*

Thinker. These enforcement actions directly impair their ability to engage in constitutionally protected public speech, satisfying standing under the First Amendment's protection against viewpoint discrimination.

Furthermore, Dr. Daniel Moynihan has already been investigated by the Commission and now refrains from expressing similar views out of fear of renewed prosecution. (Moynihan Decl., App. 63 ¶¶ 8-9.) The chilling effect on his speech constitutes an injury-in-fact, as this Court has recognized that the threat of enforcement alone creates a sufficient injury for standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014).

B. Listeners Have Standing Under the Right-to-Hear Doctrine

Applicants John Stockton and Children's Health Defense have standing as listeners with a right to hear the public speech of these physicians and others. The First Amendment protects not only the right to speak but also the right to receive information and ideas. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976). This Court has consistently held that listeners suffer a cognizable injury when they are deprived of access to speech, even if the speech is controversial or dissenting.

Here, Stockton has a concrete and personal connection with Dr. Eggleston, whose speech is currently under investigation. Stockton has hosted Eggleston on his podcast and remains an active supporter of his defense efforts. (Stockton Decl., App. 238-239 ¶¶ 3-7.) Children's Health Defense, a not-for-profit organization, also alleges injury because its members—many of whom rely on dissenting medical

opinions—are being deprived of access to critical public health information. (Compl., App. 28, ¶¶ 18-19.) These connections satisfy the personal connection requirement set forth in *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), and establish that both Stockton and Children's Health Defense have standing to assert their First Amendment right to receive the speech at issue.

C. Applicants' Standing is Consistent with Recent Precedent

This case closely parallels *Murthy v. Missouri*, 144 S. Ct. 1972, (2024) in which this Court confirmed that listeners have standing to challenge speech restrictions when they have a "concrete, specific connection to the speaker." Applicants here meet this standard: Stockton's personal relationship with Eggleston and Children's Health Defense's reliance on the public speech of dissenting physicians provide the necessary connection to establish standing.

Additionally, under *Virginia Bd. of Pharmacy*, listeners do not need to demonstrate a formal relationship with a specific speaker to have standing. The injury-in-fact arises from the suppression of information, which deprives listeners of the ability to make informed decisions. *Murthy* affirmed this principle by holding that the suppression of content-specific speech causes a direct injury to listeners, sufficient to confer standing under the First Amendment.

In sum, each applicant satisfies the requirements for standing. The physicians suffer injury from the chilling effect of the enforcement program, which directly interferes with their ability to engage in protected public speech. The listeners—Stockton and Children's Health Defense—suffer injury by being deprived

of access to this speech, impairing their right to receive information essential to the ongoing public health debate. These injuries are concrete, imminent, and cannot be effectively redressed without judicial intervention.

Given the ongoing investigations and chilling effect caused by Respondents' actions, this case presents an immediate controversy that warrants this Court's review. Applicants have both the speaker and listener standing necessary to pursue their First Amendment claims, and the injuries they allege are more than sufficient to satisfy the standards for standing under Article III.

III. THIS CASE IS RIPE

The district court dismissed this case as unripe, reasoning that the ongoing administrative proceedings against Drs. Eggleston and Siler must be resolved before the federal courts can intervene. (District Court Decision, App. 9-12.) This conclusion misapplies the ripeness doctrine. The ongoing investigations and the threat of sanctions have already created a chilling effect on the physicians' speech, which constitutes an immediate and irreparable injury under the First Amendment.

Waiting for these proceedings to conclude will not only prolong the harm but will also deprive Applicants of meaningful judicial relief. First Amendment injuries warrant prompt intervention, as even temporary restrictions on speech result in irreparable harm. The district court's decision overlooks binding Supreme Court precedent that allows courts to intervene when speech is chilled by the mere threat of enforcement.

A. The Chilling Effect of the Ongoing Proceedings Makes This Case Ripe for Review

The chilling effect on speech caused by pending enforcement actions is sufficient to render this case ripe for judicial review. This Court has repeatedly held that a credible threat of enforcement creates a justiciable controversy, even before final sanctions are imposed. *Susan B. Anthony List v. Driehaus*, 573 U.S. at 165; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

In *Susan B. Anthony List*, this Court stated that if a reasonable threat of prosecution can create a ripe controversy, then so does an actual prosecution. 573 U.S. at 165. Drs. Eggleston and Siler are currently being prosecuted for expressing dissenting opinions in public forums. (Compl., App. 32-34; Farrell Decl., App. 216-220.) Even though the administrative proceedings are not yet complete, the threat of sanctions has already deterred other physicians, including Dr. Moynihan, from engaging in similar speech. (Moynihan Decl., App. 63 ¶¶ 8-9.)

The district court's refusal to intervene fails to account for the ongoing and immediate injury caused by the chilling effect. The threat of professional sanctions has forced the physician Applicants to choose between exercising their constitutional rights and avoiding further punishment—a classic First Amendment injury that warrants immediate judicial review. *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965).

B. Prudential Ripeness Does Not Apply to Ongoing First Amendment Injuries

The district court erred by dismissing the case on prudential ripeness grounds, suggesting that the administrative process must be allowed to run its course. (District Court Decision, App. 11-12.) However, this misapplies the purpose of ripeness doctrine. Ripeness is intended to prevent courts from resolving hypothetical disputes—not to delay review of ongoing constitutional injuries.

This Court has questioned the continued viability of prudential ripeness, holding that federal courts have a "virtually unflagging obligation" to resolve constitutional claims when presented with an actual controversy. *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). In First Amendment cases, where the suppression of speech creates irreparable harm, federal courts must act promptly to prevent ongoing violations.

The fact that the proceedings against Drs. Eggleston and Siler are still pending does not change the fact that the chilling effect on their speech is already occurring. Allowing the state administrative process to continue unchecked would exacerbate the harm to Applicants and leave them without meaningful relief. Federal intervention is not premature in this context—it is essential to prevent further constitutional violations.

C. The District Court's Approach Would Frustrate First Amendment Protections

If the district court's approach were accepted, physicians and other professionals would be forced to endure lengthy administrative processes before they could seek judicial relief for ongoing First Amendment violations. This would undermine the core purpose of the First Amendment, which is to protect individuals from government efforts to suppress speech. *Dombrowski*, 380 U.S. at 486-87.

The existence of administrative proceedings does not give the government carte blanche to chill public speech during the pendency of those proceedings. Public discourse on matters of public health, such as COVID-19, must remain open, and government efforts to penalize dissenting viewpoints must be subject to immediate judicial scrutiny.

IV. YOUNGER ABSTENTION IS INAPPLICABLE

Abstention is a narrow exception to the general rule that federal courts have a "virtually unflagging" obligation to hear cases properly within their jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). While *Younger* abstention may bar federal courts from intervening in some ongoing state proceedings, it does not apply here for several reasons:

A. The *Dombrowski* Exception: Federal Courts Must Act When Speech Is Chilled

The *Dombrowski* exception allows federal intervention where state actions chill protected speech and waiting for state proceedings to conclude would cause

irreparable harm. In *Dombrowski v. Pfister*, 380 U.S. at 485-86, the Court recognized that federal courts must step in when state enforcement efforts are designed to discourage or suppress protected activities. Here, the ongoing chilling effect on speech requires immediate federal relief.

As *Younger* explained, abstention is inappropriate when "a substantial loss or impairment of freedoms of expression... will occur if appellants must await the state court's disposition." *Younger v. Harris*, 401 U.S. 37, 48-49 (1971) (citing *Dombrowski*, 380 U.S. at 485-86). In this case, the Commission's enforcement efforts have already suppressed speech:

- Dr. Eggleston has limited his public commentary due to the investigation (Alford Decl., App. 148-150).
- Dr. Siler has curtailed his speech to avoid further scrutiny (Siler Decl., App. 59 ¶¶ 12-13).
- Dr. Moynihan has refrained from speaking publicly, fearing future retaliation (Moynihan Decl., App. 63 ¶¶ 7-14).

The Commission's program chills constitutionally protected speech and undermines public discourse. Immediate intervention is essential to halt the ongoing harm and prevent further violations.

B. Abstention Does Not Apply to Future Enforcement Actions

Applicants' First Cause of Action seeks to prevent future enforcement efforts, which fall outside the scope of *Younger* abstention. Federal courts retain jurisdiction

to enjoin future unconstitutional conduct. *Younger* applies only to active, ongoing state proceedings, not to potential future actions. *See Younger*, 401 U.S. at 43-44.

Applicants are challenging not just isolated investigations, but the entire enforcement regime, which continues to pose a substantial threat of future constitutional violations.

C. CHD, Stockton, and Moynihan Are Not Parties to State Proceedings

Younger abstention does not apply to the claims of CHD, Stockton, or Dr. Moynihan because they are not participants in the administrative proceedings.

Their claims arise from the chilling effect on public speech, which exists independently of the state process. Stockton and CHD assert listeners' First Amendment rights to receive dissenting viewpoints. (Compl., App. 24 ¶ 10, App. 25 ¶¶ 12-13, App. 27 ¶¶ 17-19.) Dr. Moynihan, though not currently under investigation, has already curtailed his speech due to the climate of fear created by the Commission's actions. (Moynihan Decl., App. 63-64 ¶¶ 7-14.) Because these Applicants are not involved in the state proceedings, abstention cannot bar their claims.

D. Coordinated State Action Requires Federal Intervention

The Washington Medical Commission's enforcement program is part of a national effort led by the Federation to penalize dissenting physicians. The Federation's July 29, 2021 press release urged state boards to discipline physicians who spread so-called "misinformation" regarding COVID-19. The Commission

adopted this guidance and launched investigations that aim to suppress dissent and chill public discourse.

Finally, as pointed out, some in the media are propagating the patently unconstitutional view that medical boards have the constitutional authority to suppress the public viewpoint speech of physicians just because they have a medical license, which, as demonstrated, is a position rejected by almost 80 years of judicial authority, including this Court in *NIFLA*. In these circumstances, this Court should decide this case.

CONCLUSION

Respondents' enforcement program violates the First Amendment by chilling physicians robustly protected free speech rights. As this Court has repeatedly affirmed, speech does not lose its First Amendment protections merely because it is uttered by professionals, nor can the government strip it of its protection by calling it "misinformation."

A viewpoint-discriminatory enforcement regime targeting public speech is incompatible with the core principles of the First Amendment. The chilling effect extends beyond the immediate investigations, creating a climate of fear that discourages others from speaking out on controversial but critical issues.

The enforcement program also deprives the public of access to diverse viewpoints, which are essential to public health debates. Without intervention, this suppression of dissent will harm the public discourse necessary to resolve ongoing

health crises. Respondents' enforcement program utterly fails strict scrutiny. The record does not demonstrate that less restrictive alternatives were considered.

This case presents an opportunity for the Court to reaffirm the robust protection afforded to public speech and provide a much-needed reminder of the power of the First Amendment. Given the national campaign to suppress dissenting medical opinions, uniform guidance from this Court is essential to prevent inconsistent state-level practices that undermine free speech.

Furthermore, none of the threshold issues—standing, prudential ripeness, or *Younger* abstention—should prevent this Court from granting relief.

This Court should act now, not only to preserve the constitutional rights of physicians and the public, but also to prevent the normalization of viewpoint discrimination under the guise of regulating professional speech. Left unchecked, the Respondents' actions and the accompanying media narrative could embolden other regulatory bodies to suppress dissent, further undermining public discourse at a time when diverse opinions are most needed.

Accordingly, Applicants respectfully ask this Court to grant the requested injunction to halt all enforcement actions targeting physicians' public speech, pending appeal. Alternatively, the Court should convert this application into a petition for writ of certiorari to resolve these pressing national constitutional issues. Without immediate relief, the harm to free speech will continue to intensify, compromising both individual rights and the public's ability to engage in meaningful debate.

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Respectfully submitted,

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