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Hon. Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

RICHARD S. WILKINSON, an individual,
RYAN N. COLE, an individual, and
RICHARD J. EGGLESTON, an individual,

Plaintiffs,
v.

SCOTT RODGERS in his personal capacity
and in his official capacity as a Member of
the Washington Medical Commission,
MONICA DE LEON in her personal
capacity and in her official capacity as
Executive Director of the Washington
Medical Commission, JIMMY CHUNG, in
his personal capacity and in his official
capacity as chair of the Washington Medical
Commission, KAREN DOMINO in her
personal capacity and in her official capacity
as chair elect of the Washington Medical
Commission, TERRY MURPHY in his
personal capacity and in his official capacity
as vice chair of the Washington Medical
Commission, SARAH LYLE in her personal
capacity and her official capacity as a

FIRST AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF
AND VIOLATION OF CIVIL RIGHTS
UNDER 42 USC § 1983

CASE NO.: 1:23-cv-03035

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF AND FOR
VIOLATION OF FEDERAL
CIVIL RIGHTS UNDER
42 U.S.C. § 1983**

JURY DEMAND

Silent Majority Foundation
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1 Member of the Washington Medical
2 Commission, PO-SHEN CHANG in his
3 personal capacity and in his official capacity
4 as a Member of the Washington Medical
5 Commission, APRIL JAEGER in her
6 personal capacity and in her official capacity
7 as a Member of the Washington Medical
8 Commission, ANJALI D'SOUZA in her
9 personal capacity and in her official capacity
10 as a Member of the Washington Medical
11 Commission, HARLAN GALLINGER in his
12 personal capacity and in his official capacity
13 as a Member of the Washington Medical
14 Commission, RICHARD WOHNS, in his
15 personal capacity and in his official capacity
16 as a Member of the Washington Medical
17 Commission, ELISHA MVUNDURA, in her
18 personal capacity and in her official capacity
19 as a Member of the Washington Medical
20 Commission, ED LOPEZ in his personal
21 capacity and in his official capacity as a
22 Member of the Washington Medical
23 Commission, ARLENE DORROUGH in her
24 personal capacity and in her official capacity
25 as a Member of the Washington Medical
26 Commission, TONI BORLAS, in his
27 personal capacity and in his official capacity
28 as a Member of the Washington Medical
Commission, ROBERT PULLEN, in his

FIRST AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF
AND VIOLATION OF CIVIL RIGHTS
UNDER 42 USC § 1983- 1

Silent Majority Foundation
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1 personal capacity and in his official capacity
2 as a Member of the Washington Medical
3 Commission, MICHAEL BAILEY in his
4 personal capacity and in his official capacity
5 as a Member of the Washington Medical
6 Commission, YANLING YU, in her personal
7 capacity and in her official capacity as a
8 Member of the Washington Medical
9 Commission, ALDON W. ROBERTS in his
10 personal capacity and in his official capacity
11 as a Member of the Washington Medical
12 Commission, JOHN MALDON in his
13 personal capacity and in his official capacity
14 as a Member of the Washington Medical
15 Commission, MICHAEL FARRELL in his
16 personal capacity and in his official capacity
17 as Washington Medical Commission Staff
18 Attorney and Policy Development Manager,

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Defendants.

I. INTRODUCTION

Plaintiffs file this First Amended Complaint pursuant to Federal Rule 15(a)(1)(A) within 21 days of serving the Complaint to remove all State claims and to include additional facts, information, and law in support of the remaining Federal Claims. As such, this First Amended Complaint will retain the previously plead First Amendment claims and the Civil Rights claims under 42 U.S.C § 1983. Plaintiffs now lodge a straightforward challenge to the constitutionality of the Washington Medical Commission’s (“WMC”) *COVID-19 Misinformation* Position Statement (“Statement” or “Position Statement”) adopted during the September 22, 2021¹

1 Special Meeting. ECF No. 1-2.¹

2 Each defendant remains a properly individually named Defendant, as, upon
3 information and belief, each participated in the meeting and in the development of
4 the Statement. No attendance roster of this Meeting was published, and no names
5 were included on the Zoom screen. During the meeting, the WMC commissioners
6 **unanimously** adopted the Statement *with the intent* of adopting a standard of care
7 and chilling the speech of physicians by prohibiting certain speech based on
8 viewpoint. Defendants intended the WMC *to* enforce this speech-based standard of
9 care against any person violating the Statement. These circumstances show good
10 cause as to why the WMC's statutory immunity provided in RCW 18.130.300(1)
11 does not protect individual Defendants against liability arising from their actions.
12 The limited case law addressed commissioner liability has not addressed the
13 Commission's legislative duties, the underlying decision-making process, or an
14 instance where such a decision blatantly violates constitutionally protected rights, as
15 occurred here, with the intention of chilling licensed professionals' right to free
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22 ¹ Washington Medical Commission Special Meeting, September 21, 2021. "While
23 this meeting is open to the public, we will not be taking public comment or
24 responding to questions during this meeting." Available at:
25 <https://www.youtube.com/watch?v=P5qDoNWfdhI>. Last accessed: March 31,
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27 2023.
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1 speech.

2 The Statement officially extended the WMC’s “support[] [of] the position taken
3 by the Federation of State Medical Boards (FSMB) regarding COVID-19 vaccine
4 misinformation” and adopted a standard of care for Washington medical providers’
5 treatment of COVID-19. That “standard” adopted through the Statement was a
6 deferral to and reliance on the FDA’s approval of medication COVID-19 treatment:
7 “WMC relies on the U.S Food and Drug Administration approval of medications to
8 treat COVID-19 to be the standard of care.”
9

10
11 All three Plaintiffs’ First Amendment rights have been infringed by the
12 Commission as Plaintiffs Cole and Wilkinson have been subject to charges based
13 both on their speech and on their reasonable treatment of patients contravening the
14 statement. Plaintiff Eggleston has been subject to charges based *solely* on his speech
15 as he is currently retired. At issue, here, is not a challenge to *how* Defendants have
16 charged Plaintiffs with violations, but rather, the core issues are: (1) that the
17 Commission, including individual Commissioners, adopted the Position Statement,
18 which directly infringes on protected rights; (2) that the Statement is void for
19 vagueness as it employs undefined *enforceable* terms, such as “misinformation” and
20 “disinformation,” and other terms; (3) that the Statement discriminates based on
21 viewpoint; and (4) that the Commission is seeking to penalize Plaintiffs for their
22 constitutionally protected speech.
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28 Finally, the Statement shows its naked bias as it failed to “follow the science” as

1 stated by one Commissioner in the meeting to adopt the Statement.² For example,
2 Dr. Anthony Fauci, former director of National Institute of Allergy and Infectious
3 Diseases Dr. Rochelle Walenksy, Director of the Center for Disease Control,
4 admitted that the vaccines were ineffective in ceasing transmission of COVID-19.³
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7 ² *Id.* at time stamp 3:48 – 4:20 (Commissioner Jim [unintelligible], PA, speaking to
8 the Statement: “it’s based on the science, it’s based on the scientific leaders that
9 guide us...we are bound to follow the science...”).
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12 ³ *See:* Centers for Disease Control and Prevention, COVID-19, *Interim Public*
13 *Health Recommendations for Fully Vaccinated People*, July 27, 2021. Available at:
14 [https://web.archive.org/web/20210728032236/https://www.cdc.gov/coronavirus/20](https://web.archive.org/web/20210728032236/https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)
15 [19-ncov/vaccines/fully-vaccinated-guidance.html](https://web.archive.org/web/20210728032236/https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html); *Fully vaccinated people who get*
16 *a Covid-19 breakthrough infection can transmit the virus, CDC chief says*, August
17 6, 2021. Available at: [https://www.cnn.com/2021/08/05/health/us-coronavirus-](https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html)
18 [thursday/index.html](https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html); *Fauci admits that COVID-19 vaccines do not protect ‘overly*
19 *well’ against infection*, Fox News, July 12, 2022. Available at:
20 [https://www.foxnews.com/media/fauci-admits-covid-19-vaccines-protect-overly-](https://www.foxnews.com/media/fauci-admits-covid-19-vaccines-protect-overly-well-infection)
21 [well-infection](https://www.foxnews.com/media/fauci-admits-covid-19-vaccines-protect-overly-well-infection). Last accessed: February 24, 2023. *See also:* United States House of
22 Representatives Committee on Oversight and Accountability Press Release, March
23 8, 2023: *COVID Origins Hearing Wrap Up: Facts, Science, Evidence Point to a*
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1 Additionally, while the FDA has stated that its position on Ivermectin treatment for
2 COVID-19 was advisory only, the WMC has ignored the statement.⁴ Finally, the
3 WMC ignored the FDA’s position on Ivermectin that existed at the time of the
4 adoption of the Statement, which read, in part, “If your health care provider writes
5 you an ivermectin prescription, fill it through a legitimate source such as a
6 pharmacy, and take it exactly as prescribed.”⁵ None of these “science-based”
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10 _____
11 *Wuhan Lab Leak*. Available at: [https://oversight.house.gov/release/covid-origins-](https://oversight.house.gov/release/covid-origins-hearing-wrap-up-facts-science-evidence-point-to-a-wuhan-lab-leak%EF%BF%BC/)
12 [hearing-wrap-up-facts-science-evidence-point-to-a-wuhan-lab-leak%EF%BF%BC/](https://oversight.house.gov/release/covid-origins-hearing-wrap-up-facts-science-evidence-point-to-a-wuhan-lab-leak%EF%BF%BC/)
13 wherein ex-CDC director, Dr. Robert Redfield testified that Dr. Anthony Fauci’s
14 approach to the COVID-19 origins narrative was “antithetical to science.” Redfield
15 testified: “If you really want to be truthful, it’s antithetical to science. Science has
16 debate, and they squashed any debate.” *See also*: [https://www.johnlocke.org/ex-cdc-](https://www.johnlocke.org/ex-cdc-director-takes-fauci-to-task-on-covid/)
17 [director-takes-fauci-to-task-on-covid/](https://www.johnlocke.org/ex-cdc-director-takes-fauci-to-task-on-covid/). Last accessed: March 10, 2023.
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20 ⁴ *Apter v. Department of Health and Human Services, et al.*, (SDTX, No.: 3:22-cv-
21 00184) Hearing on Motion to Dismiss, US Department of Justice Attorney, Isaac
22 Belfer (November 1, 2022; asserting FDA position on Ivermectin for treatment of
23 COVID-19.). ECF No. 1-4.
24

25 ⁵ *Why You Should Not Use Ivermectin to Treat or Prevent COVID-19*, available at:
26 <https://www.fda.gov/consumers/consumer-updates/why-you-should-not-use->
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1 statements indicate that a medical professional should be subject to discipline for
2 prescribing Ivermectin, let alone for *speaking* (or writing) in support of COVID-19
3 treatment with Ivermectin.
4

5 The WMC's Position Statement is a complete reversal of a Statement it
6 adopted a short 18 months prior through the "Statement on Chloroquine," which
7 offered providers support, latitude, and discretion in treating COVID-19 patients:
8 "We want providers and pharmacists to act with their best discretion to ensure
9 patients continue to receive appropriate treatment in time of shortages."⁶ It is also a
10 markedly different position from the WMC's *Pandemic Regulatory Intent* adopted
11 18 months prior, which read, in part:
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15 **[R]egulatory agencies must support the front-line practitioners.** We
16 recognize there are shortages of equipment and that difficult to
17 impossible decisions must be made. ... Under these conditions,
18 practitioners need support, not fear of regulatory action. ... Under these
19 circumstances, practitioners deserve and have the support of the WMC.
20 Practitioners should not fear for their well-intentioned actions. During
21 this crisis, the WMC will focus on the intent of the practitioner and the
22 realistic availability or non-availability of possible alternatives. Put
23 another way, when assessing complaints related to practitioner's work
24 we will consider the difficult circumstances and choices they are facing.

25 _____
26 [ivermectin-treat-or-prevent-covid-19](#). Last accessed: March 30, 2023.

27 ⁶ *WMC Statement om Chloroquine*, available at:

28 <https://wmc.wa.gov/news/wmc%C2%A0statement-chloroquine>. Adopted March
23, 2020. Last accessed: February 2, 2023.

1 The WMC wants you to focus on treating the patient in front of you to
2 the best of your ability.⁷

3 It bears noting that other States have adopted regulations similar to the Statement,
4 including California’s Assembly Bill 2098 (“AB 2098”), *Physicians and surgeons:*
5 *unprofessional conduct*, which adopted California Business & Professions Code §
6 2270.⁸ However, unlike AB 2098, which was adopted through the legislative process
7 and signed into law by Governor Gavin Newsom, the Commission’s Statement was
8 adopted in near secret as a “position statement” with little notice of the meeting
9 (limited to the statutory required 24-hour window, *See*: RCW 42.30.080(2)(c)).
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11 While the Statement was advertised as a benign, precautionary measure, it has had
12 significant effect on the regulated physicians throughout Washington as it has been
13 the leading edge of the sword used to punish medical professionals who speak
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18 ⁷ *WMC Pandemic Regulatory Intent*, available at: [https://wmc.wa.gov/news/wmc-](https://wmc.wa.gov/news/wmc-pandemic-regulatory-intent)
19 [pandemic-regulatory-intent](https://wmc.wa.gov/news/wmc-pandemic-regulatory-intent). Adopted March 25, 2020. Last accessed: February 2,
20 2023. (Emphasis added.)

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22 ⁸ California Assembly Bill 2098: *Physicians and surgeons: unprofessional*
23 *conduct*.

24 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB
25 [2098](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB). Approved by the Governor, September 30, 2022. Site last accessed:
26 February 3, 2023.
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1 contrary to the Commission’s or commissioners’ opinions as adopted in the
2 Statement; additionally, the Statement may have chilled the speech of countless
3 other Washington medical professionals who would have willingly spoken in favor
4 of COVID-19 treatment with Ivermectin. As such, the Statement has genuinely
5 impacted physician speech and patient informed consent as physicians have been
6 forced to choose between risking their license, and speaking either publicly or
7 privately with patients about alternative COVID-19 treatments.
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10 On January 25, 2023, the District Court for the Eastern District of California
11 GRANTED a Preliminary Injunction, enjoining enforcement of “Cal. Bus. & Prof.
12 Code § 2270 as against plaintiffs, plaintiffs’ members, and all persons represented
13 by plaintiffs.” *Hoeg v. Newsom*, 2:22-cv-01980-WBS-AC, ECF No.: 35, at 29. ECF
14 No. 1-5. With the striking similarities between the challenged California Code and
15 the WMC’s Statement challenged in this action, this Court should follow its sister
16 court and enjoin enforcement of the Statement, although the scope of the Injunction
17 should expand to all medical practitioners in Washington.
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21 II. JURISDICTION AND VENUE

22 1. Each Defendant is properly named as an individual who has participated in
23 the adoption of the Washington Medical Commission’s *COVID-19 Misinformation*
24 Position Statement.
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26 2. Plaintiffs bring this action under Section 1 of the Civil Rights Act of 1871, 42
27 U.S.C. § 1983 and under the First and Fourteenth Amendments of the United States
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1 Constitution. This Court has jurisdiction over the requested declaratory relief under
2 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction under 28 U.S.C. § 1331 and
3 § 1343.
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5 3. This Court has jurisdiction over costs and attorneys' fees under 42 U.S.C.
6 Section 1988 (b).
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8 4. Venue is proper due to Plaintiffs Eggleston and Wilkinson's residences and
9 Plaintiff Wilkinson's practice within the jurisdictional boundaries of the Eastern
10 District of Washington, and a substantial portion of the events giving rise to the
11 claims occurred within the Eastern District of Washington. Plaintiff Cole is an out
12 of state resident. 28 U.S.C. § 1391(b)(2).
13

14 **III. PARTIES**

15 **Plaintiffs**

16 5. Plaintiff Richard Wilkinson is a resident of Yakima, Washington and
17 maintains a medical license in Washington. Wilkinson has been licensed to practice
18 as a physician and surgeon in Washington since 1977; Wilkinson's license is issued
19 and regulated by the Commission. Wilkinson is the owner of Wilkinson Wellness
20 Clinic in Yakima, WA. Wilkinson Decl., ECF No. 1-10, ¶ 2.
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23 6. The Commission received complaints regarding statements Wilkinson made
24 regarding COVID-19 on his blog maintained on the Wilkinson Wellness Clinic
25 website (<https://wilkinsonwellness.com/blog>) and for his treatment of patients who
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1 had tested positive for COVID-19 with ivermectin. These complaints lead to SOC
2 M2022-196. ECF No. 1-6.

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4 7. SOC No. M2022-196 was issued on June 7, 2022, and addresses Wilkinson’s
5 public COVID-19 blog statements as follows: “Respondent’s public false and
6 misleading statements regarding the COVID-19 pandemic, COVID-19 vaccines,
7 and public health officials are harmful and dangerous to individual patients, generate
8 mistrust in the medical profession and in public health, and have a wide-spread
9 negative impact on the health and well-being of our communities.” *Id.*

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12 8. Since the Commission has made the investigations of Wilkinson public,
13 including the publication of SOC No. M2022-196, Wilkinson has suffered
14 reputational harm and has suffered a loss his of First Amendment rights as his right
15 to free speech has been accosted and trampled through the Commission’s
16 “misinformation” and “disinformation” campaign that culminated in the Statement.
17 ECF No. 1-10, ¶ 7.

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20 9. Plaintiff Ryan Cole is a resident of Idaho and maintains medical licenses in
21 nine states including Washington; Cole’s Washington license is issued and regulated
22 by the Commission. ECF No.: 1-9, ¶ 3. Prior to COVID-19, Cole’s Washington
23 license allowed him to service Washingtonians who sent skin biopsies to Cole for
24 laboratory review. Cole practices in Idaho but was contacted by Washington
25 residents via telehealth seeking assistance with COVID-19 treatment throughout the
26 pandemic. Cole is the former owner of Cole Diagnostics, a medical diagnostic
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1 laboratory located in Boise, ID. *Id.*, at ¶ 4.

2 10.Cole Received his medical degree from Virginia Commonwealth University-
3 Medical College of Virginia, in 1997, then attended a Residency in Anatomic and
4 Clinical Pathology at the Mayo Clinic in Rochester, MN form 1997-2001, which
5 was followed by a Surgical Pathology Fellowship (Chief Fellow) at the Mayo Clinic
6 from 2001-2002. Cole then completed a Dermatopathology Fellowship (Chief
7 Fellow) at the Ackerman Academy of Dermatopathology, Columbia University
8 from 2002-2003. *Id.*, at ¶ 2, Exh., 1.

9 11.Prior to the COVID-19 pandemic and the Commission’s adoption of the
10 Statement, Cole was never disciplined by the Commission. Since the adoption of the
11 Statement, Cole has been the target of many complaints, several of which have been
12 investigated by the Commission. These investigations include, but are not limited to
13 Files No.: 2021-10232, 2021-10853, 2021-11434, 2021-11662, 2021-11729, which,
14 upon information and belief, culminated in the Commission’s Statement of Charges
15 (“SOC”) No.: 2022-207, issued on January 10, 2023. ECF No.: 1-9. Cole is
16 represented by legal counsel (not present counsel) to defend SOC 2022-207; a
17 hearing date has not been set.

18 12.Statement of Charges No.: 2022-207 alleges that Cole:

19 [M]ade numerous false and misleading statements during public
20 presentations regarding the coronavirus disease 2019 (COVID-19)
21 pandemic, COVID-19 vaccines, the use of ivermectin to treat COVID-
22 19, and the effectiveness of masks that were harmful and dangerous to
23 individual patients, generated mistrust in the medical profession and in

1 public health, and had a wide-spread negative impact on the health and
2 well-being of our communities.. *Id.* at 1.

3 13.The SOC and other investigations have negatively impacted Cole and his
4 practice as Cole has been required to dissolve his Pathology practice, Cole
5 Diagnostics. In 2019 (pre-pandemic), Cole had an offer to sell Cole Diagnostics at
6 the price of \$12,000,000, which was subsequently rescinded as revenue declined and
7 due to the negative press on Cole. *Id.*, at ¶ 12.
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9 14.Prior to the COVID-19 pandemic, Cole held contracts with several national
10 and regional insurance carriers; however, the negative implications of the board
11 reports and the associated media attention, in-network contracts with St. Luke’s
12 Health Partners, Pacific Source, Mountain Health Co-op, and Cigna were terminated
13 after Commission’s publication of the Charges against Cole.
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16 15.Since the Commission has made the investigations of Cole public, including
17 the publication of SOC No. No 2022-207, Cole has lost several of these contracts,
18 including the following contracts. *Id.*, at ¶ 4. Pre-pandemic, in 2019, Cole
19 Laboratories had a net income of \$2,102,165; the net income for 2020 increased to
20 \$3,341,732 with a maintenance of the value of diagnostic services and an increase
21 of revenue for COVID-19 testing; the 2021 net income decreased to \$2,530,107; and
22 the 2022 net income decreased to a loss of \$13,403. *Id.*, at ¶ 4; Exh. 2. The 2021
23 decreases in net income were primarily related to the loss of revenue associated with
24 COVID-19 testing, and the 2022 income loss was due to the lost insurance contracts.
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1 *Id.*

2 16. Prior to the dissolution of Cole Diagnostics, Cole anticipated working 10 more
3 years and would have sold Cole Diagnostics at the conclusion of that period.
4 Assuming a conservative annual revenue stream of \$2,000,000 (based on the 2019-
5 2021 net income) and factoring in the potential sales of Cole Diagnostics at the
6 \$12,000,000 offer, Cole would have had a total net income of \$32 million at the
7 conclusion of ten years, including the sales of Cole Diagnostics. *Id.*, at ¶ 13.

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10 17. Aside from these damages, Cole has suffered reputational harm, having lost
11 his Fellow status from the College of American Pathologists; has been informed that
12 the American Board of Pathology has corresponded with states where Cole holds a
13 license, to support disciplinary actions against Cole based on his public statements
14 related to COVID-19; and Cole lost his position as President Elect for Independent
15 Doctors of Idaho. Cole has also suffered a loss of First Amendment rights as his right
16 to free speech has been accosted and trampled through the Commission's
17 "misinformation" and "disinformation" campaign that culminated in the Statement,
18 and has been applied by individual defendants who have reviewed complaints
19 against Cole. *Id.*, at ¶ 14.

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22 18. Cole has suffered other damages, including \$50,000 in attorney fees spent in
23 the defense of his license; limitations on his ability to practice medicine as discussed,
24 above, and because of the time and effort spent in the defense of his license;
25 difficulty in hiring and retaining employees due to the threats and difficult working

1 conditions stemming from the opposition to Cole’s positions; and undue stress on
2 Cole’s marriage and family for the personal and professional attacks he has suffered
3 (including death threats) since he first openly advocated for early COVID-19
4 treatment. *Id.*, at ¶ 15.

6 19.Plaintiff Richard Eggleston is a resident of Washington and was issued a
7 license by the Commission to practice as a physician and surgeon on September 16,
8 1974. ECF No. 1-8, at 1. Eggleston maintains a medical license in Washington in
9 “active retired” status. Eggleston’s license is issued and regulated by the
10 Commission. Eggleston was the owner of Eggleston Eye Care Specialists in
11 Clarkston, WA. prior to his retirement in 2012. Since his retirement, Eggleston has
12 not actively treated patients, and has treated no COVID-19 patients. *Id.*, at ¶¶ 2-4.

16 20.The Commission’s investigations of Eggleston, including the charges in SOC
17 No. M2022-204, are founded on Eggleston’s speech, specifically, statements
18 Eggleston made in “a periodic newspaper column for a regional newspaper that
19 serves southeastern Washington and north central Idaho.” *Id.* at 1. Defendants
20 concluded that these statements were “false” and constitute the “promulgat[ion] [of]
21 misinformation regarding the SARS-CoV-2 virus and treatments for the virus.” *Id.*,
22 at 2.

25 21.Since the publication of SOC No. M2022-204, Eggleston has suffered
26 reputational harm and has suffered a loss his of First Amendment rights as his right
27 to free speech has been accosted and trampled through the Commission’s

1 “misinformation” and “disinformation” campaign that culminated in the Statement.
2 Specifically, because Eggleston is not actively treating/receiving patients, his
3 alleged “misinformation” and “disinformation” arises from publishing his opinions
4 on COVID-19 as founded in his research, in the Lewiston Tribune.⁹ *Id.*, at ¶ 4. In
5 fact, the entirety of the SOC is based on Eggleston’s speech against the mainstream
6 COVID-19 narrative. Eggleston is no longer actively practicing medicine; the WMC
7 is clearly targeting his speech. Eggleston has a 3-day hearing scheduled for his
8 license May 24 - 26, 2023.

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12 22.SOC M2022-204 has also resulted in Eggleston hiring counsel (not present
13 counsel) to defend his license and speech rights against the Commission’s
14 enforcement of the Statement.

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16 **Defendants**

17 23.Melanie De Leon is the Executive Director of the Washington Medical
18 Commission and is sued in her personal capacity and in her official capacity. Upon
19 information and belief, Defendant DeLeon participated in the development and
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22 ⁹ See: *Opinion: What I wrote was intentional, but nit in error.* Eggleston, Richard.

23 *Lewiston Tribune*, October 2, 2022. Available at:

24 <https://lmtribune.com/opinion/opinion-what-i-wrote-was-intentional-but-not-in->
25 [error/article_46557752-7717-5672-9735-a6ed2871705d.html](https://lmtribune.com/opinion/opinion-what-i-wrote-was-intentional-but-not-in-error/article_46557752-7717-5672-9735-a6ed2871705d.html). Last accessed:

26
27 February 15, 2023.

1 adoption of the challenged Statement.

2 24. Defendant Jimmy Chung is a member of the Washington Medical
3 Commission, is the chair of the Commission, and is sued in his personal capacity
4 and in his official capacity. Upon information and belief, Defendant Chung
5 participated in the development and adoption of the challenged Statement.
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7 25. Defendant Karen Domino is a member of the Washington Medical
8 Commission, is the chair elect of the Commission, and is sued in her personal
9 capacity and in her official capacity. Upon information and belief, Defendant
10 Domino participated in the development and adoption of the challenged Statement.
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12 26. Defendant Terry Murphy is a member of the Washington Medical
13 Commission, is the vice chair of the Commission, and is sued in his personal
14 capacity and in his official capacity. Upon information and belief, Defendant
15 Murphy participated in the development and adoption of the challenged Statement.
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17 27. Defendant Po-Shen Chang is a member of the Washington Medical
18 Commission and is sued in her personal capacity and in her official capacity. Upon
19 information and belief, Defendant Chang participated in the development and
20 adoption of the challenged Statement.
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22 28. Defendant April Jaeger is a member of the Washington Medical Commission
23 and is sued in her personal capacity and in her official capacity. Upon information
24 and belief, Defendant Jaeger participated in the development and adoption of the
25 challenged Statement.
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1 29. Defendant Claire Trescott is a member of the Washington Medical
2 Commission and is sued in her personal capacity and in her official capacity. Upon
3 information and belief, Defendant Trescott participated in the development and
4 adoption of the challenged Statement.
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6 30. Defendant Anjali D'Souza is a member of the Washington Medical
7 Commission and is sued in her personal capacity and in her official capacity. Upon
8 information and belief, Defendant D'Souza participated in the development and
9 adoption of the challenged Statement.
10

11 31. Defendant Harlan Gallinger is a member of the Washington Medical
12 Commission and is sued in his personal capacity and in his official capacity. Upon
13 information and belief, Defendant Gallinger participated in the development and
14 adoption of the challenged Statement.
15

16 32. Defendant Mabel Bongmba is a member of the Washington Medical
17 Commission and is sued in her official capacity. Upon information and belief,
18 Defendant Bongmba participated in the development and adoption of the challenged
19 Statement.
20

21 33. Defendant Richard Wohns is a member of the Washington Medical
22 Commission and is sued in his personal capacity and in his official capacity. Upon
23 information and belief, Defendant Wohns participated in the development and
24 adoption of the challenged Statement.
25

26 34. Defendant Elisha Mvundura is a member of the Washington Medical
27
28

1 Commission and is sued in her personal capacity and in her official capacity. Upon
2 information and belief, Defendant Mvundra participated in the development and
3 adoption of the challenged Statement.
4

5 35. Defendant Diana Currie is a member of the Washington Medical Commission
6 and is sued in her personal capacity and in her personal capacity and in her official
7 capacity. Upon information and belief, Defendant Currie participated in the
8 development and adoption of the challenged Statement.
9

10 36. Defendant Ed Lopez is a member of the Washington Medical Commission
11 and is sued in his personal capacity and in his personal capacity and in his official
12 capacity. Upon information and belief, Defendant Lopez participated in the
13 development and adoption of the challenged Statement.
14

15 37. Defendant Arlene Dorrough is a member of the Washington Medical
16 Commission and is sued in her personal capacity and in her official capacity. Upon
17 information and belief, Defendant Dorrough participated in the development and
18 adoption of the challenged Statement.
19

20 38. Defendant Toni Borlas is a member of the Washington Medical Commission
21 and is sued in her personal capacity and in her official capacity. Upon information
22 and belief, Defendant Borlas participated in the development and adoption of the
23 challenged Statement.
24

25 39. Defendant Christine Blake is a member of the Washington Medical
26 Commission and is sued in her personal capacity and in her official capacity. Upon
27
28

1 information and belief, Defendant Blake participated in the development and
2 adoption of the challenged Statement.

3
4 40. Defendant Robert Pullen is a member of the Washington Medical
5 Commission and is sued in his personal capacity and in his official capacity. Upon
6 information and belief, Defendant Pullen participated in the development and
7 adoption of the challenged Statement.

8
9 41. Defendant Scott Rodgers is a member of the Washington Medical
10 Commission and is sued in his personal capacity and in his official capacity. Upon
11 information and belief, Defendant Rodgers participated in the development and
12 adoption of the challenged Statement.

13
14 42. Defendant Michael Bailey is a member of the Washington Medical
15 Commission and is sued in his personal capacity and in his official capacity. Upon
16 information and belief, Defendant Bailey participated in the development and
17 adoption of the challenged Statement.

18
19 43. Defendant Yanling Yu is a member of the Washington Medical Commission
20 and is sued in her personal capacity and in her official capacity. Upon information
21 and belief, Defendant Yu participated in the development and adoption of the
22 challenged Statement.

23
24 44. Defendant Alden W. Roberts was a member of the Washington Medical
25 Commission at the time of the adoption of the Statement and is sued in his personal
26 capacity and in his official capacity. Upon information and belief, Dr. Roberts
27
28

1 revised draft Statement with the intent of incorporating a standard of care into the
2 Statement, which was incorporated into the final version of the Statement.¹⁰

3
4 45. Defendant John Maldon was a member of the Washington Medical
5 Commission and the President of the Commission at the time of the adoption of the
6 Statement and is sued in his personal capacity and in his official capacity. Upon
7 information and belief, Mr. Maldon presided over the meeting where the Statement
8 was adopted and assisted in the development of the Statement.¹¹

9
10 46. Michael Farrell is a staff Attorney and Policy Development Manager for the
11 Washington Medical Commission and is sued in his personal capacity and in his
12 official capacity. Upon information and belief, Mr. Farrell, in his official capacity,
13 advised the WMC on the adoption of the Statement as he was present at the special
14 meeting where the Statement was adopted.

15
16
17 **IV. FACTS**

18 47. The Commission's 21 board members are appointed by the Governor. Revised
19 Code of Washington ("RCW") Section 18.71.015. Thirteen members are licensed to
20 practice medicine; two are physician's assistants; and six are designated as "public
21

22
23

¹⁰ Washington Medical Commission Special Meeting, September 21, 2021, at
24 6:40-6:55, "providing information on a disease process is about standard of care
25 and those are the edits he was trying to...to bring in..." *See*: fn. 3.

26
27 ¹¹ *See: Id.*

1 members.” *Id.*

2 48.The WMC is the state agency charged with investigating physicians,
3 surgeons, Physician’s Assistants, and other medical professionals for unprofessional
4 conduct; the Commission held this authority prior to its adoption of the challenged
5 Statement. RCW 18.71.002.
6

7 49.The WMC adopted the Position Statement without public comment or input
8 from the regulated community, and stated at the commencement of the meeting, in
9 which the Statement was adopted, that public comment would not be allowed.
10

11 50.The Statement provides that the Commission’s “position on COVID-19
12 prevention and treatment is that COVID-19 is a disease process like other disease
13 processes, and as such, treatment and advice provided by physicians and physician
14 assistants will be assessed in the same manner as any other disease process.
15 Treatments and recommendations regarding this disease that fall below standard of
16 care as established by medical experts, federal authorities and legitimate medical
17 research are potentially subject to disciplinary action.”
18
19
20

21 51.The Statement clearly addresses regulated physician speech and seeks to
22 regulate the same as it is titled *COVID-19 Misinformation*, and it provides:
23

24 The WMC supports the position taken by the Federation of State
25 Medical Boards (FSMB) regarding COVID-19 vaccine
26 **misinformation**. The WMC does not limit this perspective to vaccines
27 but broadly applies this standard to **all misinformation** regarding
28 COVID-19 treatments and preventive measures such as masking.
Physicians and Physician Assistants, who generate and spread COVID-
19 **misinformation**, or **disinformation**, erode the public trust in the

1 medical profession and endanger patients. WMC *COVID-19*
2 *Misinformation* position statement. (Emphasis added.)

3 52.The Statement has both legal and punitive effects as Plaintiffs and other
4 medical professionals (*See: In RE: Scott C. Miller, PA*, No. M2021-272) have
5 experienced. To sanction/punish the medical professionals through the Statement,
6 the Commission finds fault with the professionals’ speech or conduct as it relates to
7 the Statement *vis-à-vis* COVID-19.
8

9 53.The Statement impermissibly intrudes on the patient-doctor relationship and
10 limits the ability of the doctor and the patient to have a free, open, and candid
11 conversation about COVID-19, its treatments, and the vaccines; simply put, the
12 standard chills medical professionals’ speech with their patients, thus inhibits them
13 from providing, and patients from receiving, adequate informed consent.
14

15 54.A “standard of care as established by medical experts, federal authorities and
16 legitimate medical research” without reference, clarification, or defined terms, is
17 vague and arbitrary. Dr. Cole, for example, is licensed in nine states and is certified
18 in pathology; he is the former owner of a medical research laboratory that operates
19 legitimately and legally. What Dr. Cole may say or do in another state where he is
20 licensed may be completely “legitimate” there while being deemed illegitimate
21 under the Statement.
22

23 55.With his credentials and experience, there is no basis for the Commission to
24 dispute the legitimacy of Dr. Cole’s medical research, and “legitimate medical
25
26
27
28

1 research” is a type of speech expressly approved by the Statement. Yet, Cole is
2 accused of “false and misleading statements,” with no explanation as to how his
3 medical research is any less legitimate than other medical research that can be
4 spoken of by medical professionals. Without clear definitions, the WMC has
5 targeted Cole’s speech based on viewpoints, not “legitimacy” or any other basis.
6

7
8 56.The distinction of Plaintiffs from other professionals who are not subject to
9 discipline under the Statement is that Plaintiffs dissented politically and
10 scientifically from health officials on various matters related to COVID-19, and
11 when threats to Plaintiffs’ licenses and practices by the Board as well as criticism by
12 politicians and from mainstream and social media personalities could not silence
13 these Plaintiffs, the Board took punitive action. This is simply due to Plaintiffs’
14 disagreement with the mainstream policies for the treatment of COVID-19.
15

16
17 57.Plaintiffs cannot communicate freely with patients, to provide informed
18 consent, nor to treat them properly or according to the Plaintiff’s best judgment,
19 when they fear being reported and potentially subject to discipline for giving a
20 patient information that departs from the Commission’s nameless experts and
21 “legitimate” researchers.
22

23
24 58.The Commission and its Statement have placed Plaintiffs between a rock and
25 a hard place, as Plaintiffs’ patients’ best interests in receiving medical information
26 necessary to make a scientifically based decision has been limited by the Statement,
27 removing patient rights to informed consent. Insofar as Plaintiff Eggleston does not
28

1 see or treat patients, he does have the ability to share scientifically and experience-
2 based (nearly 50 years as a licensed physician) opinions with the public as he's done
3 with his statements that have subjected him to discipline. The Statement has been
4 weaponized to punish doctors who dissent from the alleged mainstream "legitimate"
5 scientific community.
6

7
8 59. Individual commissioners reviewing complaints have escalated each
9 complaint made against Plaintiffs' speech.

10
11 60. The Statement also notes that the "WMC relies on the U.S Food and Drug
12 Administration approval of medications to treat COVID-19 to be the standard of
13 care," yet the Commission did nothing to change this position when the FDA's own
14 attorneys stated on the record that the FDA never adopted a formal position on the
15 use of Ivermectin for the treatment of COVID-19. ECF No.1-2.

16
17 61. The Statement contradicts the responsible practice of medicine by mandating
18 that medical professionals toe the government-sponsored line of speaking and
19 treating patients rather than by urging doctors to tailor medical care and advice to
20 each patient and his/her circumstances, using the medical professional's best
21 professional judgment.
22

23
24 62. The Statement fails to give patients the opportunity to receive information
25 sufficient to make informed decisions for their own medical care based on complete
26 information necessary to give informed consent.
27

28 63. The statement also turns the establishment of the standard of care on its head

1 by making it a dictate from the top rather than it being established by practitioners
2 actually treating the patient in front of them.¹²
3

4 64. A standard of care must be based upon conduct rather than speech. *Conant*
5 *v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002).

6 65. The Statement also fails to recognize that standards of care are not static. What
7 might be considered experimental or untested might in six months, or a year,
8 become the preferred treatment, especially for a novel disease where medical
9 science is evolving where the government allows continued evolution, an evolution
10 that is stymied by top-down dictates as are found in the Statement.
11

12 66. The Statement also fails to recognize that off-label use of a medication is
13 common amongst the medical community, especially for new or evolving diseases,
14 “[a]s off-label uses are presently an accepted aspect of a physician’s prescribing
15 regimen the open dissemination of scientific and medical information regarding
16 these treatments is of great import. The FDA acknowledges that physicians need
17
18
19

20 ¹² Washington medical Commission, *WMC Takes Public Action Against COVID-19*
21 *Misinformation*, [https://wmc.wa.gov/news/wmc-takes-public-action-against-covid-](https://wmc.wa.gov/news/wmc-takes-public-action-against-covid-19-misinformation)
22 [19-misinformation](https://wmc.wa.gov/news/wmc-takes-public-action-against-covid-19-misinformation) (“Now more than ever we must align with the oath we took to
23
24 “do no harm,” and part of that means trusting science, listening, educating and caring
25
26 for our patients according to the guidelines set by the FDA, the CDC, and experts at
27 the state health department as we work to care for and protect the people we treat.”)
28

1 reliable and up-to-date information concerning off-label uses.” *Wash. Legal Found.*
2 *v. Friedman*, 13 F. Supp. 2d 51, 56 (D.D.C. 1998). Additionally, “The need for
3 reliable information is particularly acute in the off-label treatment area because the
4 primary source of information usually available to physicians -- the FDA approved
5 label -- is absent.” *Id.*
6

7
8 67.The Statement also ignores the safety and efficacy findings prevalent in the
9 scientific literature supporting the use of ivermectin and early treatment.

10
11 68.Upon information and belief, the Statement contains mere assumptions, naked
12 assertions, and unsupported opinions conveyed by representatives of medical
13 organizations (*i.e.*, by using terms, such as “medical experts,” “federal authorities,”
14 and “legitimate medical research”) that amounts to nothing more than a fallacious
15 appeal to authority, rather than an argument based on evidence and good scientific
16 standards.
17

18
19 69. “[A] professional license is property and is protected by the Constitution.”
20 *Mishler v. Nevada State Bd. of Medical Examiners*, 896 F.2d 408, 409 (9th Cir.
21 1990).

22
23 70. A professional license cannot be granted or suspended based merely on
24 speech. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371,
25 201 L.Ed.2d 835, 847 (2018).

26
27 A licensee’s “interest in liberty is similarly implicated if a charge impairs his
28 reputation for honesty or morality,” public disclosure of the charges lodged against

1 a licensee can implicate due process required to protect that property interest. *Vanelli*
2 *v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777 (9th Cir. 1982).
3

4 **V. CAUSES OF ACTION/CLAIMS FOR RELIEF**
5 **COUNT I – VIOLATION OF THE FIRST AMENDMENT OF THE**
6 **UNITED STATES CONSTITUTION**

7 **(The Position Statement Constitutes Content and Viewpoint Discrimination in**
8 **Violation of the First Amendment; 42 U.S.C. § 1983)**

9 72.The allegations contained in paragraphs 1-71 are incorporated herein by
10 reference and are re-alleged as set forth in full.

11 73.The First Amendment of the United States Constitution states, “Congress shall
12 make no law . . . abridging the freedom of speech.”

13 74.The First Amendment is incorporated to apply to the states by the Fourteenth
14 Amendment. The First Amendment rights to free speech and freedom of association
15 have been made enforceable against the states through the Fourteenth Amendment
16 guarantee of Due Process. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gitlow v. New*
17 *York*, 268 U.S. 652 (1925).
18

19 75.The Statement constitutes an impermissible and unreasonable infringement
20 on the free speech of medical professionals licensed in Washington on the basis of
21 content and viewpoint of a doctor’s speech and is used to impose professional
22 liability in contravention of the First Amendment.
23

24 76.The Statement is being enforced through the mechanism of the Uniform
25 Disciplinary Act, RCW 18.130.180, as if the statement has the force of law.
26
27
28

1 77. “In the marketplace of ideas, few questions are more deserving of free-speech
2 protection than whether regulations affecting health and welfare are sound public
3 policy.” *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002). Moreover, the
4 Supreme Court has “stressed the danger of content-based regulations in the fields
5 of medicine and public health, where information can save lives.” *Nat’l Inst. of*
6 *Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (internal
7 quotation marks and citations omitted).
8
9

10 78. The Supreme Court has stated that “the Constitution protects the right to
11 receive information and ideas,” which “is an inherent corollary of the rights of free
12 speech and press that are explicitly guaranteed by the Constitution.” *Bd. of Educ.,*
13 *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).
14 Accordingly, “where the effect of a vague statute would infringe upon a party’s First
15 Amendment rights, standing requirements to challenge the statute under the
16 Fourteenth Amendment Due Process Clause are broader than they otherwise might
17 be.” *Arce v. Douglas*, 793 F.3d 968, 987 (9th Cir. 2015) (citing *Hynes v. Mayor &*
18 *Council of Borough of Oradell*, 425 U.S. 610 (1976); *Maldonado v. Morales*, 556
19 F.3d 1037 (9th Cir. 2009)). Thus, where a statute interferes with a plaintiff’s First
20 Amendment right to receive information, plaintiff has standing to challenge the law.
21 *Id.* at 987-88. *See also: 44 Liquormart v. Rhode Island*, 517 U.S. 484, 512, 116 S.
22 Ct. 1495, 1512, 134 L.Ed.2d 711, 733 (1996) (“The text of the First Amendment
23 makes clear that the Constitution presumes that attempts to regulate speech are
24
25
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27
28

1 more dangerous than attempts to regulate conduct. That presumption accords with
2 the essential role that the free flow of information plays in a democratic society.”)

3
4 79.Challenges that involve First Amendment rights “present unique standing
5 considerations” because of the “chilling effect of sweeping restrictions” on speech.
6 *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir.
7 2003). When the challenged law “implicates First Amendment rights, the [standing]
8 inquiry tilts dramatically toward a finding of standing.” *LSO, Ltd. v. Stroh*, 205 F.3d
9 1146, 1155 (9th Cir. 2000).

10
11
12 80.Plaintiffs have the right to free speech, including the right to freely
13 communicate information to their patients even if the government does not agree
14 with the information conveyed.

15
16 81.Plaintiffs have the corollary right to share ideas and information within the
17 profession and with the public, including the right to engage in a genuine free
18 speech dialogue, even if the government does not agree with the information or
19 message conveyed in their messages.

20
21 82.The Statement invites arbitrary, subjective, content-based, and viewpoint
22 discriminatory enforcement. Accordingly, the constitutionality of the Statement
23 should be judged by strict scrutiny and is presumptively unconstitutional.

24
25 83.The Statement regulates viewpoint by prohibiting a particular type of speech:
26 COVID-19 misinformation/disinformation connected with the FSMB’s COVID-19
27 statement. In regulating speech, the government cannot selectively enforce or
28

1 discriminate against a particular viewpoint. *See, e.g., Iancu v. Brunetti*, 139 S. Ct.
2 2294, 2299 (2019) (where rule “is viewpoint-based, it is unconstitutional”);
3 *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018)
4 (“restrictions...based on viewpoint are prohibited”); *Matal v. Tam*, 137 S. Ct. 1744,
5 1763 (2017) (“viewpoint discrimination is forbidden”). “[V]iewpoint
6 discrimination is inherent in the design and structure of this Act. This Statement is
7 a paradigmatic example of the serious threat presented when government seeks to
8 impose its own message in the place of individual speech, thought, and expression.”
9 *Nat’l Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (“NIFLA,”
10 Kennedy, J, concurring).

14 84. There are many less restrictive measures the state could continue to
15 implement which would have a more direct impact supporting the public health
16 edicts, such as its public service announcements by academic physicians who
17 support the mainstream COVID-19 narrative, influential endorsements, and other
18 measures geared directly to influence the public. The existence of these less
19 restrictive measures eliminates a finding that the Statement is the least restrictive
20 means possible, and the WMC’s use of these tools demonstrates its past and current
21 deployment of these less restrictive means. The less restrictive measures are also
22 subject to public accountability in the free marketplace of ideas, where information
23 can be freely debated.

28 85. The Statement also fails to satisfy intermediate scrutiny, which requires that

1 Defendants prove to this Court that in formulating the Statement, the
2 Commissioners have “drawn reasonable inferences based on substantial evidence.”
3
4 *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 957 (9th Cir. 2016). Upon information
5 and belief, neither the Statement, nor its adopting history contains any evidence that
6 Washington physicians have caused any harm to their patients by virtue of what
7 they tell their patients about Covid-19 vaccines or treatments.
8

9 86. Upon information and belief, there is no actual evidence in Statement that
10 the alleged COVID-19 “misinformation” or “disinformation” has “erode[d] the
11 public trust in the medical profession and endanger[ed] patients” or caused or
12 contributed to any increase in COVID-19 infections, transmissions, hospitalizations
13 or COVID-19 related deaths. In fact, the Statement does not include supporting
14 information or documentation that could have been hyperlinked as was the “WMC
15 complaint forms” and the FSMB’s “COVID-19 vaccine misinformation” position
16 statement.
17
18
19

20 87. Each of the Plaintiffs’ declaration¹³ contains proof of contradictory public
21 health information by attaching factually accurate information about differing
22

23 ¹³ Plaintiff Eggleston notes the success of the in Brazil, Philippines, and India ECF
24 No. 1-8, ¶ 11. Plaintiff Wilkinson cites worldwide COVID-19 studies. ECF No. 1-
25 10., ¶ 32. Dr. Cole cites to early COVID-19 treatment articles found at: , which
26 discusses worldwide treatment of COVID-19. ECF No. 1-9, ¶ 14.
27
28

1 levels of success on the different health measures employed throughout the world
2 in addressing the COVID-19 pandemic, including not recommending vaccines for
3 certain population subsets. Each declaration also establishes that some of these
4 health measures have produced better public health metrics than what has been
5 achieved in the US.
6

7
8 88. Chilling speech due to the threat of sanction is a cognizable harm.
9 *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L.Ed.2d 22, 28
10 (1965)
11

12 89.42 U.S.C. §§ 1983, 1988 entitle Plaintiffs to declaratory relief, and
13 preliminary and permanent injunctive relief invalidating the Statement. Plaintiffs
14 have suffered irreparable harm having been subject to discipline and having been
15 discredited as “illegitimate science,” all of which has been publicly flaunted by the
16 Commission and is a chill on protected speech. Unless Defendants are enjoined
17 from continuing enforcement of the Statement, Plaintiffs will continue to suffer
18 irreparable harm.
19
20

21 90. Even if Plaintiffs are ultimately vindicated, the process is the punishment,
22 and highlights the chilling nature of the Statement, as evidenced by these Plaintiffs’
23 experience and that of other medical professionals (*See*: Cole’s loss of business
24 discussed in ECF No. 1-9, ¶¶ 12-13.). At a minimum, each Plaintiff’s First
25 Amendment rights of free speech has been violated, and “[t]he loss of First
26 Amendment freedoms, for even minimal periods of time, unquestionably
27
28

1 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct.
2 2673, 2690, 49 L.Ed.2d 547, 565-66 (1976). Additionally, Plaintiffs have been
3 placed in a position to align speech with the Statement or risk losing license, and
4 an unconstitutional speech restriction is not salvageable because enforcement
5 authorities say that it will be enforced only in a narrow or benign manner. *See, e.g.*,
6 *United States v. Wunsch*, 84 F.3d 1110, 1118 (9th Cir. 1996).

9 91.The Statement also infringes on the First Amendment rights of patients to
10 receive advice and counsel from the doctors they consult. The patients are entitled
11 to unfiltered consultations with their doctors, rather than a potentially narrow self-
12 censored message that hues closely to a preferred government narrative regarding
13 COVID-19.

14
15 92.No speech about other diseases, no matter how serious, is covered. And
16 speakers who parrot the contemporary “consensus” (i.e., those who speak
17 “information,” rather than “dis/misinformation”) may continue speaking without
18 risk of enforcement; only those who dissent are silenced. There can be no question
19 that “official suppression of ideas is afoot.” *R.A.V. v. City of St. Paul, Minn.*, 505
20 U.S. 377, 390 (1992).

21
22 93.The Statement imposes a government mandate to espouse only those ideas
23 that the State of Washington deems acceptable arising out of only government
24 sources. This “on its face burdens disfavored speech by disfavored speakers.”
25
26 *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011).
27
28

1 94. “If there is any fixed star in our constitutional constellation, it is that no
2 official, high or petty, can prescribe what shall be orthodox in politics, nationalism,
3 religion, or other matters of opinion or force citizens to confess by word or act their
4 faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

6 95. “If there is a bedrock principle underlying the First Amendment, it is that the
7 government may not prohibit the expression of an idea simply because society finds
8 the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414
9 (1989).

11 96. The Statement is not a traditional regulation of the conduct of medical
12 professionals, although it tries to disguise itself as a conduct regulation by
13 addressing an undefined, non-existent “standard of care” or through its multiple
14 uses of the word “legitimate.”

16 97. The Statement directly and specifically burdens speech and discriminates
17 against that speech based on both content and viewpoint.

18 98. The fact that some doctors’ views are at odds with the official views of
19 government health authorities does not undermine the right of doctors to express
20 them; instead “minority views are treated with the same respect as are majority
21 views.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235
22 (2000).

24 99. 42 U.S.C. § 1983 provides a cause of action against any person who, under
25 color of law of any state, subjects any person within the jurisdiction of the United
26 States to

1 States to a deprivation of any rights, privileges, or immunities secured by the
2 Constitution.

3
4 **COUNT II — THE POSITION STATEMENT IS VOID FOR VAGUENESS**
5 **AND VIOLATES PLAINTIFFS’ FIFTH AND FOURTEENTH**
6 **AMENDMENT DUE PROCESS RIGHTS**

7 **(Violation of the First, Fifth, and Fourteenth Amendments of the United**
8 **States Constitution)**

9 100. The allegations contained in paragraphs 1-99 are incorporated herein
10 by reference and are re-alleged as set forth in full.

11 101. The Fourteenth Amendment provides “. . . nor shall any State deprive
12 any person of life, liberty, or property, without due process of law.”

13 102. Due process requires that people of ordinary intelligence be able to
14 understand what conduct a given statute, rule or regulation prohibits.

15 103. The allegations contained in paragraphs 1-98 are incorporated herein
16 by reference and are re-alleged as set forth in full.

17 104. A statute is unconstitutionally vague when it either “fails to provide a
18 person of ordinary intelligence fair notice of what is prohibited or is so standardless
19 that it authorizes or encourages seriously discriminatory enforcement.” *United*
20 *States v. Williams*, 553 U.S. 285, 304 (2008); *see also Hill v. Colorado*, 530 U.S.
21 703, 732 (2000); *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022); *United*
22 *States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). As the Ninth Circuit recently
23 held: “The operative question under the fair notice theory is whether a reasonable
24 person would know what is prohibited by the law.” *Tingley*, at 1089.
25
26
27
28

1 105. “The terms of a law cannot require ‘wholly subjective judgments
2 without statutory definitions, narrowing context, or settled legal meanings.’” *Id.*
3 (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 19, 20 (2010)).
4

5 106. To comply with the Fifth Amendment Due Process clause applicable to
6 the states under the Fourteenth Amendment, state laws must be clear enough so that
7 a reasonable person can determine what the law allows and prohibits. Otherwise, the
8 law is struck down for vagueness. When a state law infringes the First Amendment
9 right of free speech, there is a “heightened specificity” requirement for the law to be
10 held constitutional.
11

12 107. Statutes, rules, or regulations that fail to provide this fair notice and
13 clear guidance are void for vagueness.
14

15 108. Statutes, rules, or regulations that authorize or even encourage arbitrary
16 or discriminatory enforcement are void for vagueness.
17

18 109. Statutes, rules, or regulations implicating and jeopardizing First
19 Amendment rights are required to be especially precise.
20

21 110. The Statement does not define the terms “disinformation,”
22 “misinformation,” “medical experts,” “legitimate medical research,” or “standard of
23 care” with any precision or specificity and therefore does not give licensed doctors
24 like the Plaintiffs clear and adequate notice of what will be considered a violation of
25 the Statute.
26

27 111. The Statement imposes an unconstitutionally vague restriction on the
28

FIRST AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF
AND VIOLATION OF CIVIL RIGHTS
UNDER 42 USC § 1983- 37

Silent Majority Foundation
5238 Outlet Dr.
Pasco, WA 99301

1 speech of doctors such as Plaintiffs.

2 112. Vague statutes are particularly objectionable when they “involve
3 sensitive areas of First Amendment freedoms” because “they operate to inhibit the
4 exercise of those freedoms.” *Cal. Tchrs. Ass’n v. State Bd. of Educ.*, 271 F.3d 1141,
5 1150 (9th Cir. 2001) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09
6 (1972)). When the challenged law implicates First Amendment rights, a facial
7 challenge based on vagueness is appropriate. *Cal. Tchrs. Ass’n*, at 1149; *see also*
8 *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

9 113. In reviewing a facial vagueness challenge, the court “consider[s]
10 whether a regulation is vague as applied to the particular facts at issue, for ‘[a]
11 plaintiff who engages in some conduct that is clearly proscribed cannot complain of
12 the vagueness of the law as applied to the conduct of others.’” *Holder*, at 18–19
13 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495
14 (1982)).

15 114. The use of poorly defined, subjective terms is particularly objectionable
16 here because each term serves to define prohibited conduct, rather than merely
17 explain the context in which the prohibition applies. *See Gammoh v. City of La*
18 *Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005), amended on denial of reh’g, 402 F.3d
19 875 (9th Cir. 2005). The terms “misinformation,” “disinformation,” “standard of
20 care,” “medical experts,” “federal authorities,” and “legitimate medical research”
21 lack sufficient “statutory definitions, narrowing context, or settled legal meanings,”
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1 *Tingley*, 47 F.4th at 1089, and fail to provide sufficiently objective standards to
2 “focus the statute’s reach,” rendering each term unconstitutionally vague.

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4 115. 42 U.S.C. §§ 1983 and 1988 entitle Plaintiffs to declaratory relief and
5 preliminary and permanent injunctive relief invalidating and damages for the
6 infringement on their constitutional rights. Unless Defendants are enjoined from
7 enforcing the Statement, Plaintiffs will continue to suffer additional irreparable
8 harm.
9

10 **COUNT III—VIOLATION OF DUE PROCESS CLAUSE OF THE FIFTH**
11 **AND FOUREENTH AMENDMENTS OF THE UNITED STATES**
12 **CONSTITUTION**

13 **(Violation of Patient Fundamental Rights to Informed Consent and Personal**
14 **Bodily Integrity Include the Right to Off-Label Treatment for COVID-19; 42**
15 **United States Code § 1983)**

16 116. The allegations contained in paragraphs 1-115 are incorporated herein
17 by reference and are re-alleged as set forth in full.

18 117. In *Washington v. Glucksberg*, the United States Supreme Court
19 affirmed that the Due Process Clause of the United States Constitution protects
20 bodily integrity, as follows: “We have also assumed, and strongly suggested, that
21 the Due Process Clause protects the traditional right to refuse unwanted lifesaving
22 medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258,
23 2267-68, 117 S. Ct. 2302, 2267-68 (1997) citing *Cruzan v. Dir., Mo. Dep’t of Health*,
24 497 U.S. 261, 278-279 (1990). But we “have always been reluctant to expand the
25 concept of substantive due process because guideposts for responsible decision
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1 making in this unchartered area are scarce and open-ended.” *Collins*, 503 U.S. 115,
2 125 (1992). “By extending constitutional protection to an asserted right or liberty
3 interest, we, to a great extent, place the matter outside the arena of public debate and
4 legislative action. The Due Process Clause guarantees more than fair process, and
5 the “liberty” it protects includes more than the absence of physical restraint.
6 *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267, 117 S. Ct.
7 2302, 2267 (1997) *citing Collins v. Harker Heights*, 503 U.S. 115, 125
8 (1992) Importantly, this extension has included the protection of one’s “bodily
9 integrity.” *Id.*, *citing Rochin v. California*, 342 U.S. 165 (1952).

13 118. A fundamental right must be either enumerated in the Bill of Rights or
14 “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept
15 of ordered liberty, such that neither liberty nor justice would exist if they were
16 sacrificed.” *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 U.S. App.
17 LEXIS 32406, at *3 (9th Cir. Nov. 23, 2022) *citing Washington v. Glucksberg*, 521
18 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772
19 (1997) (cleaned up).

22 119. A court will apply strict scrutiny when the challenged government
23 action infringes on a fundamental right. *Id.*; *Citing Reno v. Flores*, 507 U.S. 292,
24 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

26 120. Based on the right to privacy adopted by the United States Supreme
27 Court, Plaintiffs seek a declaratory judgment that patients have a privacy right to
28

1 obtain adequate information to reach the threshold of informed consent, including
 2 discussion of available off-label drugs. Beyond the illegal nature of prohibiting
 3 viewpoint speech, the Commission cannot investigate or sanction a physician solely
 4 for writing prescriptions for the off-label use of medications for COVID-19.
 5

6 121. “[T]he federal government has recognized that doctors may use
 7 medical devices for **off-label** purposes as long as it is medically necessary and
 8 reasonable.” *The Dan Abrams Co. LLC v. Medtronic Inc.*, 850 F. App’x 508, 509
 9 (9th Cir. 2021). *citing Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 350,
 10 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) (“[O]ff label’ usage of medical devices .
 11 . . . is an accepted and necessary corollary of the FDA’s mission to regulate in this
 12 area without directly interfering with the practice of medicine.”); U.S. Dep’t of
 13 Health & Hum. Serv. (HHS), *Medicare Benefit Policy Manual*, ch. 14 § 10, available
 14 at [https://www.cms.gov/Regulations-and-](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c14.pdf)
 15 [Guidance/Guidance/Manuals/Downloads/bp102c14.pdf](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c14.pdf) (noting that Medicare
 16 reimburses for “[d]evices cleared by the FDA through the 510(k) process”—not
 17 cleared *uses* of a device) (emphasis added). The FDA also allows off-label uses for
 18 drugs and biologics in addition to medical devices. *See:*
 19 [https://www.fda.gov/regulatory-information/search-fda-guidance-documents/label-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/label-and-investigational-use-marketed-drugs-biologics-and-medical-devices)
 20 [and-investigational-use-marketed-drugs-biologics-and-medical-devices.](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/label-and-investigational-use-marketed-drugs-biologics-and-medical-devices)
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26 122. The FDCA expressly protects **off-label** use: “Nothing in this chapter
 27 shall be construed to limit or interfere with the authority of a health care practitioner
 28

1 to prescribe or administer any legally marketed device to a patient for any condition
2 or disease within a legitimate health care practitioner-patient relationship.” 21
3 U.S.C. § 396. In addition, the Supreme Court has emphasized that **off-label** use by
4 medical professionals is not merely legitimate but important in the practice of
5 medicine. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 350, 121 S. Ct.
6 1012, 148 L. Ed. 2d 854 (2001). *Carson v. Depuy Spine, Inc.*, 365 F. App’x 812, 815
7 (9th Cir. 2010).
8

9
10 123. Further, courts have acknowledged that the FDA is not a “peer review
11 mechanism for the scientific community” and that discussion of off label use is not
12 inherently misleading. *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 67
13 (D.D.C. 1998).
14

15
16 124. Upon information and belief, prescribing Ivermectin and HCQ are “not
17 approved” by the FDA for treatment and prevention of Covid-19; however, the FDA
18 has not addressed off-label use of either drug for the treatment of COVID-19, and
19 FDA legal representatives confirmed that the FDA’s position did not constitute
20 binding, final rulemaking. *See*: Introduction, *supra*. The FDA has not taken a
21 position on off-label use notwithstanding the fact that dozens of studies worldwide
22 have demonstrated that these drugs are beneficial for the treatment of Covid-19.
23
24

25 125. Washington’s standard of care on the treatment of COVID-19 outside
26 of the “reasonably prudent” standard discussed, *supra*, then the Commission adopted
27 a standard through the Statement. Moreover, the standard of care adopted through
28

1 the Statement defers to the FDA, which allows for off-label use of devices and drugs.
2 As the Statement cherry-picks its allegiance to *portions* of the FDA’s rules and
3 regulations to support its conclusion, the WMC, through the Statement, has violated
4 patient rights to informed consent, which could offer alternative treatment with
5 medicines, including Ivermectin that offered potentially effective off-label uses.
6
7 Nonetheless, Plaintiffs were barred from (1) discussing; and (2) treating patients
8 with off-label medicines that would have otherwise been allowed under current FDA
9 regulations.
10

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12 126. In Washington, the doctrine of informed consent requires a physician,
13 prior to providing treatment, to “inform the patient of the treatment's attendant risks.
14 The doctrine is premised on the fundamental principle that “[e]very human being
15 of adult years and sound mind has a right to determine what shall be done with his
16 own body’.” *Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351, 354 (1983). *citing*
17 *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92 (1914)
18 (Cardozo, J.), *overruled on other grounds*, *Bing v. Thunig*, 2 N.Y.2d 656, 667, 143
19 N.E.2d 3, 163 N.Y.S.2d 3 (1957). Importantly, “[a] necessary corollary to this
20 principle is that the individual be given sufficient information to make
21 an *intelligent* decision.” *Id. citing Canterbury v. Spence*, 464 F.2d 772, 783 (D.C.
22 Cir. 1972).
23

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1 that require the party to defend against the State’s prosecution, which “will not
2 assure adequate vindication of constitutional rights [] suggest that a substantial loss
3 or impairment of freedoms of expression will occur if appellants must await the state
4 court’s disposition and ultimate review in this Court of any adverse determination.
5 These allegations, if true, clearly show irreparable injury.” *Id.*, at 485-86.
6

7
8 133. There is a “second type of facial challenge in the First Amendment
9 context under which a law may be overturned as impermissibly overbroad because
10 a ‘substantial number’ of its applications are unconstitutional, “‘judged in relation
11 to the statute’s plainly legitimate sweep.’” *Wash. State Grange v. Wash. State
12 Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190, 170 L.Ed.2d 151,
13 160 (2008) *citing New York v. Ferber*, 458 U.S. 747, 769-771, 102 S. Ct. 3348, 73
14 L. Ed. 2d 1113 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.
15 Ct. 2908, 37 L. Ed. 2d 830 (1973)).
16
17

18 134. The Statement, through its use of overly broad terms such as “medical
19 experts,” “federal authorities,” and “legitimate medical research,” is facially over
20 broad and as applied to Plaintiffs. Moreover, these terms chill the speech of a
21 “substantial number” of other Washington licensed medical professionals far
22 exceeding its “plainly legitimate sweep.”
23
24

25 **VI. CONCLUSION AND RELIEF SOUGHT**

26
27 WHEREFORE, Plaintiffs request that judgment be entered in their favor and
28

1 against the Defendants as set forth in this Complaint and specifically that the Court:

2 A. Declare that the Statement violates Plaintiffs' rights under the First
3 Amendment of the United States Constitution because it discriminates based on
4 viewpoint;
5

6 B. Declare that the Statement violates rights to due process of law under the
7 Fourteenth Amendment to the United States Constitution due to its vagueness;
8

9 C. Declare that the Statement violates patient fundamental right to informed
10 consent by limiting provider speech and prescribing authority;
11

12 D. Declare the Statement violates the First Amendment of the United States
13 Constitution due to its overbreadth;

14 E. Issue Attorney's fees, costs, and expenses pursuant to 42 U.S.C. §§ 1983 and
15 1988; and
16

17 F. Any other legal or equitable relief to which Plaintiffs may be entitled.
18

19 **DATED** this 31st day of March, 2023.

20 **SILENT MAJORITY FOUNDATION**

21 /s/ Simon Peter Serrano

22 Simon Peter Serrano, WSBA No. 54769

23 Karen L. Osborne, WSBA No. 51433

24 Austin F. Hatcher, WSBA No. 57449

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FIRST AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF
AND VIOLATION OF CIVIL RIGHTS
UNDER 42 USC § 1983- 46

Silent Majority Foundation 5238 Outlet Dr. Pasco, WA 99301
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2023, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 31st day of March, 2023.

/s/Madeline Johnson
Madeline Johnson