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The Honorable Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

RICHARD S. WILKINSON, et al., Plaintiffs, v. SCOTT RODGERS, et al., Defendants.	NO.: 1:23-cv-03035-TOR PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS Hearing Date: July 7, 2023 Without Oral Arguments

I. INTRODUCTION

This case rests on two fundamental issues disputed in Defendants' Motion to Dismiss. These issues are: (1) whether individual medical providers receive protection to speak/not speak under the First Amendment; and (2) whether the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971) applies to this matter, requiring this Court to deny hearing the case at this time. The answers to these questions are: (1) providers are afforded broad protection under the First Amendment; and (2) *Younger* is only applicable when all four elements of the *Younger* test are met, which is not the case here. Because all four of the *Younger*

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elements are not present, *Younger* does not apply, and Plaintiffs' challenged speech is protected. This Court should not dismiss the case.

The first point is supported by a recent Ninth Circuit case, *Tingley v. Ferguson*, where the Court held that the "regulation of the medical profession is not a First-Amendment-free zone; the First Amendment's protections continue to apply even when a state legislature exercises its traditional police power." *Tingley v. Ferguson*, 57 F.4th 1072, 1073 (9th Cir. 2023). The second point was well articulated by the Ninth Circuit in *AmerisourceBergen Corp. v. Roden*.

> The goal of *Younger* abstention is to avoid federal court interference with *uniquely* state interests such as preservation of these states' peculiar statutes, schemes, and procedures. Roden cites no case, nor could he, holding that federal courts should abstain in favor of state courts when a *universal* judicial interest--such as the prompt resolution of cases--is at stake. Because neither California's interest in enforcement of a single state court judgment nor its interest in judicial efficiency is sufficiently important to satisfy *Younger*'s second threshold element, the district court erred when it found this element satisfied.

AmerisourceBergen Corp. v. Roden, 495 F.3d 1143, 1150 (9th Cir. 2007)

Like *Roden*, this case presents challenges of "universal judicial interest" as it raises questions of whether a certain type (viewpoint) of speech can be regulated by the Washington Medical Commission ("Commission") through its broadly, and vaguely, worded COVID-19 Misinformation Position Statement ("Statement"). There is no dispute that the State has interest in its regulation of the medical community; however, the State claims that it is not enforcing the Statement. Regardless of enforcement status, the Statement clearly inhibits speech of all physicians licensed or practicing in Washington, regardless of their residency (*e.g.*,

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Cole's domicile in Idaho). Thus, the universal interest of free speech remains the central issue at hand, and *Younger* does not apply.

Plaintiffs sought, and continue to seek, protection through this Court as the State of Washington does not allow for adjudication of constitutional rights or declaratory action on such rights through administrative proceedings. *See:* Washington Annotated Code ("WAC") § 246-11-480(3)(c), (4). There is no dispute that Plaintiffs can seek judicial review of constitutional issue on appeal, but such a process requires Plaintiffs to risk losing their medical licenses, a significant property interest, at the administrative level, prior to the appeal. *See: Delashaw v. Roberts*, No. C18-1850JLR, 2020 U.S. Dist. LEXIS 141871, at *25 (W.D. Wash. Aug. 7, 2020) *Citing: Mishler v. Nevada State Bd. Of Medical Examiners*, 896 F.2d 408, 409 (9th Cir. 1990) and *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777 (9th Cir. 1982).

The risk of each Plaintiffs' property right is compounded by the fact that each Plaintiff has suffered, and will continue to suffer, irreparable harm through the chilling of his speech throughout the administrative proceedings and appeals process. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547, 565 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Thus, the expediency of the matter before this court is paramount and the third prong of the *Younger* abstention doctrine fails (i.e., that Plaintiffs may raise the federal constitutional concerns during the state proceeding; ECF No. 15 at 7.). *See: Younger v. Harris*, 401 U.S. 37 (1971).

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Defendants' claims for absolute and/or qualified immunity are inaccurate as violating an individual's First Amendment rights bars claims for absolute immunity. *See: Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396, 411 (1982) ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.") The *Harlow* test is to be applied using "objective factors." *Id.* A common application of the *Harlow* test is the following two-pronged analysis: "(1) whether a protected right was violated, and (2) whether that right was clearly established at the time of the violation." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776 (9th Cir. 2022) *Citing: Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). One need not look far to understand that the free speech is well-protected by the First Amendment of the United States Constitution.

Finally, while absolute immunity may apply in challenges to quasi-judicial actions, as the court previously held, Plaintiffs challenge rulemaking, a discretionary act by the Commission to which immunity does not apply in a whole-cloth manner. *Wilkinson v. Rodgers*, No. 1:23-CV-3035-TOR, 2023 U.S. Dist. LEXIS 45525, at *9 (E.D. Wash. Mar. 17, 2023). *Citing: Delashaw* and RCW 18.71.015, RCW 18.130.300 for the premise that "the named individuals are likely protected by immunity…because they acted in a quasi-prosecutorial role..." Thus, Plaintiffs' challenges remain viable, and Defendants' immunity claims fail.

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II. ARGUMENT

Plaintiffs' complaint provides facts, details, and legal bases -- cognizable claims -- against the Defendants for the infringement of their civil rights. Thus, dismissal is improper, and this matter should proceed to discovery and an eventual trial on the merits, inclusive of the question of proper allotment of damages for these violations.

A. The Statement **is** the impetus for complaints lodged against Plaintiffs.

Defendants claim that "[n]one of the Plaintiffs have been charged with violating the Position Statement." ECF No. 15 at 3. While technically accurate, the Statement is clearly the foundation of **each** Plaintiffs' charges, and this was clearly articulated in the First Amended Complaint (ECF No. 14). For example, Plaintiff Wilkinson was cited for his "public false and misleading statements regarding the COVID-19 pandemic, COVID-19 vaccines, and public health officials" (ECF No. 15 at 11); Plaintiff Cole was cited for his "numerous false and misleading statements during public presentations regarding the coronavirus disease 2019 (COVID-19) pandemic, COVID-19 vaccines, the use of ivermectin to treat COVID-19, and the effectiveness of masks that were harmful and dangerous to individual patient" (*Id.*, at 13); and Plaintiff Eggleston, is a non-practicing licensed MD who was solely cited for his speech, specifically, his "promulgat[ion] [of] misinformation regarding the

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SARS-CoV-2 virus and treatments for the virus." *Id.*, at 16.[1] Moreover, the Statement, on its face is clear: violators "are potentially subject to disciplinary action" as are their licenses ("may be subjecting their license to disciplinary action."). ECF No. 15 at 23. Thus, though the Uniform Disciplinary Act is the mechanism used to prosecute the Doctors, the Statement was the justification and impetus for that prosecution, as the facts attest. As Plaintiffs have plead, the Commission adopted the Statement *as* a Standard of Care, creating an enforceable tool. *See:* ECF No. 14 at 21-26. As a Standard of Care, the Statement is being enforced through the Uniform Disciplinary Act.

B. *Younger* Does Not Apply as only three of four prongs are met.

Fifty years ago, the District Court of Alaska addressed the need for immediate irreparable harm or exceptional circumstances, (i.e., that the challenged rule/regulation is "flagrantly and patently unconstitutional") to overcome *Younger* abstention where the doctrine applies. *Powell v. Flanigan*, 350 F. Supp. 125, 126 (D.

[1] It must be noted that Plaintiff Eggleston's Administrative Hearing is presently Enjoined pending review by Division III of the Washington Court of Appeals. Eggleston filed for a Preliminary Injunction before the Asotin County Superior Court, which was denied on May 17, 2023. Eggleston appealed the decision, and the Court's Commission stayed the case on May 23, 2023. *See:* Declaration of S. Peter Serrano, Exhibit A.

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Alaska 1972). Such a conclusion is supported by United States Supreme Court precedence, which provides that a "district court could intervene to halt state proceedings upon a finding that the action in the state court is brought in bad faith or for harassment purposes, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it…'" *Watson v. Buck*, 313 U.S. 387, 402, 61 S. Ct. 962, 967, 85 L. Ed. 1416 (1941), quoted with approval in *Juidice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211, 51 L. Ed. 2d 376; *Huffman v. Pursue, Ltd*., 420 U.S. at 611, 95 S. Ct. 1200, 43 L. Ed. 2d 482; *Younger v. Harris*, 401 U.S. at 53-54, 91 S. Ct. 746, 27 L. Ed. 2d 669. *Williams v. Washington*, 554 F.2d 369, 370-71 (9th Cir. 1977). Thus, abstention is inappropriate where a challenged statute/ rule flagrantly violates individual rights. Here, the challenged Statement is: vague, ambiguous, and targets a specific type of speech, the undefined COVID-19 "misinformation." ECF 14 at 4 and Count II (pg. 36). The Statement flagrantly violates the regulated community's First Amendment rights by prohibiting a *type* of speech with the threat of removing the individual's medical license, which is a protected property interest. With its broad, sweeping application and its threat of enforcement, the Statement violates express constitutional prohibitions leaving *Younger* inapplicable.

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a. <u>The third *Younger* element is Not met.</u>

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The third *Younger* prong test cannot be met here; the four elements were listed in Defendants' Motion to Dismiss. ECF No. 15 at 5. *Younger* applies only when all four elements are met: "when each of an abstention doctrine's requirements are not strictly met, the doctrine should not be applied." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007); *Citing: Middlesex County Ethics Comm. V. Garden State Bar Ass'n*, 457 U.S. 423, 431-34, 437, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) (abstaining only after determining that each element of *Younger* doctrine was satisfied); *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 372-73 (1989) (not abstaining when one element of *Younger* doctrine was not satisfied).

Additionally, *Younger* abstention has a limited application. The Ninth Circuit recently clarified this point in *Duke v. Gastelo*, 64 F.4th 1088 (9th Cir. 2023), where it held that the third prong of *Younger* was not met where federal constitutional challenges could not be raised in a state proceeding. *Id.* at 1094. In this case, WAC 246-11-480 bars Plaintiffs from challenging the constitutionality of the Statement during the administrative hearing. *See: Supra*, Section I.

In *Duke*, the Court stated that "*Younger* is not focused on the number of opportunities a state provides for challenging constitutional errors" so long as the challenger was offered an opportunity to raise the issue in the appellate process of such hearings. *Id.* at 1095-97. The Court's decision was made in reliance on *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* for the premise that

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abstention is appropriate where federal constitutional matters cannot be raised at the administrative level as long as "the plaintiff retained the ability to raise constitutional challenges in the state court's process for reviewing the commission's decision." *Id.* While Plaintiffs can assert constitutional defenses at the appellate level, the distinguishable element, here, is that Plaintiffs **must** risk a protected property right in addition to suffering continued violations of their First Amendment rights prior to asserting the constitutional defense.

Notably, in *Duke*, the Court held that *Younger* abstention did not apply as a "new judgment… would not offer a remedy adequate to encompass the aim of Duke's federal habeas petition, nor would it satisfy the third part of the Younger test because Duke has no prospect of presenting his constitutional challenges in the ongoing § 1172.6 proceeding." *Id.*, 1098. Like *Duke*, *Younger* abstention is not warranted because Plaintiffs cannot advance constitutional protections of their medical licenses during the present hearing, are limited to await further judicial review to assert such defenses and lack an "'adequate opportunity'" to raise such issues. *Id.* Plaintiffs *must* be afforded an appropriate opportunity to cease the State's efforts to terminate their licenses without awaiting further appeal to appease the third *Younger* element.

b. The irreparable harm exception to *Younger* applies as enforcement of the Statement chills speech and implicates Plaintiffs' property interests in their medical licenses.

"The *Younger* abstention doctrine also does not apply because this case fits squarely within the irreparable harm exception." *Arevalo v. Hennessy*, 882 F.3d 763,

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766 (9th Cir. 2018). *Citing: World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir. 1987) (holding that an exception to abstention applies "under extraordinary circumstances where the danger of irreparable loss is both great and immediate"). Here, "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). *See also: Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547, 565 (1976). The irreparable harm exception has been applied by the Ninth Circuit when "full vindication of the right necessarily requires intervention before trial." *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992). *See also: Arevalo v. Hennessy*, 882 F.3d 763, 766-67 (9th Cir. 2018) noting that irreparable harm, exempting the case from *Younger* abstention due to the lack of meeting the third prong, occurred when an individual "was incarcerated for over six months without a constitutionally adequate bail hearing." *Id.*

Here, Plaintiffs must first risk a protected property right (their medical licenses) at the administrative level prior to having the ability to assert constitutional defenses. That should not be lost on the court—Plaintiffs must *first* risk loss of a license to obtain relief. Further, the Position Statement facially threatens physicians with a loss of license, and plaintiffs have experienced the seriousness of that threat based on their speech. Thus, Plaintiffs have suffered irreparable injury to their First

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Amendment Rights. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547, 565 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

c. Abstention is not always required to avoid duplicative litigation, especially when the federal relief is declaratory relief.

The Ninth Circuit in *AmerisourceBergen Corp.* held that, while the overarching goal of *Younger* abstention is to "avoid concurrent, duplicative litigation," such litigation "is available in some very limited circumstances--in particular, when the requested relief in federal court is a declaratory judgment." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1151-52 (9th Cir. 2007). *Citing: Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995). The Court held that while abstention is the general rule in such a case, "Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res [judicata and collateral estoppel] by the court in which the action is still pending in the orderly exercise of its jurisdiction…" *AmerisourceBergen Corp.*, at 1151-52. Thus, abstention is not a requirement, but a discretionary exercise of the Court.

d. When damages are at issue, as they are here, stay, not dismissal, is appropriate if warranted.

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Whether stay or dismissal is appropriate when damages are sought under in a 42 USC § 1983 action was addressed by the Ninth Circuit in *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004). In *Gilbertson*, at issue was the non-renewal of an Oregon surveyor's license, which he claimed was not renewed due to his criticism of the Board; the Plaintiff sought relief under the First Amendment of the United States Constitution and damages pursuant to 42 USC § 1983. *Id.*, at 983. The Circuit court held that "federal courts should not dismiss actions where damages are at issue; rather, damages actions should be stayed until the state proceedings are completed." *Id.* at 969. In remanding to the district court, the Circuit Court held that, "when damages are at issue rather than discretionary relief, deference -- rather than dismissal -- is the proper restraint. To stay instead of to dismiss the federal action preserves the state's interests in its own procedures, the federal plaintiff's opportunity to seek compensation in the forum of his choice, and an appropriate balance of federal-state jurisdiction." *Id.*, at 984.

Gilbertson is factually and legally similar to this matter as Plaintiffs assert protections under the First Amendment and seek damages under 42 USC § 1983. *Gilbertson* raised these same issues before the federal court, rather than the State court, and the Ninth Circuit concluded that Gilbertson's "failure to avail himself of the opportunity does not mean that the state procedures are inadequate. [] They clearly are adequate for the purpose of raising constitutional issues, but not for the purpose of seeking monetary relief because it could not be awarded in the ongoing

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proceeding." *Id.*, at 983. (citations omitted.) Gilbertson alleged that the Board singled him out by applying the regulation exclusively to him. Plaintiffs similarly claim that they have been made targets of the WMC by its enforcement. Finally, *Gilbertson* relied on *Huffman w. Pursue, Ltd.*, for the premise that "where the challenged statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.* Plaintiffs raise similar claims; thus, dismissal is improper and this matter should proceed to discovery, but if this Court disagrees, stay, not dismissal, is appropriate at this juncture.

C. No important state interest is implicated here as the State claims it is not enforcing the Statement; *Younger* does not apply.

One exception to *Younger* abstention occurs when the applicable inherent state function (*e.g.,* executive, legislative, or judicial) is not present. This exception was articulated by the Ninth Circuit in *Potrero Hills Landfill, Inc. v. Cty. of Solano*, in which the Ninth Circuit held that the important state interests are implicated under *Younger* only occur when one of the three inherent functions of the state (*e.g.,* executive, legislative, or judicial) "'vital to the operation of state government'" is implicated. In reviewing these three elements, the question is whether the State is seeking to enforce a law; here, the issue is whether the State is seeking enforcement of the Statement. As the Court in *Potrero Hills Landfill* held, "Rather, the content of state laws becomes 'important' for *Younger* purposes only when coupled with the

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state executive's interest in enforcing such laws." *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 884-85 (9th Cir. 2011).

While Plaintiffs have challenged the enforcement of the Statement, Defendants and this Court have clearly disclaimed that such enforcement is ongoing. Defendants, in their Motion to Dismiss, declared "None of the Plaintiffs have been charged with violating the Position Statement." ECF No. 15 at 3. This Court similarly declared that "The Position Statement does not contain any enforcement mechanisms, nor does it describe any policies or implementation procedures regarding a law or regulation. Therefore, any claims purportedly arising under the Position Statement are not cognizable." ECF No. 12 at 5. While Plaintiffs disagree with these statements (*See: Supra*, Section I) and have challenged the Statement and have alleged its enforcement (ECF No. 14 at pgs. 2- 4; ¶¶ 22, 74, 82, 83, and 89), if Defendants and the Court have accurately articulated the non-enforcement status of the Statement, non-enforcement is a clear exception to the *Younger* abstention doctrine, leaving the matter ripe for this Court as a facial challenge to the Statement and leaving damages questions viable. Under these facts, with Defendants' and the Court's statements on the non-enforcement of the Statement, the present challenge does not implicate state vital functions; the Court need not abstain, and it can render an opinion on the constitutionality of the Statement.

D. Neither absolute nor qualified immunity applies as this matter involves the infringement of Constitutionally protected Rights.

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No immunity, neither qualified nor absolute, is appropriate where the individual asserts the immunity to protect actions that clearly violate constitutional rights. While RCW 18.71.015 provides that members of the Commission are entitled to immunity "based on its disciplinary proceedings or other acts performed in good faith as members of the commission," this is no savings grace that offers absolute immunity for several reasons.

First, this is not a challenge to a disciplinary act and would need to qualify under the "other acts" As Plaintiffs seek *declaratory* and injunctive relief and have asked this court to declare the underlying action, the adoption of the Statement, unconstitutional and invalid. ECF No. 14 at 46.

Second, the Western District of Washington, in a medical licensing case, recently (2020) held that "Absolute immunity's protections depend solely on 'the specific function performed, and not the role or title of the official.'" *Delashaw v. Roberts*, No. C18-1850JLR, 2020 U.S. Dist. LEXIS 141871, at *16-17 (W.D. Wash. Aug. 7, 2020). *Citing: Miller v. Gammie,* 335 F.3d 889, 897 (9th Cir. 2003). Those specific functions include judicial and quasi-prosecutorial actions taken by an official. *Id.* Once the claim is alleged against a public official, the official "'bear[s] the burden to show that their respective common-law functional counterparts were absolutely immune.'" *Id.*

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Third, "absolute immunity is not available for an official's 'investigatory conduct, discretionary decisions, or recommendations.'" *Id. Citing: Tamas v. Dep't of Soc. & Health Servs., State of Wash.*, 630 F.3d 833, 842 (9th Cir. 2010).

Here, absolute immunity does not apply as Plaintiffs challenge the adoption of a Statement, which is a discretionary act and is not a quasi-judicial or quasi-prosecutorial action. Plaintiffs are seeking this Court to declare the Statement unconstitutional on several fronts. While Plaintiffs also seek damages for the enforcement and the impacts (i.e., deprivation of First Amendment rights) of the Statement, the threshold issue is the Statement's constitutionality.

"Qualified immunity applies only when 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Settlemeyer v. Ditsch*, No. CV-20-00221-TUC-CKJ, 2021 U.S. Dist. LEXIS 85443, at *20-21 (D. Ariz. May 4, 2021). *Quoting: Capp v. San Diego,* 940 F.3d 1046, 1053 (9th Cir., 2019). To be "clearly established[] existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (citation omitted). *See also: Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 783 (9th Cir. 2022). Moreover, that "clearly established law must be 'particularized' to the facts of the case." *White*, at 552, (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Here, the challenged Statement violates the First

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Amendment, and, as a foundational law of this country, First Amendment protections are well-established, leaving the proper inquiry for this court of whether the right claimed to be violated was "so 'clearly established' that 'a reasonable officer would have known that his conduct violated that right?'" *Saved Magazine v. Spokane Police Dep't*, 19 F.4th 1193, 1199 (9th Cir. 2021). *Citing: Romero v. Kitsap County*, 931 F.2d 624, 628 (9th Cir. 1991).

Here, Defendants adopted a statement that barred physicians from speaking about COVID-19 unless that speech was sanctioned by the Commission as any other speech was deemed "misinformation" or "disinformation" and was subject to disciplinary action. To achieve this chilling effect, Commission employed the following *authoritative* words "standard of care," "legitimate medical research," "misinformation," and "disinformation;" yet the Commission never defined these terms and simply noted that certain COVID-19 treatments were approved by the "U.S. Food and Drug Administration." ECF No. 14 at 22-25. These words were deployed without definition or "precision or specificity." *Id.*, at 37. Nonetheless, the Commission wielded these words under the threat of disciplinary action against any provider willing to utter such words while feigning that the "approved" FDA treatments were "standard of care." *Id.*, at 7, 22, and 24.

"The First Amendment's protections continue to apply even when a state legislature exercises its traditional police power." *Tingley v. Ferguson*, 57 F.4th

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1072, 1073 (9th Cir. 2023). That's not a new or novel concept. A statute is unconstitutionally vague when it either "fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Tingley*, at 1089 (9th Cir. 2022); U*nited States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). Thus, the controlling question is whether, "under the fair notice theory is whether a reasonable person would know what is prohibited by the law." *Tingley*, at 1089. Likewise, free speech is heavily protected in the health care setting: "In the marketplace of ideas, few questions are more deserving of free-speech protection than whether regulations affecting health and welfare are sound public policy." *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002). The Supreme Court has "stressed the danger of content-based regulations in the fields of medicine and public health, where information can save lives." *Nat'l Inst. of Family & Life Advocates ("NIFLA") v. Becerra*, 138 S. Ct. 2361, 2374 (2018). ECF No. 14 at 28, 36.

First Amendment protections are clear: they are afforded to the medical professional to allow him/her to adequately serve the client as such "information can save lives." *NIFLA*, at 2374. The Commission flagrantly violated these protections through the adoption and the enforcement of the Statement removing any claim to absolute or qualified immunity. Through Plaintiffs' pleading of violations of their

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First Amendment protected speech based on "clearly established" law, Plaintiffs have demonstrated that "Defendants are not entitled to qualified immunity." *Settlemeyer*, at *21.

Under the present circumstances, where Defendants undertook a discretionary act that was neither quasi-judicial nor quasi-prosecutorial, but was a purely discretionary legislative role, absolute immunity does not apply. As the Statement clearly violated First Amendment rights, qualified immunity does not protect the Commissioners. Thus, no immunity is available to individually named Defendants.

III. CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, this Court should deny Defendants' Motion to Dismiss with prejudice and should deny the same without prejudice and should allow this matter to proceed, allowing for discovery and a trial on the merits.

DATED this 6th day of June 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 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 6th day of June 2023.

/s/Simon Peter Serrano
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