No. 25-606

IN THE
Supreme Court of the United States

JOHN STOCKTON, *et al.*,

Petitioners,

v.

NICK BROWN, in His Official Capacity as Attorney General of the State of Washington, *et al.*,

*Respondent*s.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of America's Future, Association of American Physicians and Surgeons, and Conservative Legal Defense and Education Fund in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Amici America's Future and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Amicus Association of American Physicians and Surgeons ("AAPS") is a national association of physicians, founded in 1943. AAPS is dedicated to protecting the patient-physician relationship and defending ethical medical freedom, and has been a litigant in this Court and in other appellate courts. *See, e.g., Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975); *Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547 (5th Cir. 2010); *Ass'n of Am. Physicians & Surgs. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

Some of these *amici* (and CLDEF's Center for Medical Freedom) have filed *amicus* briefs in several

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

other cases involving arbitrary state suppression of medical and health-related speech.

- *Storman's Inc. v. Wiesman,* U.S. Supreme Court, No. 15-862, Brief *Amicus Curiae* of PAUS, *et al.* (Feb. 5, 2016) (Petition);
- *Welch v. Brown*, U.S. Supreme Court, No. 16-845, Brief *Amicus Curiae* of AFTAH, *et al.* (Mar. 2, 2017) (Petition);
- *Nat'l Inst. of Family & Life Advocates v. Becerra*, U.S. Supreme Court, No. 16-1140, Brief *Amicus Curiae* of USJF, *et al.* (Apr. 20, 2017) (Petition) and Brief *Amicus Curiae* of CLDEF, *et al.* (Jan. 16, 2018) (Merits);
- *Tingley v. Ferguson*, U.S. Supreme Court, No. 22-942, Brief *Amicus Curiae* of America's Future, *et al.* (Apr. 27, 2023) (Petition);
- *NIFLA v. James,* U.S. Court of Appeals for the Second Circuit, No. 24-2481, Brief *Amicus Curiae* of America's Future, *et al.* (Mar. 24, 2024); and
- *Chiles v. Salazar*, U.S. Supreme Court, No. 24-539, Brief *Amicus Curiae* of America's Future, *et al.* (June 13, 2024) (Merits).

STATEMENT OF THE CASE

This case involves a facial and as-applied challenge to Rev. Code Wash. § 18.130.180 subsections (1) and (13), the state's "unprofessional conduct" rule for physicians. *Stockton v. Ferguson*, 2024 U.S. Dist. LEXIS 92004 at *2-3 (E.D. Wash. 2024) ("*Stockton I*"). The challenged subsections relate to allegedly "dishonest" conduct by members of the medical profession. Under these provisions, the Commission

investigates complaints "alleging 'moral turpitude, dishonesty, or corruption relating to the practice of' medicine, and '[m]isrepresentation or fraud in any aspect of ' the practice of medicine." *Id.* at *5.

Petitioners also challenge disciplinary investigations under the statute by the Washington Medical Commission ("the Commission") against physicians Richard Eggleston and Thomas Siler. The Commission alleges that "Dr. Eggleston's articles minimized deaths from the SARS-CoV-2 virus, incorrectly asserted that PCR tests for a COVID diagnosis are inaccurate, and falsely stated that COVID-19 vaccines and mRNA vaccines are harmful or ineffective and that ivermectin is a safe and effective treatment for COVID-19." It also alleges that "Dr. Siler wrote false statements about the risks of contracting COVID-19, the effectiveness of hydroxychloroquine and ivermectin as treatments for COVID-19, the transmissibility of COVID-19 from children, and the safety of COVID-19 vaccines." *Stockton I* at *7.

Petitioners are physicians Eggleston and Siler, retired physician Dr. Daniel Moynihan, as well as John and Jane Does 1-50, who are "licensed Washington physicians currently subject to the Commission's investigations and prosecutions," John Stockton, a former NBA star and member of the Basketball Hall of Fame, who is now a podcaster and critic of some COVID vaccines and treatments favored by the Commission, and Children's Health Defense, formerly headed by now-Health and Human Services Secretary Robert F. Kennedy, Jr. *Id.* at *3-4.

Respondents are Nick Brown, the Washington Attorney General, and Kyle Karinen, the Commission's executive director. *Id.* at *4.

Petitioners sought a preliminary injunction in the Eastern District of Washington. Respondents moved to dismiss. The district court granted the motion to dismiss on grounds of ripeness and the doctrine of federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

The district court determined that Petitioners' request to enjoin future investigations and disciplinary actions under the unprofessional conduct law were not yet ripe. It further noted that Doctors Eggleston and Siler had continued to make statements advocating their proposed COVID treatments despite the investigation, and therefore their speech was not "chilled." *Stockton I* at *10-11. The district court then defined the administrative investigations as "state proceedings" and concluded that "[u]nder *Younger*, a court may not hear claims for equitable relief while state proceedings are pending." *Id.* at *12. The court further noted its belief that state courts could adequately adjudicate any federal constitutional challenges once the administrative investigations concluded. *Id.* at *13. Finally, the court ruled that even if abstention did not apply, it could not adjudicate Petitioners' First Amendment claims, because "the Commission may fully regulate professional conduct of physicians licensed to practice in this state. States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at *15.

The Ninth Circuit affirmed the dismissal. *Stockton v. Brown*, 152 F.4th 1124 (9th Cir. 2025) ("*Stockton II*"). The Ninth Circuit agreed with the district court that *Younger* abstention barred consideration of the claims of doctors Eggleston and Siler and Does 1-50, because it involved an ongoing state proceeding. *Stockton II* at 1136-37. Although *Younger* did not bar consideration of the other Petitioners' claims since they were not the subjects of administrative proceedings, the claims were nonetheless unripe as there was no evidence that the speech of other Petitioners had yet been chilled. *Id.* at 1142, 1145. The Ninth Circuit also rejected claims based on "listener standing," ruling that "[t]he right to receive speech is entirely derivative of the rights of the speaker." *Id.* at 1147 (internal quotation omitted).

SUMMARY OF ARGUMENT

These *amici* believe that all Petitioners have established standing and concur with Petitioners' arguments that *Younger* abstention is inappropriate particularly where, as here, the state Court of Appeals has already declared the Commission's "unprofessional conduct" speech regulations unconstitutional. The claim that speech is not being chilled by the state is particularly unpersuasive. This conclusion ignores both allegations made in the complaint and argument reiterated during this litigation.

These *amici* believe that Washington's medical censorship law flagrantly defies this court's clear direction contained in *NIFLA v. Becerra*, for the reasons set out in Section I, *infra*. The use of

occupational licensure to censor speech is a relatively modern development, which undermines the free marketplace of ideas necessary for medicine to advance and grow. It violates the First Amendment, for the reasons set out in Section II, *infra*.

It is all too clear that the rulings of the lower courts evidence their desire to allow to stand a ruling supportive of a powerful medical establishment, while avoiding a decision on the merits where each day new revelations demonstrate the correctness of the speech which is being suppressed. The question presented here is one of the most important free speech issues of the day — whether states may rely on the "police power" of occupational licensing to crush dissenting views to prop up the state's viewpoint on disputed matters of health and wellness.

ARGUMENT

I. WASHINGTON'S MEDICAL CENSORSHIP LAW DEFIES THIS COURT'S HOLDING IN *NIFLA V. BECERRA*.

In *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), the Ninth Circuit invented a category generally known as "professional speech," and declared it to be subject to a less-rigorous, somewhat deferential, "intermediate scrutiny" standard of review. Courts in the Ninth Circuit, including the courts below in this case, continue to default reflexively to *Pickup* to allow censorship of speech occurring within a professional context. But in 2018, this Court resoundingly rejected the rationale of *Pickup*. In *Nat'l Inst. of Family & Life*

Advocates v. Becerra, 585 U.S. 755, 766-68 (2018) ("*NIFLA*"), this Court flatly rejected the creation of a lesser protected category of "professional speech." This Court rebuked courts which created a "professional speech" category out of whole cloth designed to reduce the degree of protection provided to it:

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules.... So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.... But **this Court has not recognized "professional speech" as a separate category** of speech. Speech is not unprotected merely because it is uttered by "professionals".... This Court's precedents do not recognize such a tradition for a category called "professional speech." [*Id.* at 767-68 (cleaned up) (emphasis added).]

But the Ninth Circuit appears to have rejected this Court's warnings in *NIFLA*, and even its own guidance that "'public dialogue' by a professional ... receives the greatest First Amendment protection." *Tingley v. Ferguson*, 47 F.4th 1055, 1072-73 (9th Cir. 2022). This time, the circuit court simply uses the expedient of "ripeness" to greenlight Washington's infringement of speech, as if deciding not to decide were not a decision in favor of the state's censorship.

This Court has long been clear that if "conduct" consists of speech then it is protected by the First

Amendment's free speech guarantee. If "the conduct triggering coverage under the statute consists of communicating a message," and if "Plaintiffs want to speak ... and whether they may do so under [the statute] depends on what they say," then First Amendment protection applies. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). The clear purpose of Washington's medical censorship law is still the suppression of state-disfavored speech.

It has become painfully clear, at least since the COVID pandemic, and probably before, that medical and health related speech has become an overtly political battlefield. This has been true in multiple contexts, particularly COVID, "conversion therapy," and "transgender" standards of care. Without question, the state of Washington has been a belligerent in that battle. It first banned "conversion therapy" in 2018. *Tingley* at 1064. Now it has passed its medical censorship law. It has defended both all the way to this Court.

This Court has already heard argument on October 7, 2025, in *Chiles v. Salazar*, examining Colorado's blatantly viewpoint-discriminatory "Minor Therapy Conversion Law," which expressly permits counselors to affirm a child's gender transition, while punishing counselors who help a client desiring to change same-sex attraction. That Colorado law is similar to the Washington law upheld by the Ninth Circuit in *Tingley*, where this Court could have granted certiorari to resolve the issue, but declined on December 11, 2023. When this Court denies review in such cases, allowing state censorship to be sanctioned by lower

courts, it allows powerful financial interests whose arguments cannot prevail in the court of public opinion, to misuse of the force of the state to suppress opposing views. When such issues are allowed to go unresolved by this Court, that delay causes real injuries not limited to Petitioners.

For example, with regard to politicized cases regarding "transgender" treatments, the Fourth Circuit blindly accepted the dictates of the politically powerful World Professional Association for Transgender Health ("WPATH") "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People" as presenting "the consensus approach of the medical and mental health community. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020). Yet as Justice Thomas has noted, "...WPATH's lodestar is ideology, not science.... For example, newly released documents suggest that WPATH tailored its Standards of Care in part to achieve legal and political objectives.... Worse, recent reporting has exposed that WPATH changed its medical guidance to accommodate external political pressure." *United States v. Skrmetti*, 605 U.S. 495, 545-46 (2025) (Thomas, J., concurring) (internal quotations omitted). State medical boards can be subject to improper ideological or financial pressures when they dictate "standards of care" in hotly disputed areas of medicine and squelch the type of free speech and open discussion necessary for medicine to advance.

The practice of getting a "second opinion" has long been a foundational principle of medicine. When supposed minimum "standards of care" are rigorously

applied, the second opinion will always be the same as the first, rendering them redundant and meaningless. Physicians are required to ignore their clinical experience in favor of decrees issued by medical regulators who may have political or financial agendas other than public health. Such state control of the practice of medicine often muzzles the most creative in the profession and does great disservice to patients.

As with "conversion therapy," here Washington seeks to suppress all views other than its own on issues of COVID diagnosis and treatment, as Petitioners note:

> The WMC [Commission] **supports the position** taken by the Federation of State Medical Boards (FSMB) regarding COVID-19 vaccine misinformation. The WMC does not limit this perspective to vaccines but broadly applies this standard to all misinformation regarding 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 medical profession and endanger patients.... The WMC bases masking and vaccination safety on expert recommendations from the U.S. Centers for Disease Control and Prevention (CDC) and the Washington State Department of Health (DOH). The WMC relies on the U.S Food and Drug Administration approval of medications to treat COVID-19 to be the standard of care.

> While not an exhaustive list, the public and practitioners should take note:
>
> • Ivermectin is not FDA approved for use in treating or preventing COVID-19
>
> • Hydroxychloroquine (Chloroquine) is not FDA approved for use in treating or preventing COVID-19.[2]

Here, Washington State tries to give the impression that, unless a drug is "approved for use in treating or preventing COVID-19," it is dangerous to prescribe. However, the FDA advises the public that: "once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient."[3]

If there is any question which speech has Washington's seal of approval, the state goes on to threaten: "The WMC will scrutinize any complaints received about practitioners granting exemptions to vaccination or masks that are not based in established science or verifiable fact.... The public and practitioners are encouraged to use the WMC complaint forms when they believe the standard of care has been breached." Pet. at 2-3 (quoting

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[2] Petition for Certiorari at 2-3 ("Pet.") (quoting Washington Medical Commission, "COVID-19 Misinformation Position Statement" (Sept. 22, 2021)).

[3] FDA, "Understanding Unapproved Use of Approved Drugs 'Off Label.'"

Washington Medical Commission, "COVID-19 Misinformation Position Statement" (Sept. 22, 2021)).

Yet the CDC has been wrong about COVID more than it has been right. In March of 2021, CDC Director Rochelle Walensky glibly stated, "Our data from the CDC today suggests that vaccinated people do not carry the virus, don't get sick."[4] In July 2021, President Biden continued to repeat the claim that "[y]ou're not going to get COVID if you have these vaccinations."[5]

Later, left without explanation when the "fully-vaccinated" Walensky contracted both an initial case and a "rebound" case of the virus the "vaccine" was supposed to prevent, the CDC admitted that the "vaccine" neither prevents contracting or transmitting the disease.[6] The "fully-vaccinated" President Joe Biden also contracted both an initial case and a

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[4] H. Brueck and A. Haroun, "CDC director says data 'suggests that vaccinated people do not carry the virus,'" *Business Insider* (Mar. 30, 2021).

[5] F. Mulraney, "Biden's latest gaffe as he claims people won't get Covid if they're vaccinated despite reported breakthrough infections," *The Sun* (July 23, 2021).

[6] *See, e.g.*, Press Release, "CDC Director Tests Positive For COVID-19," *Centers for Disease Control* (Oct. 22, 2022) ("Last night, CDC Director Dr. Rochelle Walensky tested positive for COVID-19. She is up to date with her vaccines"); L. Walmsley, "Vaccinated People With Breakthrough Infections Can Spread The Delta Variant, CDC Says," *NPR* (July 30, 2021).

rebound case.[7] Indeed, almost as soon as Biden promised that vaccination equals immunity, the CDC admitted that its own study found that three-quarters of victims in one COVID outbreak had been vaccinated.[8] The study further "found no significant difference in the viral load present in the breakthrough infections occurring in fully vaccinated people and the other cases, suggesting the viral load of vaccinated and unvaccinated persons infected with the coronavirus is similar," so even the argument that the "vaccine" reduces the severity of the illness has been destroyed. *Id.*

Within a year of the CDC's admission, former President Trump's COVID response coordinator Dr. Deborah Birx acknowledged that the government "scientific" community had willfully fed the public COVID misinformation. "I knew these vaccines were not going to protect against infection," she conceded. "I think we overplayed the vaccines…."[9]

But as long as Petitioners tailor their speech to the CDC's views on a given day, Washington State is satisfied — however erroneous that speech may be. And district courts in the Ninth Circuit continue to reject this Court's warnings in *NIFLA* that the First

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[7] K. Liptak and D. Judd, "President Joe Biden tests positive for Covid-19 again," *CNN* (July 30, 2022).

[8] L. Wamsley, *supra*.

[9] J. Davis, "Dr. Birx's Bombshell Vaccine Admission: I Knew Vaccines Wouldn't Protect Against Infection," *Western Journal* (July 25, 2022).

Amendment carries no "exception" for "professional" speech. As the district court put it, "the Commission may fully regulate professional conduct of physicians licensed to practice in this state ... even though that conduct incidentally involves speech." *Stockton I* at *15 (citing *Tingley* at 1074).

Washington's law challenged here is even more destructive to free speech than California's AB 2098 "medical misinformation" law which, after receiving a frosty reception from a Ninth Circuit panel, the state "quietly" repealed in late 2023. California Deputy Attorney General Kristin Liska argued to the Ninth Circuit that AB 2098 should survive because it applied only in the direct context of treating patients and "[w]ithout risking their licenses and livelihoods ... doctors could still 'publish articles in scientific journals,' 'go on talk shows,' 'post on their blogs,' and 'engage in research studies.'"[10] The law challenged here goes still further and punishes speech entirely outside the context of a doctor-patient relationship. It is essentially a complete ban on speech of a particular disfavored viewpoint on a particular topic of public interest.

As this Court has tried to make clear, "there is a bedrock principle underlying the First Amendment ... that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "Our whole constitutional heritage

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[10] J. Sullum, "California Quietly Repeals Restrictions on Doctors' COVID-19 Advice," *Reason* (Oct. 11, 2023).

rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1968) (opinion by Marshall, J.). In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), this Court held that, even where there is a significant governmental interest, any incidental effect on free speech pursuant to that interest is permissible only "if the governmental interest is unrelated to the suppression of free expression." Here, the suppression of a particular viewpoint on COVID treatments is not only related, but is the direct target of the medical censorship law.

II. THE USE OF OCCUPATIONAL LICENSURE TO CENSOR SPEECH VIOLATES THE FIRST AMENDMENT.

At common law, it was the general rule that each individual had the freedom to engage in the occupation of his choice, without prior government approval. Certain restrictions on who could practice certain trades were imposed by royal charters granting monopolies to the favorites of the king.

The use of licensing by government to suppress dissenting speech traces its lineage back to the Star Chamber in 16th-century England, and its requirement that printers be licensed and publication of disfavored views forbidden.[11] "The Star Chamber

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[11] M. Meyerson, "The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers," 34 IND. L. REV. 295, 299-300 (2001).

has long symbolized the arbitrary and uncontrollable abuse of power both in England and the United States." *Id*. at 299.

> For almost two centuries, a stream of royal proclamations, Star Chamber decrees, and Parliamentary enactments, constantly increasing in complexity, shackled the art and the business of printing and publication. The Licensing Act of 1662 illustrates the scope of the system. Not only were seditious and heretical books and pamphlets prohibited, but no person was allowed to print any material unless it was first entered with the Stationers' Company, a government monopoly, and duly licensed by the appropriate state or clerical functionary ... and sweeping powers to search for suspect printed matter in houses and shops ... were granted.[12]

The Star Chamber was abolished in 1641, but the temptation for government to control what views are shared publicly has continued. Although this Court has made clear that there can be no prior restraint on speech or press, states have sought to leverage their asserted authority to license to restrict the speech of those who have licenses.

The relatively recent nature of occupational licensing in America supports this Court's conclusion that the Ninth Circuit is wrong in holding that

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[12] T. Emerson, "The Doctrine of Prior Restraint: Obscenity and the Arts." 20 LAW & CONTEMP. PROBS. 648, 650 (1955).

government can suppress or compel speech by recategorizing it as "professional conduct." Until the late 1800s, there was relatively little occupational licensing at all.[13] "States exercised virtually no licensing authority over the mere rendering of advice during either the post-colonial or Reconstruction eras."[14] As one author put it, "to restrict the practice of any art to people specially trained would have been intolerable in a country where every man had to be able to be his own farmer, manufacturer, doctor, lawyer, builder, and banker."[15]

Indeed, "modern licensing laws did not begin to show up until the 1880-1920 era."[16] When states did begin licensing, it was primarily directed toward skilled professions with significant risk to clients, such as doctors, dentists, attorneys, and pharmacists. *See* Kleiner at 7. The purpose was to ensure the licensed professional had met minimum educational or experiential standards. Licensing was a police power's "public health and safety" measure, not a backdoor means for the government to squash disfavored speech. *Id.* And even then, "there is a large body of

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[13] M. Kleiner, "Reforming Occupational Licensing Policies" at 7, Brookings (Mar. 2015) (hereinafter "Kleiner").

[14] R. Kry, "The 'Watchman for Truth': Professional Licensing and the First Amendment," 23 SEATTLE U. L. REV. 885, 956 (2000) (hereinafter "Kry").

[15] J. Lieberman, "The Tyranny of the Experts: How Professionals are Closing the Open Society" at 70 (Walker & Co. 1970).

[16] Kry at 955.

historical, economic, and sociological literature that suggests that the primary motivation for professional licensing laws is economic self-interest," not protection of the public. Kry at 888.[17]

As this Court put it in an early case approving state licensing powers, the object was to shield clients against "the consequences of ignorance and incapacity as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). Nonetheless, where a professional engages in speech, the First Amendment forbids the government from deciding what speech to punish:

> Simply put, the historical practices at the time of the ratification of the First and Fourteenth Amendments show that the rendering of personalized advice to specific clients was not one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." Viewed in this light, the licensure of professional advice is inconsistent with the original understanding of the First Amendment.[18]

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[17] *See, e.g.*, W. Gelhorn, "Abuse of Occupational Licensing," 44 U. CHI. L. REV. 1, 11 (1976) ("[L]icensing has been eagerly sought-always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers.").

[18] Kry at 957 (*quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

Professor Thomas Emerson has been hailed as "arguably the foremost First Amendment scholar of his generation,"[19] and a "pillar of the Bill of Rights."[20] Emerson wrote, "there can be little doubt that the First Amendment was designed to foreclose in America the establishment of any system of prior restraint on the pattern of the English censorship system."[21] He explained:

> Under a system of prior restraint, the issue of whether a communication is to be suppressed or not is determined by an administrative rather than a criminal procedure. This means that the procedural protections built around the criminal prosecution — many of which are constitutional guarantees — are not applicable to a prior restraint. The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure — all these are not on the side of free expression when its fate is decided. Further, the initial decision rests with a single government functionary rather than with a jury. Those who framed the First Amendment

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[19] D. Hudson, Jr., "Thomas Emerson," First Amendment Center (Jan. 1, 2009).

[20] L. Pollak, "Thomas I. Emerson: Pillar of the Bill of Rights," 101 YALE L.J. 321 (1991-1992).

[21] T. Emerson, "The Doctrine of Prior Restraint," 20 LAW & CONTEMP. PROBS. 648, 652 (1955).

placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression. [*Id*. at 657.]

Emerson added:

[a] system of prior restraint usually operates behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse. Decisions are less likely to be made in the glare of publicity ... and the whole apparatus of public scrutiny fails to play the role it normally does...

Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration.... [C]ommon experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry [the state censors] to excesses. This ... occurs in all areas where officials are driven by fear or other emotion to suppress free communications. [*Id.* at 658.]

Further, Emerson argued:

it is necessary to keep in mind not only the character structure of the licenser, but the institutional framework in which he operates. **The function of the censor is to censor.**

> **He has a professional interest in finding things to suppress.** His career depends upon the record he makes. He is often **acutely responsive to interests which demand suppression** — interests which he himself represents — and not so well attuned to the more scattered and less aggressive forces which support free expression. [*Id.* at 659 (emphasis added).]

He concluded, "[t]he long history of prior restraint reveals over and over again that the personal and institutional forces inherent in the system nearly always end in a stupid, unnecessary, and extreme suppression." *Id.*

But it is not just prior restraint, but post-publication punishment, that offends the First Amendment. As James Madison put it, "security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws."[22]

Recognizing these facts, this Court has repeatedly upheld the principle that when government forbids businesses to speak, or compels them to speak, it

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[22] J. Madison, "Report on the Virginia Resolutions" (Jan. 1800), reprinted in 5 The Founders Constitution at 142 (P. Kurland & R. Lerner eds.) (Univ. of Chicago Press: 1987).

violates the First Amendment. Moreover, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This Court has noted that:

> the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint ... is pernicious not merely by reason of the censure of particular comments but by the reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. [*Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) (internal quotation and emphasis omitted).]

Yet a prior restraint on speech — disguised as a licensing requirement — is precisely what Washington's medical censorship law is. Licensing regimes do not give the state an exception to the First Amendment, even under the guise of "protecting the public." As this Court noted in a 1945 case dealing with state regulation of labor unions, even "regulation ... aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945). *Thomas* is "significant for the Court's rejection of the state's argument that it was merely regulating

the business practices (in other words, the 'professional conduct') of union organizers."[23]

The insult to the First Amendment is still greater when government suppresses speech based not only on its content, but also on its viewpoint. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court recognized that:

> [w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. [*Id.* at 829.]

Washington's medical censorship law is pure viewpoint discrimination. As the WMC's "position statement" puts it, "Physicians and Physician Assistants, who generate and spread COVID-19 misinformation, or disinformation, erode the public trust in the medical profession" and "may be subjecting their license to disciplinary action." Pet. at 2. On the other hand, physicians who limit their speech to that approved by "the U.S. Centers for Disease Control and Prevention (CDC) and the Washington State Department of Health (DOH)," specifically on COVID-

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[23] Kry at 898-99.

19 prevention and treatment, have nothing to fear. *Id.* at 3. Thus, the censorship law's entire point is viewpoint discrimination. Washington has turned its licensing laws from a police powers shield aimed at assuring public health and safety, into a censorship sword, with the right to practice a licensed profession subject to cancellation by government if a doctor does not sacrifice his First Amendment rights.

But as this Court has made clear, "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.... And the State's asserted power to license professional[s] carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 801 (1988). Thus, "[r]egulations of expressive activity are valid only when the government's regulatory interest aims at the nonexpressive component of the activity."[24] In this case, the actions for which Petitioners have been disciplined are the purest expressions of free speech and free press. Shockingly enough, no discipline in this case even relates to treatment of a patient. The discipline is entirely due to doctors publishing opinion pieces stating their opinion on COVID treatments. There is no "conduct" here; only pure speech.

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[24] Kry at 892.

This Court has long held that government cannot censor commercial speech to ensure that only approved speech may participate in the stream of commerce:

> [I]f [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. [*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).]

This Court has made clear the First Amendment's "general rule, that the speaker has the right to tailor the speech." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This right is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574. But today, the field of professional licensing has increasingly become a tool

for states to enact "coercive elimination of dissent."[25] Professor Timothy Zick has noted that "[s]tates are becoming increasingly active, even aggressive, in the area of professional speech regulation."[26] Washington's blanket ban on speech containing dissenting medical opinions on COVID "vaccination" and treatment is only the latest example.

This case presents the opportunity to revisit and heed the warning Justice Jackson gave us 80 years ago:

> [I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because **the forefathers did not trust any government to separate the true from the false for us**. [*Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (emphasis added).]

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[25] *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard").

[26] T. Zick, "Professional Rights Speech," 47 ARIZ. ST. L.J. 1289, 1291 (2015).

CONCLUSION

These *amici* urge this Court to grant certiorari, reverse the courts below, and remand to the district court with instructions to stay Respondent's enforcement until a final review is made of Petitioners' arguments on the merits.

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