STATE OF WASHINGTON
WASHINGTON MEDICAL COMMISSION

In the Matter of: RICHARD EGGLESTON, MD, License No. MD.MD.00014109 Respondent.	NO. M2022-204 COMMISSION'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

When a health care provider "acts or speaks about treatment with the authority of a state license, that license is an imprimatur of a certain level of competence." *Tingley v. Ferguson*, 47 F.4th 1055, 1082 (9th Cir. 2022) (internal quotation omitted). Respondent knowingly, recklessly, or incompetently wrote about and disseminated information of a demonstrably false factual character regarding the treatment, care, and prevention of COVID-19 during the height of the deadly pandemic. His editorials misrepresented matters of science and medical practice. He provided incompetent and misleading medical advice to the public. Throughout his harmful editorial campaign, he repeatedly relied on his licensure as a physician to bolster the credibility of these publications.

In his first such article on January 24, 2021, Respondent touted his medical training, board certifications, and licensure as a Washington physician to support to readers his authority and expertise on matters of science and medical research. He used his physician status as "M.D." in his editorial credits. Save for the statement of charges (SOC), any member of the

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public researching Respondent to examine his credentials would discover that he is a licensee in good standing with the Washington Medical Commission holding the imprimatur of the state for competence and integrity. Respondent's knowing, reckless, or incompetent dissemination of false pseudoscience and injurious pseudomedicine erodes the standing of the medical profession in the eyes of the public. The Commission's inability to remove its endorsement of his licensure in the face of such unprofessional conduct will do even more grievous injury to the public health. As long acknowledged by the Supreme Court, the First Amendment does not shield Respondent from professional regulatory discipline for this unprofessional physician conduct.

II. STATEMENT OF RELEVANT FACTS

Dr. Eggleston retired from his ophthalmological practice approximately 10 years ago. R's MTD at 2. He currently holds his physician's license in "Retired Active In-State Volunteering" status. HSQA Provider Credential Lookup, *available at* https://fortress.wa.gov/doh/providercredentialsearch/. A retired active physician's license allows a physician to practice, without compensation for health care services, "in emergent or intermittent circumstances." WMC "Request For Retired Active Physician License" form, *available at* https://wmc.wa.gov/sites/default/files/public/657132.pdf. Respondent intentionally retained his ability to practice medicine as a volunteer during the COVID-19 pandemic and for the time period captured in the SOC.

In 2020, Respondent wrote opinion/editorial pieces in the Lewiston Tribune regarding the COVID-19 pandemic. Attachment A to Declaration of Kristin G. Brewer. On January 24, 2021, Respondent's Op/Ed article was published entitled, "Piercing the bubbles of science and expertise." *Id.* at 1. In reference to being "continually subjected to the phrase 'follow the science,'" Respondent wrote that readers should trust his statements and explanations of science and medicine as authoritative because of his status as a physician:

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> For sure, some few readers will opine that I am uneducated, sexist, racist, homophobic, etc. In other words, these leftists will accuse me of what is their core being. Preemptively, I would inform them that I am board certified in two medical specialties – ophthalmology and integrative medicine. I understand the scientific method for different studies (the methodologies for physics is different from social studies) – biology, heredity and mutations – and the very brief whiff of lifetime during which our fate for eternity is determined.

Id. He identified himself: "Eggleston, M.D., is a retired ophthalmologist. He lives in Clarkston." *Id*. Respondent used this same platform to disseminate demonstrably false and harmfully incorrect pseudoscience and advice regarding COVID-19 and related topics as described in the SOC. Apart from this SOC, any reader of his articles would find his credential in good standing on the Department of Health Provider Credential Lookup website.

The Commission received complaints regarding Respondent's pseudoscientific publications and authorized investigation. When questioned by the Commission's investigator, Respondent attempted to put off any prospective discipline by repeating the misrepresentations from his editorials to the Commission. SOC ¶¶ 1.23-1.25. On August 4, 2022, the Commission charged Respondent in this action. SOC. Respondent answered, denying the charges, and has now moved to dismiss the action on the pleadings. The Commission offers this memorandum in opposition.

III. ISSUES

1. **Is this tribunal precluded from granting a motion to dismiss in this case because it alleges violations of the standards of the practice of medicine and requires the clinical expertise of the Commission to decide?**

2. **Is Respondent's alleged unprofessional conduct related to the practice of medicine because he knowingly, recklessly, or incompetently promulgated demonstrably false statements regarding medical facts and advice to the public using his physician credentials thereby lowering the standing of the profession in the eyes of the public?**

3. **Do the Commission's compelling interests to protect the standing of and public trust in physicians and to protect its citizens in the time of a deadly pandemic survive the intermediate scrutiny to be applied to its enforcement of content neutral disciplinary statutes?**

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IV. AUTHORITY

Respondent states his motion is supported by the Commission's investigative file and other documents, but he does not attach or refer to them in this motion. Rather, his motion is an argument that the Commission's action must be dismissed on the pleadings, as a matter of law in the nature of a CR 12(c) motion. "A CR 12(c) motion is proper when a defendant relies for the motion on an affirmative defense, since an affirmative defense is external to the complaint." *Howell v. Dep't of Soc. & Health Servs.*, 7 Wn. App. 2d 899, 910, 436 P.3d 368, 374 (2019), *as amended on denial of reconsideration* (2019). "A motion under CR 12(c) raises the same issue as a motion to dismiss under CR 12(b)(6): whether a complaint states a claim for which a court can grant relief" but is brought after both the complaint and answer are filed and the pleadings are closed. *Id*. The Court must accept all facts, including hypothetical facts, in the pleadings as true, and dismissal is only appropriate when the pleadings set forth "no set of facts" that would justify a favorable result on the complaint. *Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). The Court may rely on the allegations in the complaint, documents referenced therein, and public documents properly subject to judicial notice. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015). The Commission has limited supporting evidence to the pleadings and the articles of Respondent that are referred to in the pleadings. Brewer Decl. Exh. A.

V. ARGUMENT

A. Dismissal Is Precluded by Statute and Lack of Agency Authority

1. Where standards of practice are alleged or where clinical expertise is necessary, no allegation may be dismissed by motion on the pleadings

In a disciplinary action, the Commission may not delegate the final decision regarding disposition of the license or imposition of sanctions to a presiding officer "in any case pertaining to standards of practice or where clinical expertise is necessary, including deciding any motion

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that results in dismissal of any allegation contained in the statement of charges." RCW 18.130.050(10). The statute defines "standard of practice" as "the care, skill, and learning associated with the practice of a profession." RCW 18.130.020(12). In this context, "clinical expertise" means "the proficiency or judgment that a license holder in a particular profession acquires through clinical experience or clinical practice and that is not possessed by a lay person." RCW 18.130.020(2).

Respondent's motion requests dismissal of all allegations in the Commission's SOC on grounds that his alleged conduct, as a matter of law, was not unprofessional conduct as defined by the Uniform Disciplinary Act, chapter 18.130 RCW, and is in any case shielded from discipline by the First Amendment. Because the SOC in this matter requires clinical expertise to resolve, no allegations in the matter may be dismissed by motion.

The Commission has alleged that Respondent's written publication of knowingly, recklessly, or incompetently false medical information using his physician credentials constituted the practice of medicine in Washington State. The hearing panel must use its clinical expertise at hearing to review the evidence and make this determination. The hearing panel should find for the Commission.

The legislature in exercise of its traditional state police power has defined the "practice of medicine" broadly for Washington licensed physicians:

> A person is practicing medicine if he or she does one or more of the following:
>
> (1) Offers or undertakes to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality;
> . . . .
> (4) Uses on cards, books, papers, signs, or other written or printed means of giving information to the public, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human disease or conditions the designation "doctor of medicine," "physician," "surgeon," "m.d.," or any combination thereof . . . .

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RCW 18.71.011. Respondent gave information, albeit false and inaccurate information, to the public in the conduct of his occupation as an Op/Ed columnist pertaining to the diagnosis and treatment of COVID-19 in human beings. He used his designation as doctor, the credentials "M.D.," and other monikers of his physician status with those writings. This conduct fits squarely within the practice of medicine. RCW 18.71.011(4). His columns also advised members of the public regarding health risks, prophylactic and treatment measures, and medical care efforts regarding the COVID-19 virus and pandemic. His advice on the care and treatment of this disease, for which he used his credentials and experience as a doctor for credibility, also constituted the practice of medicine. RCW 18.71.011(1). It is for the trier of fact to apply clinical expertise in making findings and conclusions of law on these issues. They are not subject to dismissal by motion on the pleadings.

As alleged in the SOC, Respondent's publications were not merely statements of opinion by a concerned citizen joining a public debate. They did not present information aimed at the exchange of ideas on a subject of medical or scientific controversy. They were demonstrably and conspicuous falsehoods founded on pseudoscience that any competent physician should have recognized as false. They were advice to the public on medical topics regarding the prevention, care, existence, and treatment of a deadly virus affecting human health. In a motion on the pleadings, the Commission is entitled to have these facts taken as true. CR 12(c). The truth or falsehood of Respondent's publications is a matter for hearing that requires clinical expertise to resolve and as such are not allegations amendable to dismissal by motion. RCW 18.130.050(10).

The Commission also alleges that Respondent's conduct constitutes moral turpitude and misrepresentation or fraud in Respondent's conduct of his business or the practice of medicine. RCW 18.130.180(1) and (13) respectively. These allegations require the clinical expertise of the Commission to determine. The Commission is uniquely qualified to determine the truth or falsehood of Respondent's statements regarding medical and scientific matters and determine whether they concern the practice of the profession, the conduct of his business as a provider,

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and whether they undermined public trust in or lowered the standing of the medical profession in the eyes of the public. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991). To be sanctionable under RCW 18.130.180(13) as misrepresentation or fraud, "misconduct does not have to be committed during the actual diagnosis or treatment of an actual patient." *Johnson v. Dep't of Health*, 133 Wn. App. 403, 409, 136 P.3d 760 (2006). "The principal question in applying the moral turpitude provision is 'the relationship between the practice of the profession and the conduct alleged to be unprofessional.' . . . The conduct must 'indicate unfitness to bear the responsibilities of, and to enjoy the privileges of, the profession.'" *Johnson*, 133 Wn. App at 410, *quoting Haley*, 117 Wn.2d at 731. Determining what conduct renders a health care professional unfit to practice his or her profession is "a question of fact for the trier of fact." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 605, 903 P.2d 433 (1995), amended, 909 P.2d 1294 (Wash. 1996). Therefore, these issues must be addressed by the Commission at hearing and cannot be dismissed on the pleadings. RCW 18.130.050(10).

Respondent's argument that his conduct does not rise to the level of moral turpitude as a matter of law should not be well taken. Respondent's argument relies heavily on a dictionary definition from the sixth edition of Black's Law Dictionary and a misapplication of the *ejusdem generis* cannon of *statutory* interpretation. The ninth edition of Black's Law Dictionary defines "moral turpitude" with language favorable to the Commission as: "Conduct that is contrary to justice, honesty, or morality" that demonstrates a person's unfitness to practice their profession. Black's Law Dictionary at 1101 (Deluxe 9th ed., Garner Ed.) (in the area of legal ethics, "offenses involving moral turpitude – such as fraud or breach of trust – traditionally make a person unfit to practice law.") Neither dictionary definition is necessary here because the Washington Supreme Court has long defined "moral turpitude" in the context of medical professional discipline. *Haley*, 117 Wn.2d at 742. "Moral turpitude" is "conduct indicating unfitness to practice the profession." *Id.*

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The court has long acknowledged that acts of moral turpitude by medical professionals erode the public's trust in physicians and their medical treatment and advice, and thereby injure public health. *E.g. Haley*, 117 Wn.2d 720. Discipline is not limited to those situations "where a professional has actual knowledge that her conduct is inappropriate." *Johnson*, 133 Wn. App. at 412, *citing Heinmiller*, 127 Wn.2d at 603, 903 P.2d 433 ("Misconduct is not less harmful to the public simply because the professional who engages in it fails to recognize it as such."). Knowing or reckless dishonesty, indifference for the truth, or gross incompetence related to the practice of medicine indicates an unfitness to practice:

> The daily practice of medicine concerns life and death consequences to members of the public. They have an understandable interest in the maintenance of sound standards of conduct by medical practitioners. The public has a right to expect the highest degree of trustworthiness of the members of the medical profession.

In re Kindschi, 52 Wn.2d 8, 12, 319 P.2d 824 (1958). It is unprofessional conduct to misrepresent regardless of the content or viewpoint of the misrepresentation. Respondent betrayed the public trust and undermined the credibility of his profession through incompetence in his presentation of demonstrably false and harmful non-evidence based medical statements. He did the same through his knowing or reckless dissemination of that material without regard for its truth or falsehood. His conduct causes harm to the standing of the profession and to those engaged in the daily practice of medicine who rely on patient trust to effectively carry out their duties as physicians. *Id*.

There are a cadre of cases where Washington courts have upheld sanctions for moral turpitude violations under the UDA for acts of fraud and other dishonesty. *E.g. Kindschi*, 52 Wn.2d 8 (tax fraud); *Johnson*, 133 Wn. App. 403 (even "unwitting" violation of counselor professional standards and misrepresentation of professional credentials to the court in judicial proceedings upheld as moral turpitude); *Deatherage v. Examining Bd. Of Psychology*, 134 Wn.2d 131, 948 P.2d 828 (1997), (violation of psychologist ethics and standard of care while testifying as expert witness in child custody proceedings). Such dishonest conduct

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involves inherent immorality that indicates an unfitness to practice medicine. *Id*. Moral turpitude is not composed entirely of heinous or depraved acts such as sexual abuse of current or former patients. *See Ritter v. State, Bd. of Registration for Prof'l Engineers & Land Surveyors*, 161 Wn. App. 758, 761, 255 P.3d 799 (2011) (reversing moral turpitude finding for public engineer convicted of three counts of first degree child molestation involving a family member).

The fact that Respondent mislead and knowingly, recklessly, or incompetently lied to the public by means of publication instead of patient by patient does not save him from the charge of moral turpitude. His publication of egregiously untrue misinformation about COVID-19 during a pandemic is not any less inherently immoral than the dishonesty involved in committing fraud against the IRS or making material misrepresentations in judicial proceedings. His conduct cuts even more directly to the core of his professional being, dishonesty about the medicine and science itself. The law squarely targets Respondent's abuse of his status as a physician:

> *In re Kindschi*, {} and *Standow* demonstrate that conduct may indicate unfitness to practice a profession or occupation without being directly related to the specific skills needed for that practice. The conduct need not have occurred during the actual exercise of professional or occupational skills, nor need the conduct raise general doubts about the individual's grasp of those skills. In the context of medical disciplinary proceedings, and in the light of the purposes of such proceedings, conduct may indicate unfitness to practice medicine if it raises reasonable concerns that the individual may abuse the status of being a physician in such a way as to harm members of the public, or if it lowers the standing of the medical profession in the public's eyes.

Haley, 117 Wn.2d at 733 (citing *In re Kindschi*, 52 Wn.2d at 12; *Standow v. Spokane*, 88 Wn.2d 624, 638, 564 P.2d 1145, appeal dismissed, 434 U.S. 992 (1977)). Respondent is charged with abusing his status as a physician in such a way as to harm members of the public. He is charged with lowering the standing of the medical profession. It is a question of fact for the trier of fact

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to decide using their clinical expertise. The allegations cannot be dismissed by a CR 12(c) motion. RCW 18.130.050(10).

Respondent also asserts that the allegations that he committed unprofessional conduct through misrepresentation should be dismissed as a matter of law because the charge was not plead with specificity as a subtype of fraud. Washington appellate courts have upheld conclusions that a health care provider has violated RCW 18.130.180(13) for misrepresentation when the agency did not apply a civil fraud standard to the conduct. *E.g. Johnson*, 133 Wn. App. at 412 (upholding health law judge application of dictionary definition of "misleading" as "Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts."). Whether or not Respondent's published "manifestations" to the public amounted to assertions "not in accordance with the facts" is a determination for the hearing panel that requires clinical expertise to resolve. It is an allegation that precludes dismissal here. RCW 18.130.050(10).

The charge that Respondent interfered with the Commission investigation is not amenable to dismissal for the same reasons. The allegations arise from Respondent's misrepresentations to the Commission in response to the LOC served on him by the Commission's investigator. In that Response, he made more misrepresentations regarding the science and medical aspects of COVID-19, the pandemic, and the medical consensus for prevention, care, and treatment of the virus. It requires the clinical expertise of the hearing panel to determine the accuracy of the allegations in the SOC. The charge cannot be dismissed.

2. The Agency Lacks Legislative Authority to Declare Portions of the Uniform Disciplinary Act Partially Invalid

Respondent's motion to dismiss must fail because it asks the agency to declare one or more statutes partially or wholly invalid. Respondent moves to dismiss by raising an affirmative defense that the unprofessional conduct provisions charged in this matter, RCW 18.130.180(1), (13), and (22), are unconstitutional as applied to that alleged conduct. His challenge is

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appropriately categorized as an "as applied challenge" to the constitutionality of these statutes. An "as applied" challenge "occurs where a plaintiff contends that a statute's application in the context of the plaintiff's actions or proposed actions is unconstitutional." *Washington State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000). A successful as-applied challenge renders the challenged statute "invalid as-applied." *Id*.

Administrative agencies have only the authority granted to them by the legislature, which does not include the authority to declare any statute or portion of a statute invalid. *Haines-Marchel v. Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 744, 406 P.3d 1199 (2017). This precept is codified for this tribunal at WAC 246-11-480(3)(c). The Presiding Officer may afford the parties an opportunity to make a record on the issue as needed in order to preserve appellate review. WAC 246-11-480(4). Respondent fails to demonstrate that any harm he purports he will suffer by complying with the administrative procedure is different than any other harm that befalls the subject of an administrative action where constitutional invalidation of statutory provisions is possible on appeal. The Presiding Officer should deny Respondent's motion because it may not be granted at the administrative level.

B. Respondent's Charged Conduct Is Related to the Practice of Medicine

Respondent's conduct was carried out as part of the practice of medicine, as described above. The definition does not limit the practice of medicine to a physician patient relationship. RCW 18.71.011. It does not use the word patient when stating it includes the act of a physician providing advice regarding human disease or other ailments. RCW 18.71.011(1). The definition encompasses writings disseminated not only to patients, but also to the public in general when "M.D." or another professional designation is used. RCW 18.71.011(4). Because the hearing panel uses clinical expertise to determine what conduct fits this definition, the Commission's determination regarding what is unprofessional conduct in Washington state is due deference by the courts. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002).

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Respondent's conduct, as discussed above, is also related to the practice of medicine because it lowers the standing of the profession in the eyes of the public and undermines the public's trust in physicians. The Commission is the disciplinary authority charged with the duty of upholding the public trust in physicians. RCW 18.71.002-004. That trust is essential to their ability to provide effective care and treatment:

> The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.

National Ass'n for the Advancement of Psychoanalysis v. California Bd. Of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2002) (rejecting First Amendment challenge to psychologist professional licensing standards due to compelling interest to protect state residents' mental health), *quoting, Thomas v. Collins*, 323 U.S. 516, 544, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (Jackson, J., concurring) (rejecting labor union member Fourteenth Amendment due process challenge). This principle is enshrined in statute. RCW 18.71.002 (purpose).

Regulation of the competency and honesty of physicians requires careful scrutiny by a duly empaneled medical board or commission. Commission scrutiny is of heightened importance because the general public lacks the ability to evaluate the competency and honesty of physician advice and medical opinion:

> Few professions require more careful preparation by one who seeks to enter it than that of medicine. . . . Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.

Dent v. State of W.Va., 129 U.S. 114, 122–23, 9 S. Ct. 231, 233, 32 L. Ed. 623 (1889). The Commission plays a diligent and key role maintaining the competence and integrity of physicians through licensing standards and discipline. RCW 18.71.002-.004. The gulf between the ability

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of lay persons and physicians to evaluate the accuracy of medical and scientific information by physicians is long evidenced in the common law and Anglo-American jurisprudence. *Compare Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (In general, medical facts in particular must be proven by expert testimony), *with Ames v. Dep't of Health, Med. Quality Health Assurance Comm'n*, 166 Wn.2d 255, 261, 208 P.3d 549 (2009) (Washington law does not require that expert testimony be provided to MQAC and allows for Commissioners to use their own expertise in disciplinary hearings).

The good standing of a license granted by the Commission is an endorsement of the competency and integrity of a physician. The endorsement fortifies the public status of the physician as an arbiter of scientific and medical information and advice. When a health care provider "acts or speaks about treatment with the authority of a state license, that license is an imprimatur of a certain level of competence." *Tingley v. Ferguson*, 47 F.4th 1055, 1082 (9th Cir. 2022) (internal quotation omitted). The core competency of physicians has always been the required advanced scientific training. *See* RCW 18.71.051 (curriculum requirements for Commission approved medical schools); *e.g. Collins v. State of Tex.*, 223 U.S. 288, 296–97, 32 S. Ct. 286, 288–89, 56 L. Ed. 439 (1912) ("An osteopath professes . . . to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible, therefore, that the state should require of him a scientific training.")

The SOC in this matter explicitly alleges that Respondent abused his status as a physician by repeatedly publishing misleading and false information about the prevention, care, and treatment of COVID-19 in a manner that threatened the public health and undermined the public trust in physicians. The incompetence of his expositions on the subject are compounded by him touting his licensure and education as a physician trained to read and understand scientific medical literature. He relied not only on his medical school education, diploma, and board certifications to bolster his credibility, but upon the imprimatur of his license as a physician licensed to practice by the Commission. The Commission's disciplinary action, as noted above,

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seeks not only to remediate Respondent's incompetence and integrity as a physician, but to restore standing to the medical profession. When the public checks on Respondent's licensure, it needs to understand that he is not considered in good standing with the Commission and the state. He carried out his physician conduct as a licensed physician, even if largely retired, and is therefore subject to the regulatory oversight of the Commission.

C. The Commission's Compelling Interests Overcome the Intermediate First Amendment Scrutiny Applied to Enforcement of the Content Neutral Disciplinary Statutes

Respondent, for all intents and purposes, concedes that the Commission's interest in disciplining physicians who engage in false speech regarding COVID-19 information is compelling. R's MTD at 8. He emphasizes the Supreme Court's ruling which states that publicly disseminated information or lies about medicine and public health policy can be matters of life or death to the public. *Id*., *quoting, Nat'l Inst. of Family & Life Advocates v. Becerra*, 201 L. Ed. 2d 835, 138 S. Ct. 2361, 2374 (2018). And it is a compelling interest.

Maintaining the integrity of the medical profession, public trust in physicians, and the standing of the medical profession in the eyes of the public is a compelling state interest because such trust is necessary for physicians to effectively care and treat human disease and bodily ailments. *Matter of Recall of Inslee*, 199 Wn.2d 416, 430–31, 508 P.3d 635 (2022) (preserving public health regarding COVID pandemic "is a substantial and compelling public interest."); *Haley* 117 Wn.2d at 732 (trust in the medical profession "is essential to ensure treatment will be accepted and advice followed."). Here, even if a court determines Respondent's conduct merits First Amendment protection, the Commission is likely to prevail in the enforcement of content neutral laws where Respondent's untruthful speech is only incidentally abridged.

It is true that speech does not lose any of its First Amendment protection simply because the speaker is a professional. *NIFLA*, 138 S. Ct. at 2373. A state may not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 439, 83 S. Ct. 328, 341, 9 L. Ed. 2d 405 (1963). But

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it is properly within the state's police power, and an interest more compelling than the regulation of in-person attorney client solicitation, to "regulate and license professions, especially when public health concerns are affected." *NAAP*, 228 F.3d at 1054. "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. For example, I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline." *In re Sawyer*, 360 U.S. 622, 646–647, 79 S. Ct. 1376, 1387–89, 3 L. Ed.2d 1473 (1959) (Stewart, J concurring). The First Amendment does not shield physicians from malpractice simply because speech was used to communicate about or administer treatments. *NIFLA*, 138 S. Ct. at 2373 ("Longstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.' *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed.2d 405 (1963)"). By longstanding principles of First Amendment jurisprudence, the Commission's action will pass intermediate or strict scrutiny because the Constitution does not shield him from traditional enforcement of content neutral regulatory discipline.

Courts apply differing levels of scrutiny to determine whether a government regulation or enforcement action is constitutional under the First Amendment when it abridges expression of protected speech. Courts apply the same analysis to determine the constitutionality of a government prohibition or punishment on speech regardless of whether the challenge is to the whole statue, a portion of the statute, or as applied to the present facts. *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011). Nearly all government regulation that imposes upon First Amendment speech and expression is subject to some form of heightened scrutiny beyond rational basis review. Smolla & Nimmer on Freedom of Speech § 2:62, Heightened scrutiny methodology—Heightened scrutiny defined.

The highest level of scrutiny applies "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v.*

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F.C.C., 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497 (1994). Content and viewpoint based laws can stand only if they survive strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171, 135 S. Ct. 2218, 2231, 192 L. Ed. 2d 236 (2015). Traditionally, to survive strict scrutiny under the First Amendment, a statute must be "narrowly tailored to serve a compelling government interest …" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 455, 135 S. Ct. 1656, 1672, 191 L. Ed. 2d 570 (2015).

Typically, an intermediate level of heightened scrutiny applies to regulations that are unrelated to the content of speech. The principal inquiry in determining content neutrality "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. … A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989). By way of contrast, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are not content neutral. *Turner*, 512 U.S. at 643. Content neutral laws receive intermediate scrutiny because they are less likely to eliminate particular content or viewpoints from public dialogue. *Turner*, 512 U.S. at 642.

To survive intermediate scrutiny, the Court requires there to be "a sufficiently important governmental interest in regulating the nonspeech element" in order to "justify incidental limitations on First Amendment freedoms." *U. S. v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678-79, 20 L. Ed. 2d 672 (1968). The *O'Brien* Court articulated several factors for consideration to guide analysis of content neutral laws:

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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O'Brien, 391 U.S. at 377. The Court has cautioned that the scrutiny tests are not to be rigidly applied, but that courts should treat them "as guidelines informing our approach to the case at hand." *Williams-Yulee*, 575 U.S. at 457 (Breyer, J. Concurring).

The unprofessional conduct statutes of the UDA that the Commission is enforcing in this action are content neutral. The moral turpitude statute, RCW 18.130.180(1), does not distinguish favored speech from disfavored speech. In fact, the statute targets nonspeech conduct as well as spoken and written conduct. *E.g. Haley*, 117 Wn.2d 720. The only lines it draws regarding the content of speech is that speech that is dishonest, corrupt, or constitutes moral turpitude. RCW 18.130.180(1). It has been interpreted to apply to conduct that lowers the standing of the medical profession in the eyes of the public, but no specific viewpoint or content of speech has been denoted or singled out. *Haley*, 117 Wn.2d 720. The Commission's interest in enforcing the statute is to safeguard the integrity and standing of the medical profession and the public's trust in their physicians, and to prevent physicians from harming the public through immoral acts. *Id*.

Similarly, the statute prohibiting misleading or fraudulent conduct in the business and practice of medicine similarly prohibits misrepresentation and fraudulent conduct in general, regardless of viewpoint or content. RCW 18.130.180(13). The statute that prohibits interference with a Commission investigation is also similarly directed solely at conduct. RCW 18.130.180(22). Any imposition on speech regarding particular content or viewpoints through these statutes is incidental to the purpose of maintaining the standing of and trust in the medical profession and protection of the public by regulation of physician competence and conduct.

These statutes are not COVID or vaccine related. The provisions were drafted long before the advent of COVID-19 and the related COVID-19 misinformation and disinformation that is the subject of the SOC in this matter. They reach certain speakers or viewpoints only incidentally based on the immoral, dishonest, corrupt, misleading, negligent, or incompetent

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character of their acts. They concern a broad array of both speech and non-speech conduct, and they are of general application to all licensees. A reviewing court would therefore subject them to intermediate scrutiny when reviewing Respondent's affirmative First Amendment defense.

These are not content and viewpoint focused statutes as was the policy in *Conant*, the case upon which Respondent relies. *Conant*, 309 F.3d 629. In that case, the DEA sought to prevent doctors from directing patients toward an illegal but useful medicine. That was a case where the government sought to protect patients from choosing a disfavored or illegal treatment by silencing those who would *truthfully* inform about and discuss it with them. *Id*. at 636. It may be true that the First Amendment "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell v. IMS Health Inc.*, 564 U.S. 522, 577, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) (internal quotation omitted). Here however, the regulations at issue do not silence any valuable information or alternative treatments. Unlike the medical marijuana recommendations in *Conant*, this action does not concern the truthful dissemination of useful information. Rather this action is an attempt to remediate a Respondent who would keep the people in the dark with misleading and false medical information and medically incompetent advice.

The long tradition of state regulation of medicine and of professional conduct that incidentally impacts speech exempts the content neutral statutes at issue here from heightened First Amendment scrutiny. *Tingley*, 47 F.4th at 1080. In addition, the false and misleading nature of the Respondent's publications diminishes his ability to rely on traditional speech protections. While speech may not be silenced merely because it is false,

> [t]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues. . . . They belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *New York Times Co. v. Sullivan*, 376 U.S., at 270, 84 S. Ct., at 721.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S. Ct. 2997, 3007, 41 L. Ed. 2d 789 (1974).

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The demonstrably untruthful character of Respondent's statements contribute to the conclusion that discipline concerning them is subjected to lesser scrutiny. Untruthful speech often receives lesser protection where it concerns a traditional legally cognizable harm like the wrongful loss of reputation apprehended by the torts of defamation and libel. *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). Even political speech may be regulated where it is knowingly false or made with reckless disregard for the truth because of the diminished social value of "calculated falsehood." *Garrison*, 379 U.S. at 75 (defamation and libel). This principle applies more broadly than to just defamatory or libelous statements. *U.S. v. Alvarez*, 567 U.S. 709, 719, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). Such lowered speech protections apply here where the calculated or incompetently false nature of the speech is associated with a traditional legally cognizable harm of unprofessional conduct. *See Id*.

Consistent with the discussion above, any court adjudicating this issue should apply intermediate scrutiny to the statutes challenged here. For intermediate scrutiny, courts apply the *O'Brien* considerations quoted above. *O'Brien*, 391 U.S. at 377. In line with the *O'Brien* considerations, the regulation of the medical profession for unprofessional conduct is well within the constitutional powers of state. *NIFLA*, 138 S. Ct. at 2371–72; *Conant*, 309 F.3d at 639; *Haley*, 117 Wn.2d 720. There is a long tradition of regulation "governing the practice of those who provide health care within state borders. . . . And such regulation of the health professions has applied to all health care providers, not just those prescribing drugs." *Tingley*, 47 F.4th at 1080. Washington's Uniform Disciplinary Act, chapter 18.130 RCW, regulates a category of speech belonging to this "long tradition" of state regulation and is therefore subject to lesser scrutiny. *Id*, *citing*, *NIFLA*, 138 S. Ct. at 2372.

The Commission's interests are not only substantial, but compelling. The Supreme Court has long acknowledged that "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and

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regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed.2d 572 (1975); *Tingley*, 47 F.4th at 1078. The health professions differ from other licensed professions "because they *treat* other humans, and their treatment can result in physical and psychological harm to their patients. . . . And '[f]ew professions require more careful' scrutiny than 'that of medicine.'" *Tingley*, 47 F.4th at 1083, *quoting*, *Dent*, 129 U.S. at 122. That some of the health care professions that fall within the sweep of the Uniform Disciplinary Act, chapter 18.130 RCW, use speech when treating various conditions is incidental. *Id*. "The treatment can be regulated all the same." *Id*.; *see NIFLA*, 138 S. Ct. at 2372 ("Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech."). Protection of the trust that is foundational to the practice of medicine is a compelling and substantial interest of the Commission.

The Commission's interest is especially compelling for matters of moral turpitude because counterspeech cannot be the remedy here in lieu of discipline. The danger here cannot be easily corrected in the digital social media age with authoritative true speech. Because of the nature of the heightened scientific training of physicians, the lay public lacks the ability to discriminate and parse truthful and authoritative medical speech from the kind offered by Respondent under the auspices of his medical credentials. *Dent*, 129 U.S. at 122–23.

Even more critically, the harm cannot be fully remedied by correction of the false information disseminated by Respondent because the harm is to the standing of the medical profession itself and the Commission. When the public looks up Respondent's credential on the provide credential search and sees that it is still in good standing, the public has the right to presume the Commission guarantees Respondent as a competent and honest physician. *See NAAP*, 228 F.3d at 1054 (licensing system is state remedy to guarantee competence, integrity, and responsibility of medical professionals). The public will be disillusioned in the profession when they learn that he is not. The Commission's role of assuring the public of the competency

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and integrity of its licenses would be eroded. No amount of counterspeech can rebuild the regulatory institution's reputation with the lay public. *See Dent*, 129 U.S. at 122 (1889).

The Commission also has a compelling interest in enforcing its disciplinary statutes in order to preserve life and public health. Preserving public health "is a substantial and compelling public interest." *Matter of Recall of Inslee*, 199 Wn.2d at 430–31. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27, 25 S. Ct. 358, 362, 49 L. Ed. 643 (1905) (affirming criminal conviction of man who refused small pox vaccine on religious liberty grounds against Massachusetts law). It is hard to imagine an interest that, when considered on a pandemic scale, would be more compelling for state government action. *Matter of Juveniles A, B, C, D, E*, 121 Wn.2d 80, 94, 847 P.2d 455 (1993) (Invasion of privacy under state and federal constitutions to draw and test blood of juvenile offenders for HIV justified in part because control "of a communicable disease is a valid and compelling exercise of the State's police power.").

The Commission's means of achieving these compelling interests are narrowly tailored and effective to achieve its objectives. The use of existing unprofessional conduct statutes to discipline Respondent is the narrowest means by which the state can protect the interests discussed above. *See NIFLA*, 128 S. Ct. 2361. The Commission is able to evaluate conduct on a case-by-case basis. This way the Commission does not rely on laws targeting specific content or viewpoints of speech. Speech is captured only incidentally when it is used by a physician in a way that is already violative of the Uniform Disciplinary Act, chapter 18.130 RCW. Without the authority to discipline conduct carried out by means of speech, the Commission would be unable to guarantee public trust in the profession.

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VI. CONCLUSION

For the reasons provided above, the Commission respectfully requests that the Presiding Officer DENY Respondent's motion to dismiss.

DATED this 3rd day of April, 2023.

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PROOF OF SERVICE

I certify that I served a true and correct copy of ***Commission's Opposition to Respondent's Motion to Dismiss*** and ***Declaration of Kristin G. Brewer ISO Commission's Opposition to Respondent's Motion to Dismiss*** on all parties or their counsel of record on the date below as follows:

TODD S. RICHARDSON LAW OFFICES OF TODD S. RICHARDSON 604 SIXTH STREET CLARKSTON, WA 99403 TODD@MYATTORNEYTODD.COM	☐U.S. Mail via state Consolidated Mail Service (with proper postage affixed) ☐Facsimile ☒Electronic mail per eService Agreement ☐ABC/Legal Messenger

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of April 2023, at Olympia, Washington.

DEANA G. SULLIVAN
Legal Assistant

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