

**AN APPLE A DAY KEEPS THE DOCTOR AWAY:  
COVID-19 MISINFORMATION BY MEDICAL  
PROFESSIONALS MAY BE PROTECTED BY THE  
FIRST AMENDMENT**

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ABSTRACT

In *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court of the United States clarified that under the First Amendment, there are only two categories of speech under which licensed professionals receive diminished protections: commercial speech and conduct regulations that incidentally burden speech. This 2018 decision overturned Circuit Courts of Appeals’ prior recognition of a third category, professional speech. Since freedom of speech plays a foundational role in a well-functioning democracy, based on the circumstances in *Becerra*, the Supreme Court declined to treat professional speech as a unique category that would receive lesser protection under the First Amendment. However, the Supreme Court appeared to leave the door open for an opportunity to revisit the issue, saying, “[we] do not foreclose the possibility that some such reason exists.”

COVID-19 misinformation poses a significant danger to public health, particularly when that false information is communicated by licensed medical professionals during the pandemic. To address increasing complaints regarding medical professionals spreading COVID-19 misinformation, the Federation of State Medical Boards (FSMB) recommended that its members and state medical boards, take disciplinary action against these physicians, including the suspension or revocation of their medical licenses. The generation and spread of COVID-19 misinformation by physicians has largely occurred on social media, in interviews, in public appearances, and in communication with clients, both verbally and in writing. Accordingly, action taken pursuant to the FSMB recommendation may unconstitutionally impede on physicians’ First Amendment rights to free speech.

This Note examines several instances of physicians communicating COVID-19 misinformation and analyzes whether

disciplinary action taken pursuant to the FSMB's recommendation would be a constitutional exercise of state police powers under the First Amendment. Lastly, this Note recommends modifying and narrowly reinstating professional speech as a third category of speech to receive diminished First Amendment protection, to be applied only when the licensed professional's false speech is within their field of expertise, and the false speech is related to dangerous extenuating circumstances.

#### INTRODUCTION

"The science is settled. [COVID-19 vaccines are] not working. They're not completely safe," alleged Dr. Robert Malone.<sup>1</sup> "Hydrogen peroxide treatment can successfully treat . . . coronavirus," claimed Dr. Joseph Mercola.<sup>2</sup> "[T]here exists the possibility of sterilizing all females in the population who receive the vaccination . . ." asserted Dr. Mark Brody.<sup>3</sup>

These are merely a few examples of COVID-19 misinformation communicated by licensed medical professionals during the global pandemic.<sup>4</sup> In response, the Federation of State Medical Boards (FSMB) condemned licensed physicians who communicated falsities about COVID-19 and recommended that state medical boards take disciplinary action:

Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license. Due to their specialized knowledge and training, licensed physicians possess a high degree of public trust and therefore have a powerful platform

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1. Robert Malone, *Speech at the Washington, D.C. Defeat the Mandates Rally*, DAILY MAIL, <https://www.dailymail.co.uk/video/news/video-2596417/Video-Vaccine-scientist-Robert-Malone-speaks-anti-vaxx-rally-DC.html?page=> (last visited Dec. 16, 2022) [hereinafter Dr. Malone Defeat the Mandates Speech] (video which originated on YouTube has been removed for violating community guidelines.).

2. CTR. FOR COUNTERING DIGIT. HATE, THE DISINFORMATION DOZEN 13 (Mar. 24, 2021) (available at [https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9\\_b7cedc0553604720b7137f8663366ee5.pdf](https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_b7cedc0553604720b7137f8663366ee5.pdf)) [hereinafter DISINFORMATION DOZEN REPORT].

3. Mark Brody, MD, License No. 08028 (R.I. Dep't of Health Bd. of Med. Licensure & Discipline Apr. 14, 2021) (Consent Order).

4. See Davey Alba & Sheera Frenkel, *Calls Grow to Discipline Doctors Spreading Virus Misinformation*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/technology/doctors-virus-misinformation.html?referringSource=articleShare>.

in society, whether they recognize it or not. They also have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factual, scientifically grounded and consensus-driven for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and puts all patients at risk.<sup>5</sup>

The same day this recommendation was released, the Center for Disease Control and Prevention (CDC) reported 612,237 cumulative deaths in the United States due to COVID-19.<sup>6</sup> Doctors and hospitals were consistently ranked the most trusted “people and organizations to do the right thing to best handle” the COVID-19 pandemic.<sup>7</sup> Yet, complaints regarding physicians spreading misinformation increased.<sup>8</sup> Accordingly, the FSMB recommended sanctioning physicians who communicate scientifically false information in the midst of a global pandemic.<sup>9</sup> However, such disciplinary action may unconstitutionally impede on physicians’ right to free speech under the First Amendment of the United States Constitution.<sup>10</sup>

This Note determines whether physicians may constitutionally be held accountable for communicating false COVID-19 information pursuant to the FSMB recommendation. Part I explores the gravity of the COVID-19 pandemic and the prevalence of misinformation. Part II discusses specific instances of misinformation by physicians and the

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5. *FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License at Risk*, FED’N OF STATE MED. BDS., (July 29, 2021), <https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/> [hereinafter *FSMB on Vaccine Misinformation*].

6. *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#trends\\_totaldeaths|tot\\_deaths|select](https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths|tot_deaths|select) (last visited Dec. 16, 2022) [hereinafter *CDC, Covid Data Tracker*].

7. See *COVID-19 Trust Tracker-All*, THE COVID STATES PROJECT, <https://covidstates.org/trust-in-institutions> (last visited Dec. 16, 2022) [hereinafter *COVID States Project Over-Time Trust Tracker*].

8. Rob Kuznia et al., *They Take an Oath to do No Harm, but These Doctors are Spreading Misinformation About the Covid Vaccine*, CNN (Oct. 20, 2021, 4:07 PM), <https://www.cnn.com/2021/10/19/us/doctors-covid-vaccine-misinformation-invs/index.html>; see generally DISINFORMATION DOZEN REPORT, *supra* note 2.

9. *FSMB on Vaccine Misinformation*, *supra* note 5.

10. See U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech”); *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72, 2375 (2018).

FSMB’s response. Part III considers the Circuit Courts of Appeals’ previous decisions regarding professional speech and the Supreme Court’s decision in *Becerra*. Part IV analyzes the constitutionality of the FSMB recommendation and examines examples of doctors’ misinformation under the current First Amendment framework. Part V provides a recommendation.

## I. THE COVID-19 GLOBAL PANDEMIC & COVID-19 MISINFORMATION

### A. *The Global COVID-19 Pandemic*

On March 11, 2020, the Director-General of the World Health Organization (WHO), Dr. Tedros Ghebreyesus, announced that the COVID-19 crisis had been elevated to a pandemic: “COVID-19 can be characterized as a pandemic. Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.”<sup>11</sup> The WHO urged countries around the world to prepare, test, isolate, and combat the pandemic.<sup>12</sup> Nearly two years later, as of March 4, 2022, seventy-nine million cases of COVID-19 were reported to the CDC and 955,135 United States citizens have died as a result of COVID-19.<sup>13</sup>

Each of the fifty states enacted various COVID-19 prevention measures, which have fluctuated in scope throughout different points in time during the pandemic.<sup>14</sup> It is well settled that state and local governments are authorized to enact such necessary and reasonable measures under emergency circumstances to protect the health and well-being of its citizens.<sup>15</sup>

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11. Tedros Adhanom Ghebreyesus, *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020>.

12. *Id.*

13. CDC, *Covid Data Tracker*, *supra* note 6.

14. See *COVID Data Tracker: State-Issued Prevention Measures at the State-Level*, CNTRS. FOR DISEASE CONTROL & PREVENTION (last visited Dec. 16, 2022), <https://covid.cdc.gov/covid-data-tracker/#state-level-covid-policy>. Prevention measures included mask mandates, stay at home orders, business closures, and cancelling public transportation. *Id.*

15. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 24–25, 26, 27 (1905). In this case, a vaccine mandate issued by Massachusetts was challenged as violative of the defendant’s personal liberties. *Id.* at 26–27. However, the Court found that the legislature constitutionally enacted the mandate pursuant to its police powers: “Massachusetts required the inhabitants of a city or town to be vaccinated

However, despite the government's broad authority in health emergencies, COVID-19 became extremely politicized.<sup>16</sup> Recognizing this, the COVID States Project developed an "Over-Time Trust Tracker" to display its survey data regarding citizens' trust levels of various entities across the political spectrum.<sup>17</sup> Democrats, Republicans, and Independents all consistently indicated that doctors and hospitals are the most trusted sources to best manage the pandemic.<sup>18</sup> Despite this apparent consensus, the politicization of the pandemic was fueled by the extraordinary amount of polarizing misinformation communicated to the public.<sup>19</sup> Notably, complaints to state medical boards regarding physicians communicating COVID-19 misinformation drastically increased.<sup>20</sup>

### *B. Prevalence of COVID-19 Misinformation*

COVID-19 misinformation has become widespread. According to the COVID States Project Misinformation Report, fifty-one percent of respondents were unsure whether to believe at least one false claim and twenty percent of respondents believed at least one false claim about vaccines.<sup>21</sup> In an effort to combat the effect of the increasing

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only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body . . . ." *Id.* at 27. See also Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 130–32 (2020).

16. See Dorit Reiss, *Politicization of Science*, A.B.A. (June 14, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-truth-about-science/politicization-of-science/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-truth-about-science/politicization-of-science/). See also Michael Specter, *How Anthony Fauci Became America's Doctor*, THE NEW YORKER (Apr. 10, 2020), <https://www.newyorker.com/magazine/2020/04/20/how-anthony-fauci-became-americas-doctor>. The politicized nature of COVID-19 is also evident in the polarizing treatment of Dr. Anthony Fauci by the left-wing and right-wing. *Id.* Members of the left-wing have created "In Dr. Fauci we trust" merchandise, while members of the right-wing have used the hashtag #FauciFraud on social media. *Id.* In the middle, Dr. Fauci endeavors to "stay completely apolitical and non-ideological" as a physician and scientist. *Id.*

17. *COVID States Project Over-Time Trust Tracker*, *supra* note 7.

18. *Id.*

19. Reiss, *supra* note 16.

20. Kuznia et al., *supra* note 8. The President of the FSMB, Dr. Humayun Chaudhry, told CNN that several state medical boards have reported "a lot of complaints about physicians sharing coronavirus misinformation." *Id.*

21. KATHERINE OGNANOVA ET AL., THE COVID STATES PROJECT: A 50-STATE COVID-19 SURVEY, REPORT #60: VACCINE MISINFORMATION, FROM UNCERTAINTY

amount of false information, the Cybersecurity and Infrastructure Security Agency (CISA) published a toolkit to educate citizens on what misinformation is, how to verify information, and how to detect manipulative or false sources.<sup>22</sup> CISA defines misinformation as “false, but not created or shared with the intention of causing harm,” and disinformation as “deliberately created to mislead, harm, or manipulate a person, social group, organization, or country.”<sup>23</sup> David Lazer alleged physicians who communicate misinformation are taking advantage of the credibility and prestige that accompany the title “doctor” to facilitate its spread.<sup>24</sup> This practice poses a significant danger during a public health crisis.<sup>25</sup>

## II. CASE STUDIES OF COVID-19 MISINFORMATION BY MEDICAL PROFESSIONALS & THE RESPONSE BY THE FEDERATION OF STATE MEDICAL BOARDS

### A. *Physicians Communicating Misinformation*

The generation and spread of misinformation by licensed medical professionals appears to fall into three categories: commercial speech, professional conduct, and pure speech.<sup>26</sup> However, under the First Amendment, only misinformation that qualifies as commercial speech or conduct may be sanctioned; misinformation that constitutes pure speech may be protected.<sup>27</sup>

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TO RESISTANCE 4 (2021), (available at <https://osf.io/xtjad>). The research also found that when citizens believe or are uncertain whether to believe such misinformation, they will have lower vaccine rates and increased vaccine hesitancy. *Id.* See also DISINFORMATION DOZEN REPORT, *supra* note 2 at 4. “Researchers are increasingly connecting misinformation disseminated via social media to increase vaccine hesitancy, which will ultimately cause unnecessary deaths.” *Id.*

22. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, DISINFORMATION AND COVID-19: HOW STATE AND LOCAL OFFICIALS CAN RESPOND (2020) (available at [https://www.cisa.gov/sites/default/files/publications/SLTTCOVIDToolkit\\_FINAL\\_508.pdf](https://www.cisa.gov/sites/default/files/publications/SLTTCOVIDToolkit_FINAL_508.pdf)) [hereinafter CISA, DISINFORMATION AND COVID-19].

23. *Id.* This Note uses these CISA definitions of misinformation and disinformation.

24. Kuznia et al., *supra* note 8.

25. *Id.*

26. Nat’l Inst. of Family & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2371–72 (2018).

27. See U.S. CONST. amend. I; *Becerra*, 138 S. Ct. at 2371–72, 2375.

### 1. *The Disinformation Dozen*

“Forced vaccination is part of the plan to ‘reset’ the global economic system . . . .”<sup>28</sup> “The #MaskAgenda has nothing to do with health and everything to do with control & suppressing your #immunesystem. The longer you wear one, the more unhealthy you become.”<sup>29</sup> “Get the COVID vaccine but remember the following . . . becoming sterile [is] almost a certainty. . . .”<sup>30</sup>

In its “Disinformation Dozen” report, the Center for Countering Digital Hate (CCDH) attributed sixty-five percent of COVID-19 misinformation on social media to twelve individuals, four of whom are current or former physicians.<sup>31</sup> Dr. Joseph Mercola, Dr. Sherri Tenpenny, and Dr. Rashid Buttar, who posted these respective statements, are amongst the group.<sup>32</sup> The CCDH analyzed social media posts that promoted anti-vaccine content, finding the Disinformation Dozen was responsible for seventy-three percent of anti-vaccine content on Facebook and seventeen percent of anti-vaccine content on Twitter.<sup>33</sup> “The public cannot make informed decisions about their health when they are constantly inundated by disinformation and false content,” the CCDH alleged.<sup>34</sup> Since this report was published, social media companies increased efforts to monitor and remove such misinformation.<sup>35</sup>

### 2. *Dr. Joseph Mercola*

Dr. Joseph Mercola has been dubbed “the most influential spreader of coronavirus misinformation online.”<sup>36</sup> He is an osteopathic

28. DISINFORMATION DOZEN REPORT, *supra* note 2, at 13. Dr. Mercola posted this statement on Instagram.

29. *Id.* at 19. Dr. Sherri Tenpenny tweeted this claim.

30. *Id.* at 24. Dr. Rashid Buttar asserted this claim in a Facebook post.

31. *Id.* at 6.

32. *Id.* at 6. “These individuals were selected either because they run anti-vaccine social media accounts with large numbers of followers, because they produce high volumes of anti-vaccine content or because their growth was accelerating rapidly at the outset of our research in February.” *Disinformation Dozen Report*, *supra* note 2 at 6.

33. *Id.* at 7, 9.

34. *Id.* at 10.

35. Kuznia et al., *supra* note 8.

36. Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/07/24/technology/joseph-mercola-coronavirus-misinformation-online.html>.



physician who has an established business promoting natural health and anti-vaccination remedies, and is one of the Disinformation Dozen.<sup>37</sup> Over the course of his career, Dr. Mercola built a substantial audience of a combined 4.1 million followers across his social media accounts.<sup>38</sup> In 2017, he reported a net worth of \$100 million.<sup>39</sup> Dr. Mercola was also identified as one of the most profitable and influential anti-vaccine content producers, with his revenue totaling \$7.2 million during the pandemic.<sup>40</sup>

Dr. Mercola communicates COVID-19 misinformation and promotes anti-vaccine alternative remedies using social media, his website, and his book.<sup>41</sup> His claims include: “[h]ydrogen peroxide treatment can successfully treat most viral respiratory illnesses, including coronavirus,”<sup>42</sup> “COVID vaccines may bring avalanche of neurological disease,”<sup>43</sup> “How COVID-19 Vaccines may destroy the Lives of Millions,”<sup>44</sup> and he frequently poses leading questions on social media to cast doubt on the efficacy of the vaccine and the CDC’s preventative measures.<sup>45</sup>

Further, on his website, Dr. Mercola advertised products such as Liposomal Vitamin C, Liposomal Vitamin D, and Quercetin and Pterostilbene Advanced to prevent and treat COVID-19.<sup>46</sup> These

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37. See *About Dr. Mercola*, MERCOLA, <https://www.mercola.com/forms/background.htm> (last visited Dec. 16, 2022); DISINFORMATION DOZEN REPORT, *supra* note 2, at 12; Kuznia et al., *supra* note 8 (noting Mercola is also a member of “America’s Frontline Doctors,” an organization that opposes COVID-19 preventative and treatment measures); Alba & Frenkel, *supra* note 4.

38. CTR. FOR COUNTERING DIGIT. HATE, PANDEMIC PROFITEERS: THE BUSINESS OF ANTI-VAXX 18 (June 1, 2021), <https://www.counterhate.com/pandemicprofiteers> [hereinafter CCDH PROFITEERS REPORT].

39. Frenkel, *supra* note 36.

40. CCDH PROFITEERS REPORT, *supra* note 38, at 18.

41. *Id.* at 18–19.

42. DISINFORMATION DOZEN REPORT, *supra* note 2, at 13.

43. CCDH PROFITEERS REPORT, *supra* note 38, at 18.

44. DISINFORMATION DOZEN REPORT, *supra* note 2, at 7. This is the title of an article published by Joseph Mercola, that was shared over 12,000 times on Facebook.

45. Frenkel, *supra* note 36.

46. Letter from the U.S. Food & Drug Admin. to Dr. Joseph Mercola (Feb. 18, 2021) (available at <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/mercolacom-llc-607133-02182021> [hereinafter FDA Warning Letter]).

promotions earned Dr. Mercola a warning letter from the Food and Drug Administration (FDA) because he “misleadingly represent[ed] them as safe and/or effective for the treatment or prevention of COVID-19.”<sup>47</sup> In response, Dr. Mercola removed the offending content.<sup>48</sup> However, Dr. Mercola recently announced a new feature on his website: The Censored Library.<sup>49</sup> Here, paying subscribers may access previously deleted content.<sup>50</sup>

### 3. Dr. Steven LaTulippe

Dr. Steven LaTulippe sued the Oregon Medical Board (OMB), alleging the state medical board violated his First Amendment rights when his license was suspended in December 2020.<sup>51</sup> According to the complaint, “[t]he OMB’s suspension of Dr. LaTulippe was based on the fact that he has publicly stated at a political rally (“Stop the Steal” rally) that masks are not effective in slowing the spread of COVID-19,” as well as comments he made to patients.<sup>52</sup> Dr. LaTulippe was one of many speakers at the public rally protesting various COVID-19 restrictions.<sup>53</sup> Further, Dr. LaTulippe claimed that the suspension violated conduct-based speech by sanctioning his refusal to wear a mask.<sup>54</sup>

The OMB denied that the suspension violated Dr. LaTulippe’s right to free speech; rather the “OMB found plaintiff to be a serious danger to public health and safety.”<sup>55</sup> The OMB had investigated Dr.

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47. *Id.*

48. CCDH PROFITEERS REPORT, *supra* note 38, at 18; Joseph Mercola, *Your Ability to Access Deleted Articles Returns*, MERCOLA.COM (Jan. 3, 2022), <https://articles.mercola.com/sites/articles/archive/2022/01/03/mercola-censored-library.aspx> [hereinafter Mercola, *Your Ability to Access Deleted Articles Returns*].

49. Mercola, *Your Ability to Access Deleted Articles Returns*, *supra* note 48. Mercola expressed outrage at having to remove over 15,000 articles from his website, claiming he was the target of censorship by the U.S. government following the Disinformation Dozen Report. *Id.*

50. *Id.* Dr. Mercola’s website is hosted by Substack, “a major free speech platform that many censored journalists are using.” *Id.* Here, the content will be protected by private membership agreements. *Id.*

51. Complaint for Declaratory and Injunctive Relief and Damages at 2–8, *LaTulippe v. Harder*, 574 F. Supp. 3d 870 (D. Or. 2021) (No. 3:21-cv-00090-SB) [hereinafter *LaTulippe Complaint*].

52. *Id.* at 7–8.

53. *Id.* at 7.

54. *Id.* at 8.

55. *See* Defendants’ Motion to Dismiss for Lack of Jurisdiction, for Judgment on the Pleadings and for Summary Judgment at 5, *LaTulippe v. Harder*, 574 F. Supp.

LaTulippe's medical practice after receiving numerous complaints that he was not following mask requirements.<sup>56</sup> Accordingly, the OMB claimed the suspension was based on Dr. LaTulippe's professional conduct.<sup>57</sup> Citing numerous United States Supreme Court cases in its motion to dismiss, the OMB asserted that it acted well within its police powers to regulate the practice, and in doing so, permissibly incidentally burdened Dr. LaTulippe's speech.<sup>58</sup> The OMB suspended Dr. LaTulippe because he refused to wear a mask while treating patients, he did not enforce mask-wearing requirements for his clinic staff and patients, and he did not screen patients for COVID-19.<sup>59</sup> The OMB additionally asserted that they had absolute or qualified immunity.<sup>60</sup> On November 23, 2021, the District Court dismissed LaTulippe's case with prejudice, finding the OMB was correct that it was entitled to absolute immunity.<sup>61</sup>

#### 4. Dr. Mark Brody

Dr. Mark Brody, an integrated medicine physician, was sanctioned by the Rhode Island Board of Medical Licensure and Discipline in January 2021 for communicating COVID-19 vaccine falsehoods to his patients.<sup>62</sup> Dr. Brody mailed unsolicited letters to his patients advising against the then-forthcoming COVID-19 vaccine.<sup>63</sup>

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3d 870 (D. Or. 2021) (No. 3:21-cv-00090-HZ) [hereinafter *Harder* Second Motion to Dismiss].

56. *Id.*

57. *Id.* at 12

58. *Id.* at 11–12 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (“To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (“There can be no doubt that the government has an interest in protecting the integrity and ethics of the medical profession. . . . Under our precedents it is clear the state has a significant role to play in regulating the medical profession.”)).

59. *Harder* Second Motion to Dismiss, *supra* note 55 at 12. “The factual basis for the suspension was plaintiff’s conduct as a physician practicing medicine, not his personal behavior as a member of the public.” *Id.* at 13.

60. *Id.* at 6, 16–17.

61. *LaTulippe v. Harder*, 574 F. Supp. 3d 870, 874, 883 (D. Or. 2021).

62. Kuznia et al., *supra* note 8. See also Alexa Gagosz, *R.I. ‘Integrated Medicine’ Doctor’s License Suspended for 5 Years*, THE BOSTON GLOBE (Aug. 17, 2021, 11:07 AM), <https://www.bostonglobe.com/2021/08/17/metro/ri-integrated-medicine-doctors-license-suspended-5-years/>.

63. Mark Brody, MD, License No. 08028 (R.I. Dep’t of Health Bd. of Med. Licensure & Discipline Apr. 14, 2021) (Consent Order).

In this letter, he stated, “there exists the possibility of sterilizing all females in the population who receive the vaccination,”<sup>64</sup> and “authorities within the government and the media have become untethered from science in promoting a poorly and inadequately tested product . . . .”<sup>65</sup> The Investigative Committee found that Dr. Brody was misinformed, that he communicated patently false information, and that he demonstrated a “general lack of expertise in the field.”<sup>66</sup> Notably, the consent order categorized this letter as the practice of medicine because it constituted advising patients.<sup>67</sup>

### 5. Dr. Robert Malone

Dr. Robert Malone is a medical physician and biochemist.<sup>68</sup> Over the course of his decades-long career, Dr. Malone invented nine mRNA vaccine patents, supervised more than one hundred clinical vaccine trials, won federal grants and contracts for vaccines and biodefense, and has worked with the CDC.<sup>69</sup> He is also a vocal opponent to the COVID-19 vaccine.<sup>70</sup>

Dr. Malone was recently featured on The Joe Rogan Experience, Episode #1757.<sup>71</sup> The Joe Rogan Experience is one of the most popular Spotify podcasts, with more than 11 million audience members per episode.<sup>72</sup> For three hours, Rogan interviewed Dr.

64. *Id.* at 2.

65. *Id.* at 3.

66. *Id.* at 2.

67. *Id.* (“Mindful of Respondent’s First Amendment rights, the Investigative Committee noted that Respondent’s letter to his patients communicated advice to his patients. . . .”)

68. *Editorial Board Biography*, SCI. RSCH. PUBL’G, <https://www.scirp.org/journal/DetailedInforOfEditorialBoard.aspx?personID=5968> (last visited Dec. 16, 2022).

69. See The Joe Rogan Experience, #1757 – Dr. Robert Malone, MD (Dec. 31, 2021), <https://open.spotify.com/show/4rOoJ6Egrf8K2IrywzwOMk?si=840ca54c2f9043cc> [hereinafter The Joe Rogan Experience Episode #1757].

70. *Id.* Dr. Malone was coincidentally removed from Twitter one day prior to this interview. *Id.* See also Dr. Malone Defeat the Mandates Speech, *supra* note 1 (“Regarding these genetic COVID vaccines: the science is settled. They’re not working. They’re not completely safe. . . .”)

71. The Joe Rogan Experience Episode #1757, *supra* note 69.

72. Madhava Setty, *Rogan and Malone: Most Important Interview of Our Time?*, CHILD.’S HEALTH DEF. (Jan. 4, 2022), <https://childrenshealthdefense.org/defender/joe-rogan-robert-malone-interview-covid-vaccine/>.

Malone, who discussed his criticisms of the COVID-19 preventative measures taken by the U.S. government, his theories regarding the efficacy of the COVID-19 vaccine, and his support of alternative treatments.<sup>73</sup> The podcast has become extremely controversial because of the COVID-19 misinformation Dr. Malone discussed.<sup>74</sup> Dr. Malone's highly controversial claims include: "[one] third of the population [is] basically being hypnotized" by Anthony Fauci and the mainstream media;<sup>75</sup> the suppression of hydroxychloroquine and ivermectin as early treatments has resulted in half a million deaths;<sup>76</sup> "these mandates of an experimental vaccine are explicitly illegal,"<sup>77</sup> and multiple doses of the "jab" are ineffective against the Omicron variant.<sup>78</sup>

Reactions to Dr. Malone's interview were widespread and varied. For example, Texas Congressman Troy Nehls supported Dr. Malone's claims and feared censorship from "big tech."<sup>79</sup> As a result, Congressman Nehls entered the podcast transcript into the

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73. The Joe Rogan Experience Episode #1757, *supra* note 69.

74. See Nik Popli, *Spotify's Joe Rogan Controversy Isn't Over Yet*, TIME (Feb. 11, 2022, 4:50 PM), <https://time.com/6147548/spotify-joe-rogan-controversy-isnt-over/>; see also Linda Qiu, *Fact-Checking Joe Rogan's Interview with Robert Malone That Caused an Uproar*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/08/arts/music/fact-check-joe-rogan-robert-malone.html> ("Several prominent musicians and podcasters have left the streaming service to protest what they describe as Mr. Rogan's history of promoting misinformation about the coronavirus and vaccines. . . The catalyst for much of the controversy was a December episode of his podcast that featured Dr. Robert Malone, a virologist and vaccine skeptic.").

75. The Joe Rogan Experience Episode #1757, *supra* note 69; see also Timothy Bella, *A Vaccine Scientist's Discredited Claims Have Bolstered a Movement of Misinformation*, THE WASH. POST (Jan. 24, 2022, 11:51 AM), <https://www.washingtonpost.com/health/2022/01/24/robert-malone-vaccine-misinformation-rogan-mandates/>.

76. The Joe Rogan Experience Episode #1757, *supra* note 69; see also Setty, *supra* note 72.

77. The Joe Rogan Experience Episode #1757, *supra* note 69. Malone continued, "They're explicitly inconsistent with the Nuremberg Code. They're explicitly inconsistent with the Belmont Report. They are flat out illegal and [the government doesn't] care." *Id.*

78. *Id.*

79. 117 CONG. REC. E1403–05 (daily ed. Jan 3, 2022) (Extension of Remarks) (available at <https://www.congress.gov/congressional-record/volume-167/extensions-of-remarks-section/page/E1403>).

Congressional Record in order to preserve it.<sup>80</sup> On the other hand, a coalition of nearly 300 “scientists, medical professionals, professors, and science communicators” penned an open letter to Spotify advocating for the removal of Episode #1757, because they feared the danger that the “predatory medical misinformation” discussed on the podcast posed to listeners.<sup>81</sup>

Further, on January 24, 2022, Dr. Robert Malone delivered a speech at the “Defeat the Mandates Rally” in Washington, D.C.<sup>82</sup> During this speech, he said, “[r]egarding these genetic COVID vaccines: the science is settled. They’re not working. They’re not completely safe,” and alleged, “even if [everyone] were vaccinated, these products cannot achieve herd immunity and stop COVID. They’re not completely safe, and the full nature of the risks remain unknown. In contrast, the natural immunity healthy immune systems develop after infection and recovery from COVID, is long-lasting, broad, and highly protective . . . .”<sup>83</sup> Yet, two days prior, the CDC released a study demonstrating the high efficacy of the vaccine against the Omicron variant.<sup>84</sup>

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80. *Id.* See also Press Release, Congressman Troy E. Nehls, Joe Rogan Experience #1757 – Dr. Robert Malone, MD Full Transcript (Jan. 3, 2022) (available at <https://nehls.house.gov/posts/joe-rogan-experience-1757-dr-robert-malone-md-full-transcript>).

81. See Letter from Adriana Sosa, DO et al., to Spotify (Jan. 10, 2022) (available at <https://spotifyopenletter.wordpress.com/2022/01/10/an-open-letter-to-spotify/>) [hereinafter Open Letter to Spotify] (a call from the global scientific and medical communities to implement a misinformation policy); see also EJ Dickson, ‘A Menace to Public Health’: Doctors Demand Spotify Puts an End to Covid Lies on ‘Joe Rogan Experience’, ROLLING STONE (Jan. 12, 2022, 12:56 PM), <https://www.rollingstone.com/culture/culture-news/covid-misinformation-joe-rogan-spotify-petition-1282240/>.

82. Bella, *supra* note 75; see also Dr. Malone Defeat the Mandates Speech, *supra* note 1.

83. Dr. Malone Defeat the Mandates Speech, *supra* note 1.

84. Bella, *supra* note 75; CTR. FOR DISEASE CONTROL & PREVENTION, EFFECTIVENESS OF A THIRD DOSE OF mRNA VACCINES AGAINST COVID-19-ASSOCIATED EMERGENCY DEPARTMENT AND URGENT CARE ENCOUNTERS AND HOSPITALIZATIONS AMONG ADULTS DURING PERIODS OF DELTA ANDOMICRON VARIANT PREDOMINANCE – VISION NETWORK, 10 STATES, AUGUST 2021-JANUARY 2022 (2022), [https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e3.htm?s\\_cid=mm7104e3\\_x#:~:text=During%20b oth%20Delta%2D%20and%20Omicron,and%2090%25%2C%20respectively.](https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e3.htm?s_cid=mm7104e3_x#:~:text=During%20b oth%20Delta%2D%20and%20Omicron,and%2090%25%2C%20respectively.)

These doctors illustrate a few examples of medical professionals communicating COVID-19 misinformation during the global pandemic.<sup>85</sup> Accordingly, calls to discipline doctors who spread COVID-19 falsehoods have become widespread.<sup>86</sup>

*B. Response by the Federation of State Medical Boards*

The Federation of State Medical Boards (FSMB) is a nonprofit organization that supports state medical boards by providing research, recommendations and best practices, and uniform education, licensure and disciplinary services to its member state boards.<sup>87</sup> On July 29, 2021, the FSMB addressed the problem of licensed physicians generating and spreading COVID-19 misinformation during the pandemic.<sup>88</sup> The FSMB recommended that state medical boards take disciplinary action against offending doctors who communicate COVID-19 misinformation, including the suspension or revocation of their medical licenses.<sup>89</sup> This raises the question, if a state medical board acts strictly pursuant to the FSMB's recommendation, would such disciplinary action impermissibly violate physicians' First Amendment rights to free speech?<sup>90</sup>

III. THE PROFESSIONAL SPEECH DOCTRINE & ITS DEMISE

Prior to the United States Supreme Court 2018 decision in *Becerra*, the Circuit Courts of Appeals recognized three categories of speech by licensed professionals that receive diminished protections under the First Amendment: (1) commercial speech, (2) conduct regulation that has an incidental impact on speech, and (3)

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85. Alba & Frenkel, *supra* note 4; *see also* Geoff Brumfiel, *Anti-Vaccine Activists Use a Federal Database to Spread Fear About COVID Vaccines*, NPR (June 14, 2021, 5:00 AM), <https://www.npr.org/sections/health-shots/2021/06/14/1004757554/anti-vaccine-activists-use-a-federal-database-to-spread-fear-about-covid-vaccine>.

86. Alba & Frenkel, *supra* note 4.

87. *About FSMB*, FED'N OF STATE MED. BDS., <https://www.fsmb.org/about-fsmb/> (last visited Dec. 16, 2022).

88. *FSMB on Vaccine Misinformation*, *supra* note 5.

89. *Id.* (“Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license.”)

90. *See* U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech . . .”).

professional speech.<sup>91</sup> “Professionals” are defined as “individuals who provide personalized services to clients and who are subject to ‘a generally applicable licensing and regulatory regime,’” and “Professional Speech” is “any speech by these individuals that is based on ‘their expert knowledge and judgment’ or that is within the confines of the professional relationship.”<sup>92</sup>

*A. The United States Circuit Courts of Appeals Regarding Professional Speech*

In 2014, the Court of Appeals for the Third Circuit in *King v. Governor of New Jersey* held that Assembly Bill A3371 (A3371) was a valid prohibition on professional speech.<sup>93</sup> A3371 prohibited licensed professional counselors from engaging in Sexual Orientation Change Efforts (SOCE) with clients.<sup>94</sup> Those counselors who violated the law would be subject to discipline by the applicable professional licensing board.<sup>95</sup> A3371 was passed based on critical findings that SOCE had a significantly harmful impact on LGBTQ clients.<sup>96</sup> SOCE was administered by a licensed counselor through “talk therapy,” which was a form of treatment “administered solely by communication” that was often supported by Biblical teachings.<sup>97</sup> The plaintiffs were organizations and individuals that provided SOCE.<sup>98</sup> Accordingly, they claimed that A3371 violated their First Amendment rights to free speech and free exercise of religion.<sup>99</sup> The district court dismissed the free speech challenge, finding that A3371 regulated

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91. See Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371–72 (2018). See also, *King v. Governor of N.J.*, 767 F.3d 216, 240 (3d Cir. 2014); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 567–70 (4th Cir. 2013); *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014).

92. *Becerra*, 138 S. Ct. at 2371.

93. See *King*, 767 F.3d at 240.

94. See *id.* at 221.

95. See *id.*

96. See *id.* at 221–22.

97. *Id.* at 221.

98. See *King*, 767 F.3d at 220–21.

99. See *id.* at 220, 222.



professional conduct and did not have an incidental effect on speech.<sup>100</sup> The Third Circuit affirmed on different grounds.<sup>101</sup>

First, the Third Circuit addressed whether the regulated speech was conduct or speech.<sup>102</sup> Relying on the Supreme Court's decision in *Holder v. Humanitarian Law Project*, the Third Circuit disagreed with the district court that A3371 regulated conduct.<sup>103</sup> Instead, it found that since the therapy was solely administered through verbal communication, the counseling qualified as speech under the First Amendment: "simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment."<sup>104</sup>

Then, the Third Circuit determined whether the speech at issue was entitled to the full protection of the First Amendment.<sup>105</sup> In doing so, the court recognized the professional speech doctrine: licensed professionals, when speaking within the confines of a professional relationship, are not entitled to the full protection of free speech under the First Amendment.<sup>106</sup> The court determined this doctrine was appropriate because the state licenses professionals based on their specialized knowledge and training, which induces clients to trust and rely on the professional.<sup>107</sup> However, licensed professionals' free speech rights are not diminished when speaking publicly or discussing personal opinions with a client.<sup>108</sup> Accordingly, since A3371 prohibited talk therapy and not public dialogue, diminished protections applied.<sup>109</sup>

Finally, the court determined intermediate scrutiny applied because such speech was based on specialized knowledge and training, and the state had broad authority to regulate professionals

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100. *See id.* at 203. In determining that the SOCE talk therapy was conduct, and not protected speech under the First Amendment, the district court relied on the Ninth Circuit's decision in *Pickup v. Brown*. *Id.* at 226–28. The Third Circuit rejected the Ninth Circuit's continuum of professional speech and conduct, calling it a "labeling game." *Id.* at 228.

101. *See King*, 767 F.3d at 220, 224.

102. *See id.* at 224.

103. *See id.* at 225 (discussing *Holder v. Humanitarian L. Project*, 561 U.S. 1, 10–11 (2010), where the Court rejected the notion that legal communication amounted to professional conduct.).

104. *Id.* at 224, 228–29.

105. *See id.* at 229.

106. *See King*, 767 F.3d at 229–33.

107. *See id.* at 232.

108. *See id.*

109. *Id.* at 233.

through its police powers.<sup>110</sup> The Third Circuit emphasized that the purpose of the regulation must be to protect citizens from “harmful or ineffective professional services.”<sup>111</sup> The state presented ample empirical evidence regarding the harms of SOCE, supporting its interest in protecting minors from harmful professional practices.<sup>112</sup> The court found New Jersey’s interest in protecting clients from SOCE was “unquestionably substantial.”<sup>113</sup> Finally, the court held the regulation was sufficiently tailored and not overly burdensome.<sup>114</sup> Therefore, A3371 survived scrutiny and the regulation was a valid limitation on speech.<sup>115</sup>

In *Pickup v. Brown*, a similar SOCE prohibition, California Senate Bill 1172 (SB 1172), was challenged as violative of counselors’ First Amendment rights.<sup>116</sup> This bill was also upheld as a constitutional restriction on professional speech.<sup>117</sup> However, the Ninth Circuit arrived at its decision by using a different analysis.<sup>118</sup> To determine whether the bill regulated conduct or speech, the court adopted a continuum approach.<sup>119</sup> The continuum was comprised of three categories of speech: (1) public dialogue, where the professional was entitled to the full protection of the First Amendment, despite advocating for dangerous or unconventional treatments; (2) the speech occurred within a professional relationship, where the state may enact regulations to serve the citizens’ welfare; and (3) the speech qualified as conduct, where the state’s power to regulate, despite incidental

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110. *Id.* at 233–35. In doing so, the Third Circuit analogized professional speech to commercial speech. *King*, 767 F.3d at 233–34. Commercial speech is different from regular speech because it communicates information to consumers, is directly linked to the transaction which the State has an interest in, and is thus “traditionally subject to government regulation.” *Id.* “Accordingly, a prohibition of commercial speech is permissible when it ‘directly advances’ a ‘substantial’ government interest and is ‘not more extensive than is necessary to serve that interest.’” *Id.* at 234.

111. *Id.* at 236. The court rejected the plaintiff’s argument that the regulation should be subject to strict scrutiny because A3371 regulates content. *Id.* This was a category of permissible content discrimination because of the State’s authority to protect its citizens from harms such as those presented by SOCE. *King*, 767 F.3d at 237.

112. *Id.* at 237–39.

113. *Id.* at 237.

114. *Id.* at 239–40.

115. *Id.* at 240.

116. *Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2014).

117. *Id.* at 1232.

118. *See id.* 1227–32.

119. *Id.* at 1227–29.

effects on speech, is greatest.<sup>120</sup> The court noted almost all medical treatments involve speech, but the act of speaking itself did not “give rise to a First Amendment claim when the state bans a particular treatment.”<sup>121</sup> Accordingly, the court found that since SB 1172 banned a specific treatment for minors and did not prohibit the communication of a particular message or viewpoint, the law regulated conduct.<sup>122</sup>

Since SB 1172 regulated conduct, the Ninth Circuit concluded that rational basis was the appropriate review standard.<sup>123</sup> The California Legislature enacted the law to protect minors who identified as LGBTQ from the physical and psychological harms caused by SOCE.<sup>124</sup> In doing so, the legislature rationally relied on professional reports and opinions that concluded SOCE was harmful and ineffective.<sup>125</sup> Therefore, the court found the law was reasonably passed to serve the legitimate interest of protecting citizens, and was constitutional.<sup>126</sup>

Lastly, in 2013, the Court of Appeals for the Fourth Circuit in *Moore-King v. County of Chesterfield, Virginia*, applied the professional speech doctrine to uphold a county zoning ordinance that required business licenses for fortune tellers.<sup>127</sup> Among other challenges, the plaintiff claimed the ordinance violated her right to free speech because she was required to obtain a license to operate her spiritual counseling and psychic reading business.<sup>128</sup>

The county argued that fortune telling was deceptive, and inherently deceptive speech was not protected by the First Amendment.<sup>129</sup> Rejecting the first premise of this argument, the court

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120. *Id.*

121. *Pickup*, 740 F.3d at 1229, 1230–31.

122. *Id.* at 1229–30.

123. *Id.* at 1231 (“SB 1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest.”).

124. *Id.*

125. *Id.* at 1231–32.

126. *Pickup*, 740 F.3d at 1232.

127. *See Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 562–70 (4th Cir. 2013).

128. *Id.* at 565. The district court dismissed her claim, holding that the predictive nature of her business qualified as deceptive speech and was not protected by the First Amendment. *Id.* The district court also provided alternative explanations for the dismissal: (1) the plaintiff’s speech qualified as commercial speech; or (2) the ordinance was a valid time, place and manner restriction. *Id.* The Fourth Circuit affirmed. *Id.* at 565–66.

129. *Moore-King*, 708 F.3d at 566.

found fortune telling was not necessarily deceptive because it was predictive, as many professional practices are predictive in nature.<sup>130</sup> Still, the court turned to whether inherently deceptive speech was protected by the First Amendment.<sup>131</sup> In rejecting the second premise of the county's argument, the court relied on *U.S. v. Alvarez*, where the Supreme Court stated: "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood."<sup>132</sup> Because the county did not present specific arguments that the speech was knowingly or recklessly false, the argument was without merit, and the speech was deemed to be protected by the First Amendment in some capacity.<sup>133</sup>

The Fourth Circuit next found that while neither the commercial speech doctrine nor the time, place, and manner doctrine helped to determine the level of First Amendment protections the plaintiff should be afforded, the professional speech doctrine was appropriate.<sup>134</sup> Relying on Justice Jackson's concurrence in *Thomas v. Collins*, the Fourth Circuit found: "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary. Professional speech applies in the former context. . . ."<sup>135</sup> Further, a state may regulate a profession within the bounds of the First Amendment when the regulation is for a "generally applicable licensing provision' affecting those who practice the profession."<sup>136</sup> Because the plaintiff's speech occurred within a personal counseling relationship with a paying client, the professional speech doctrine applied.<sup>137</sup> The ordinance was a reasonable and generally applicable regulation on fortune telling businesses, so the court found it did not violate the plaintiff's right to free speech.<sup>138</sup>

The Third Circuit, Fourth Circuit, and Ninth Circuit differed regarding the analytical framework that should be applied to free

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130. *Id.*

131. *Id.* at 566–67.

132. *Id.* at 567 (quoting *United States v. Alvarez*, 567 U.S. 709, 719 (2012)).

133. *Id.* at 567.

134. *See Moore-King*, 708 F.3d at 567–70.

135. *Id.* at 568–69 (citing *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring)).

136. *Id.* at 569 (citing *Lowe v. Sec. Exch. Comm'n*, 472 U.S. 181, 232 (1985) (White, J. concurring)).

137. *Id.*

138. *Id.* at 570.

speech challenges by professionals under the First Amendment.<sup>139</sup> However, these circuit courts recognized professional speech as a valid third category that was subject to diminished First Amendment protections.<sup>140</sup>

*B. The Supreme Court of the United States in National Institute of Family and Life Advocates v. Becerra*

In 2018, the United States Supreme Court rejected the professional speech doctrine: “this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’”<sup>141</sup> Justice Thomas emphasized the only two instances in which professionals’ speech may be less protected under the First Amendment are: (1) commercial speech and (2) conduct regulations that have an incidental effect on speech.<sup>142</sup> However, Justice Thomas noted that in this case, “neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. *We do not foreclose the possibility that some such reason exists.*”<sup>143</sup> Accordingly, based on the facts of *Becerra*, the Supreme Court rejected the professional speech doctrine and abrogated the decisions in *King*, *Pickup*, and *Moore-King*.<sup>144</sup> However, it appears the Supreme Court left the door open for circumstances under which the doctrine may be appropriate.<sup>145</sup>

Justice Thomas offered numerous rationales for rejecting a third category of speech that does not receive full First Amendment protections.<sup>146</sup> First, the Court emphasized the lack of tradition and precedents for affording fewer protections for professional speech that

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139. See *King v. Governor of N.J.*, 767 F.3d 216, 224–37 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 567–69 (4th Cir. 2013).

140. See *King*, 767 F.3d. at 232.

141. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018).

142. *Id.* at 2372.

143. *Id.* at 2375 (emphasis added).

144. See *id.* at 2371–75.

145. See *id.* at 2375.

146. *Becerra*, 138 S. Ct. at 2372.

is not commercial or conduct-based.<sup>147</sup> According to *Zauderer*, regulations on commercial speech may require disclosures of “purely factual and uncontroversial information about the terms under which . . . services will be available.”<sup>148</sup> Restrictions where the state requires or prohibits specific conduct while acting in a professional capacity are reasonable and valid exercises of power by the state, despite incidentally restricting or compelling speech.<sup>149</sup>

Next, Justice Thomas emphasized the dangers of regulating content-based speech, which include the suppression of valuable ideas, information, and differing points of view.<sup>150</sup> Employing Justice Holmes’ marketplace of ideas theory, Justice Thomas recounted numerous debates that regularly occur within various professions.<sup>151</sup> He noted, “the people lose when the government is the one deciding which ideas should prevail.”<sup>152</sup> Finally, Justice Thomas expressed concern regarding the broad, imprecise population that the professional speech doctrine impacted, because it gave the state too much power.<sup>153</sup> Since the doctrine was implicated by a state license to practice the profession, the Court stressed that First Amendment rights should not be diminished by a state simply imposing licensing requirements.<sup>154</sup>

The Court rejected the content-based professional speech doctrine because these foundational rationales were not overcome by a persuasive justification in *Becerra*.<sup>155</sup> However, the Supreme Court did not “foreclose the possibility that some such reason exists” to treat

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147. *Id.*

148. *Id.* (quoting *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

149. *See id.* at 2373. For example, in *Planned Parenthood v. Casey*, the Court rejected the plaintiff’s First Amendment challenge, which asserted that the state unconstitutionally compelled content-based speech when it required physicians to obtain informed consent from the patient prior to performing an abortion. *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992)). The law was valid because it regulated the “practice of medicine, subject to reasonable licensing and regulation by the State,” and not speech as speech. *Becerra*, 138 S. Ct. at 2373.

150. *Becerra*, 138 S. Ct. at 2374.

151. *Id.* at 2374–75 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Debates include the ethics of assisted suicide, the importance of prenuptial agreements, and the benefits of tax reform. *Id.*

152. *Id.* at 2375.

153. *Id.*

154. *Becerra*, 138 S. Ct. at 2375.

155. *Id.*

professional speech separately.<sup>156</sup> The intersection of a global pandemic, a high level of trust placed in medical professionals during a public health crisis, and the communication of pandemic-related misinformation by licensed physicians, may be a candidate for “some such reason” to treat professional speech as a unique category under the First Amendment.<sup>157</sup>

#### IV. CONSTITUTIONALITY OF THE FSMB RECOMMENDATION & ITS APPLICABILITY UNDER *BECERRA*

##### A. Analysis of the FSMB Recommendation

In addition to the processes employed by the Circuit Courts of Appeals above, the *O’Brien* test may be an instructive mechanism to analyze the constitutionality of the FSMB recommendation. Under *O’Brien*, a restriction does not violate the First Amendment if (1) the regulation is within the government’s constitutional power, (2) the restriction furthers an “important or substantial governmental interest,” (3) that interest is “unrelated to the suppression of free expression,” and (4) the restriction is appropriately and narrowly tailored.<sup>158</sup>

As discussed, the government is within its constitutional police powers when it acts to protect the health and well-being of citizens during emergencies.<sup>159</sup> Accordingly, state medical boards that act pursuant to the FSMB recommendation could be reasonably exercising their authority to protect citizens from false medical

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156. *Id.*

157. *See id.*; *FSMB on Vaccine Misinformation*, *supra* note 5; Alba & Frenkel, *supra* note 4.

158. *See* *United States v. O’Brien*, 391 U.S. 367, 377 (1968). The *O’Brien* test has traditionally been employed to assess conduct-based expression. *Id.* at 376–77. Since the FSMB recommendation may impact physicians’ professional conduct, the test may be appropriate here. *Id.* *See* *King v. Governor of N.J.*, 767 F.3d 216, 224–37 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 567–69 (4th Cir. 2013).

159. *Jacobson v. Mass.*, 197 U.S. 11, 24–27 (1905). *See also* Erwin Chemerinsky, *How will SCOTUS Handle Future Issues Related to the COVID-19 Crisis?*, A.B.A. J. (Aug. 5, 2020, 8:00 AM), <https://www.abajournal.com/news/article/chemerinsky-how-will-scotus-handle-future-covid-19-related-issues> (discussing COVID-19 litigation trends: “Overwhelmingly federal and state courts have ruled in favor of the government and its power to take action to stop the spread of a communicable disease.”).

information during a global pandemic.<sup>160</sup> Therefore, the first prong of the *O'Brien* test may be satisfied.<sup>161</sup>

Next, the state's interest, purpose, and rationale must be considered.<sup>162</sup> The FSMB maintains that restricting the communication of misinformation is "for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and puts all patients at risk."<sup>163</sup> Accordingly, the FSMB prioritizes public health and the general welfare of the public, which should qualify as a substantial interest during a pandemic.<sup>164</sup> This interest is supported by the fact that these professionals are licensed experts.<sup>165</sup> The circuit courts recognized that this level of expertise induces the public to trust professionals as a valid source of information.<sup>166</sup> Therefore, the second prong in *O'Brien* is satisfied; it appears the recommendation is supported by a substantial interest to convey accurate and scientifically sound medical information during the pandemic.<sup>167</sup>

Under *O'Brien's* third prong, the state's interest must be "unrelated to the suppression of free expression."<sup>168</sup> Accordingly, it must be determined whether this recommendation aims to regulate

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160. See *Jacobson*, 197 U.S. at 26–27; *FSMB on Vaccine Misinformation*, *supra* note 5.

161. *O'Brien*, 391 U.S. at 377.

162. See *King*, 767 F.3d at 235. In order to be protected, the governmental interest must be substantial. *Id.* See also *O'Brien*, 391 U.S. at 377, 382. The Court in *O'Brien* found the prohibition on destroying "his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies." *Id.* at 381.

163. *FSMB on Vaccine Misinformation*, *supra* note 5.

164. See *id.* See also *King*, 767 F.3d at 234–35, 237–38 (emphasizing that the purpose of the regulation must be to protect citizens from "harmful or ineffective professional services" to be subject to the lesser intermediate scrutiny review. The Court of Appeals for the Third Circuit found New Jersey's interest in protecting clients was "unquestionably substantial" and was strengthened by the fact that A3371 was enacted to protect minors from harmful professional practices.).

165. *FSMB on Vaccine Misinformation*, *supra* note 5.

166. *Id.* See also *King*, 767 F.3d at 232 ("Due to their specialized knowledge and training, licensed physicians possess a high degree of public trust and therefore have a powerful platform in society.").

167. *O'Brien*, 391 U.S. at 377.

168. *Id.*



speech or conduct.<sup>169</sup> The FSMB purports to regulate speech as speech, as is evident in the language used: “*generate* and *spread*,” and “must *share* information that is factual, scientifically grounded and consensus-driven. . .” (emphasis added).<sup>170</sup> This appears to have little to do with the practice of medicine itself because the recommendation’s focus is to limit the communication of COVID-19 falsities.<sup>171</sup> Further, the recommendation is content-based because the FSMB is seeking to control the information that licensed physicians are presenting publicly.<sup>172</sup> Therefore, this constitutes a content-based restriction that purports to regulate speech as speech.<sup>173</sup> As a result, the FSMB recommendation likely fails the *O’Brien* test on this prong.<sup>174</sup>

Finally, even if the recommendation does not fail *O’Brien*’s third prong, the government’s restriction must be narrowly tailored.<sup>175</sup> The FSMB recommended disciplinary action, including the suspension or revocation of medical licenses, for those doctors who generate and spread COVID-19 misinformation.<sup>176</sup> This appears to include a broad range of potential sanctions.<sup>177</sup> As a result, the tailoring of the restriction may turn on the specific disciplinary action taken.<sup>178</sup>

The FSMB recommendation likely fails the *O’Brien* test because it is an impermissible content-based restriction that purports to regulate speech as speech.<sup>179</sup> Therefore, if state medical boards discipline offending physicians strictly pursuant to this recommendation, such action may unconstitutionally impede on doctors’ rights to free expression under the First Amendment.

#### *B. Analysis of Misinformation Generated and Communicated by*

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169. See *King*, 767 F.3d at 224–29. See also *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014).

170. *FSMB on Vaccine Misinformation*, *supra* note 5. See also *King*, 767 F.3d at 224–29.

171. See *FSMB on Vaccine Misinformation*, *supra* note 5.

172. *Id.*

173. See *id.*; see *King*, 767 F.3d at 224–29; see *Pickup*, 740 F.3d at 1227–29.

174. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

175. *Id.*

176. *FSMB on Vaccine Misinformation*, *supra* note 5.

177. See *id.*

178. See *O’Brien*, 391 U.S. at 377.

179. See *id.*; *FSMB on Vaccine Misinformation*, *supra* note 5; *King v. Governor of N.J.*, 767 F.3d 216, 224–29 (3d Cir. 2014).

*Medical Professionals under Becerra*

Instances of COVID-19 misinformation by medical professionals must be analyzed under the First Amendment because the false speech was communicated verbally or in writing.<sup>180</sup> As discussed, the two categories of professional speech that carry diminished protections are commercial speech and conduct regulation.<sup>181</sup> It appears that while some cases of physicians communicating COVID-19 misinformation may be held accountable under *Becerra*, other instances of false speech may not.<sup>182</sup> Accordingly, it is possible that the FSMB recommendation may not be constitutionally applied because it purports to regulate pure speech.

*1. Commercial Speech*

Commercial speech serves the important societal interests of disseminating information to consumers and promoting the economic interests of the speaker.<sup>183</sup> As such, regulations on commercial speech apply when a transaction is at issue and the associated speech is “false, deceptive, or misleading, or that proposes an illegal transaction.”<sup>184</sup> This is permissible because consumers must be able to make well-informed decisions.<sup>185</sup> Accordingly, the First Amendment prefers that accurate information is communicated to the public over no or false information.<sup>186</sup> Misinformation, by definition, is false.<sup>187</sup> Therefore,

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180. *King*, 767 F.3d at 224, 229 (“[S]peech is speech, and it must be analyzed as such for the purposes of the First Amendment.”).

181. *See Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

182. *See id.*

183. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 561–62 (1980).

184. *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985).

185. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–72 (1976). In this case, a statute prohibiting price advertisement of drugs dispensed by pharmacists was challenged. *Id.* at 749–52. It was passed to maintain the high standards and professionalism of the pharmaceutical industry: “[i]t appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers.” *Id.* at 769. However, the Court found this approach to be “highly paternalistic” and held that since “people will perceive their own best interests if only they are well enough informed,” the board may not keep customers in ignorance by suppressing the information. *Id.* at 770.

186. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562.

187. *See CISA, DISINFORMATION AND COVID-19* *supra* note 22.

this narrow category may apply to cases where physicians monetize COVID-19 misinformation.<sup>188</sup>

Dr. Mercola should qualify for diminished First Amendment protections under this standard as one of the leading profiteers during the pandemic.<sup>189</sup> He is an entrepreneur who uses social media and his website to advertise and sell his anti-vaccine health products.<sup>190</sup> The FDA identified several instances in which Dr. Mercola misled his consumers to believe that his products were effective against COVID-19.<sup>191</sup> In its warning letter, the FDA demanded that Dr. Mercola cease the promotion and sale of these “unapproved and misbranded products” as part of its effort to protect consumers in a national state of emergency.<sup>192</sup>

Dr. Mercola’s advertisements of alternative COVID-19 treatments contained false anti-vaccination content.<sup>193</sup> These claims reasonably qualify as commercial speech because the statements serve to promote his economic interests.<sup>194</sup> His advertisements can be directly contrasted with those in *Bates v. State Bar of Arizona*, where the appellants’ promotions of legal services were permissible because they contained truthful statements.<sup>195</sup> There, the Court held that false or misleading speech in advertisements may be regulated to protect consumers’ ability to make informed and reliable decisions.<sup>196</sup> Therefore, Dr. Mercola’s advertisements that amount to misinformation should be held accountable as commercial speech.<sup>197</sup>

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188. See *Zauderer*, 471 U.S. at 638.

189. See CCDH PROFITEERS REPORT, *supra* note 38 at 5, 18.

190. See Frenkel, *supra* note 36.

191. See FDA Warning Letter, *supra* note 46.

192. *Id.*

193. See *id.*

194. See *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. at 637 (stating, “commercial speech doctrine rests heavily on ‘the common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.’”).

195. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (rejecting the Arizona State Bar Association’s suppression of a “truthful advertisement concerning the availability and terms of routine legal services.”).

196. See *id.* at 383 (noting, “advertising that is false, deceptive, or misleading of course is subject to restraint.”).

197. See *id.*; see also *Nat’l Inst. of Fam. & Life Advocs. v. Beccera*, 138 S. Ct. 2361, 2372–73 (2018).

## 2. *Conduct Regulations that Incidentally Burden Speech*

The United States Supreme Court has consistently held that the state may regulate a professional's conduct, despite incidentally burdening speech.<sup>198</sup> Accordingly, state medical boards may sanction physicians who provide care that amounts to poor COVID-19 treatment and false information.<sup>199</sup> Dr. Steven LaTulippe and Dr. Mark Brody's respective actions qualify under this category, and they were both properly disciplined.

As discussed, the OMB suspended Dr. LaTulippe's license for failing to provide adequate care and advice to his patients regarding COVID-19 prevention and treatment.<sup>200</sup> Dr. LaTulippe "active[ly] discourage[d] . . . mask wearing by patients and staff," and "his advice to patients conflicted with basic principles of epidemiology and physiology and undermined the acceptance of measures recommended to prevent the transmission of COVID-19. . . ."<sup>201</sup> While Dr. LaTulippe's speech was incidentally burdened by the suspension, the OMB properly sanctioned him because his advice and conduct within the clinic amounted to the practice of medicine.<sup>202</sup>

Dr. Mark Brody mailed a letter to his patients advocating against the vaccine and alleging numerous false claims regarding its safety and potential impact.<sup>203</sup> This action demonstrates that communicating with patients via a written letter qualifies as professional conduct subject to state regulation.<sup>204</sup> The Consent Order disciplining Dr. Mark

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198. *See Becerra*, 138 S. Ct. at 2372. *See, e.g., in Planned Parenthood v. Casey*, the Court upheld a mandate that required physicians to provide state-produced information and obtain informed consent from patients seeking an abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) ("To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here."). *See also, Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (noting, "[t]here can be no doubt that the government 'has an interest in protecting the integrity and ethics of the medical profession.' . . . Under our precedents it is clear the State has a significant role to play in regulating the medical profession.").

199. *See Becerra*, 138 S. Ct. at 2372.

200. *See LaTulippe v. Harder*, 574 F. Supp. 3d 870, 875 (D. Or. 2021).

201. *Id.* at 877.

202. *See Harder Second Motion to Dismiss*, *supra* note 55 at \*12–13.

203. *See Mark Brody, MD, License No. 08028* (R.I. Dep't of Health Bd. of Med. Licensure & Discipline Apr. 14, 2021), at 1–2 (Consent Order).

204. *See id.* at 2.

Brody went so far as to note: “[m]indful of Respondent’s First Amendment Rights, the Investigative Committee noted that Respondent’s letter to his patients communicated advice to his patients and constituted the practice of medicine. . . .”<sup>205</sup> Consistent with Supreme Court precedents, Rhode Island properly regulated the false and dangerous advice that Dr. Brody communicated to his patients.<sup>206</sup>

### 3. *Pure Speech*

Claims made on social media, during interviews, or in speeches by Dr. Robert Malone, Dr. Joseph Mercola, and other members of the Disinformation Dozen do not appear to fall into either of the two categories of professional speech that currently receive diminished First Amendment protections. Therefore, disciplinary action taken strictly pursuant to the FSMB recommendation may unconstitutionally impede these physicians’ right to free speech.<sup>207</sup>

In his interview with Joe Rogan, Dr. Robert Malone advocated for alternative COVID-19 treatments such as hydroxychloroquine and ivermectin, he cast doubt on the efficacy of the COVID-19 vaccine, and he claimed the population had been hypnotized by Dr. Fauci.<sup>208</sup> However, he did not promote these claims as part of a transaction nor in consultation with patients. Instead, in both this interview and his “Defeat the Mandate Speech,” Dr. Malone advocated against the COVID-19 preventative measures and vaccine under the guise of contributing to the scientific debate and marketplace of ideas: “I try really hard to give people the information and help them to think, not to tell them what to think.”<sup>209</sup>

The Disinformation Dozen similarly contributed to the debate by posting false claims on social media.<sup>210</sup> Dr. Joseph Mercola posted on Instagram, “[f]orced vaccination is part of the plan to ‘reset’ the global economic system. . . .”<sup>211</sup> Dr. Sherri Tenpenny tweeted: “[t]he

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205. *Id.*

206. *See id.* at 8–9; *see also* *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

207. *See Becerra*, 138 S. Ct. at 2371–72; *see also FSMB on Vaccine Misinformation*, *supra* note 5.

208. *See* The Joe Rogan Experience Episode #1757, *supra* note 69; *see also* Setty, *supra* note 72.

209. The Joe Rogan Experience Episode #1757, *supra* note 69; *see also* Dr. Malone Defeat the Mandates Speech, *supra* note 1.

210. *See* Kuznia et al., *supra* note 8.

211. DISINFORMATION DOZEN REPORT, *supra* note 2, at 13.

#MaskAgenda has nothing to do with health and everything to do with control & suppressing your #immunesystem. The longer you wear one, the more unhealthy you become.”<sup>212</sup> Dr. Rashid Buttar said on Facebook: “[g]et the COVID vaccine but remember the following . . . becoming sterile [is] almost a certainty. . . .”<sup>213</sup> Again, these statements do not appear to be part of commercial transactions nor consultations with patients.

Dr. Malone, Dr. Mercola, Dr. Tenpenny, and Dr. Rashid were “generat[ing] and spread[ing]” misinformation by posting false claims on social media, speaking publicly, and appearing on a widely distributed podcast.<sup>214</sup> As discussed, the FSMB sought to regulate precisely this form of false speech.<sup>215</sup> However, these forms of expression appear to constitute pure speech; they were not made while providing care to patients, nor were they alleged in connection with a commercial transaction. Accordingly, under *Becerra*, absent commercial speech and professional conduct, it is likely that this form of COVID-19 misinformation may not be constitutionally disciplined.<sup>216</sup>

#### V. RECOMMENDATION

The COVID-19 pandemic exemplified the difficulty in broadly protecting professional speech by doctors in the same manner as other forms of speech under the First Amendment. Licensed medical professionals hold an important and trusted position in society, particularly during a global public health crisis.<sup>217</sup> As reflected by the FSMB recommendation, doctors communicating misinformation dangerously undermines the medical profession and general well-being of the population during a global pandemic.<sup>218</sup> Accordingly, it

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212. *Id.* at 19.

213. *Id.* at 24.

214. *FSMB on Vaccine Misinformation*, *supra* note 5, *see also* The Joe Rogan Experience Episode #1757, *supra* note 69; Dr. Malone Defeat the Mandates Speech, *supra* note 1; DISINFORMATION DOZEN REPORT, *supra* note 2 at 13, 19, 24.

215. *See FSMB on Vaccine Misinformation*, *supra* note 5.

216. *See* Nat’l Inst. of Fam. & Life Advoc. v. *Becerra*, 138 S. Ct. 2361, 2372 (2018); *see also* United States v. O’Brien, 391 U.S. 367, 377 (1968); *FSMB on Vaccine Misinformation*, *supra* note 5.

217. *COVID States Project Over-Time Trust Tracker*, *supra* note 7.

218. *FSMB on Vaccine Misinformation*, *supra* note 5 (“Spreading inaccurate COVID-19 vaccine information contradicts that responsibility [to practice medicine in the best interests of their patients and share factual information], threatens to further erode public trust in the medical profession and puts all patients at risk.”).

is of the utmost importance that those who have specialized medical knowledge communicate truthful and scientifically sound information during the pandemic.<sup>219</sup> However, under *Becerra*, many physicians spreading COVID-19 misinformation may not be held accountable.<sup>220</sup>

The United States Supreme Court did “not foreclose that the possibility that some such reason [for treating professional speech as a unique category] exists.”<sup>221</sup> Licensed medical professionals communicating false COVID-19 information during an ongoing pandemic may present an opportunity to treat professional speech as a separate, narrow category.<sup>222</sup> The doctrine should be revisited, modified, and narrowly applied when the false speech is within the professional’s field of expertise and it relates to the extenuating circumstances.

The Circuit Courts of Appeals each noted that public speech by a licensed professional spoken beyond the confines of the professional relationship was outside the scope of the professional speech doctrine.<sup>223</sup> As discussed, the generation and spread of COVID-19 misinformation by medical professionals has largely occurred on social media, on podcasts, or in speeches, and thus is outside the traditional doctor-patient relationship.<sup>224</sup> However, audience members on these platforms often seek out these professionals, follow them closely, listen to and elect to take the medical advice communicated; much like patients do in a traditional doctor-patient relationship.<sup>225</sup> Accordingly, it could be argued that this interaction constitutes a sufficient basis for a modern professional relationship.

Public speech is protected because the open discussion and debate of differing opinions is essential to democracy.<sup>226</sup> However, the danger that false medical advice or incorrect information communicated by doctors poses during a global pandemic is

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219. *Id.*

220. *Becerra*, 138 S. Ct. at 2372.

221. *Id.* at 2375.

222. *See id.*

223. *See* *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013).

224. *See* *The Joe Rogan Experience Episode #1757*, *supra* note 69. *See also* *Dr. Malone Defeat the Mandates Speech*, *supra* note 1; *DISINFORMATION DOZEN REPORT*, *supra* note 2 at 13, 19, 24.

225. *See* *DISINFORMATION DOZEN REPORT*, *supra* note 2 at 4, 6.

226. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372–74 (2018)

significant. Citizens rely on doctors to provide sound, scientifically correct information during a public health crisis because they are the accredited, licensed experts in the field “due to their specialized knowledge and training.”<sup>227</sup> As a result of this reliance on professionals’ extensive knowledge, misinformation communicated by physicians may satisfy a reckless or knowing falsehood standard.<sup>228</sup> Therefore, medical professionals who communicate COVID-19 misinformation during the COVID-19 global pandemic should not be wholly protected by the First Amendment. This Note recognizes that differing opinions and public debate are crucial to our society.<sup>229</sup> Therefore, while the professional speech doctrine should be modified to include modern professional relationships, it should be narrowly applied only when the false speech is both within the licensed professional’s field of expertise and is related to the extenuating circumstances.

The intersection of a global pandemic, the high level of trust placed in medical professionals, and the dangerous communication of misinformation by these physicians, presents a compelling candidate for “some such reason” to hold those physicians accountable and treat professional speech as a unique category under the First Amendment.<sup>230</sup>

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227. *FSMB on Vaccine Misinformation*, *supra* note 5. See also *King*, 767 F.3d at 232 (“Licensed professionals, through their education and training, have access to a corpus of specialized knowledge that their clients usually do not. . . . Thus, clients ordinarily have no choice but to place their trust in these professionals, and, by extension, in the State that licenses them.”).

228. *Moore-King*, 708 F.3d at 567 (quoting *United States v. Alvarez*, 567 U.S. 709, 719 (2012)).

229. *Becerra*, 138 S. Ct. at 2375 (“[T]he people lose when the government is the one deciding which ideas should prevail.”).

230. See *id.* at 2375; *FSMB on Vaccine Misinformation*, *supra* note 5.