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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12
13 LETRINH HOANG, D.O., PHYSICIANS
14 FOR INFORMED CONSENT, a not-for-profit
corporation; CHILDREN’S HEALTH
15 DEFENSE, a not-for-profit corporation,
16 PIERRE KORY, M.D., and BRYAN TYSON,
M.D.,

17
18 Plaintiffs,

19 v.

20 ROB BONTA, in his official capacity as
Attorney General of California;
21 ERIKA CALDERON, in her official capacity
as Executive Officer of the Osteopathic
22 Medical Board of California; and
23 REJI VARGHESE, in his official capacity as
24 Executive Director of the Medical Board of
25 California,

26 Defendants.
27
28

Case No: 2:22-cv-02147-WBS-AC
(PROPOSED) FIRST AMENDED
COMPLAINT

Action Commenced: December 1, 2022

1 Plaintiffs by their undersigned counsel, hereby allege against the Defendants as follows:
2

3 **JURISDICTION AND VENUE**

4 1. This is a 42 U.S.C. Section 1983 civil rights action for which this Court has
5 jurisdiction under 28 U.S.C. Section 1331. This Court has authority to grant the requested
6 injunctive relief under 28 U.S.C. Section 1343; the requested declaratory relief under 28
7 U.S.C. Sections 2201 and 2202; and costs and attorneys' fees under 42 U.S.C. Section 1988
8 (b).

9 2. Venue is proper in the federal Eastern District of California pursuant to 28
10 U.S.C. Section 1391 (b). Defendant ROB BONTA, the California Attorney General has his
11 principal office in this District, as does ERICA CALDERON, the Executive Director of the
12 Osteopathic Medical Board of California, as does REJI VARGHESE, the Executive Director
13 of the MEDICAL BOARD OF CALIFORNIA (collectively the "Boards"), and as such
14 enforcement of the challenged statute and actions by the individual Defendants in their official
15 capacity will take place in this district.

16 **INTRODUCTION AND SUMMARY OF ACTION**

17 3. The original complaint was a pre-enforcement constitutional challenge to AB
18 2098, which was enacted as Bus. & Prof. Code Section 2270 granted the California medical
19 boards the specific statutory power to sanction physicians for providing information,
20 recommendations, and advice to their patients which the Boards considered to be "Covid
21 misinformation" as defined in the statute.

22 4. This lawsuit (and three others like it, including the related *Høeg v. Newsom*)
23 asserted that the speech targeted by the statute was fully protected under the First Amendment
24 and that the statute was unconstitutionally vague under the Fifth Amendment.

25 5. The Defendants response to the First Amendment argument in all four lawsuits
26 was the same, namely, that all speech to patients is part of medical/patient care, and as such
27 constitutes medical conduct, over which the medical boards have jurisdiction under their
28 general powers to enforce the standard of care (*e.g.*, Section 2234 of the Business and

1 Professions Code).

2 6. In effect and in essence, the Defendants sought to revive the “professional
3 speech” exception to First Amendment fully protected speech that had been promoted by a
4 prior California Attorney General and accepted by the Ninth Circuit in *Pickup v. Brown* in
5 2014 (and two other Circuits upon the urgings of other state Attorney Generals).

6 7. However, the professional speech exception doctrine was specifically rejected
7 by the Supreme Court because the doctrine plainly violates *Nat'l Inst. Advocates & Life*
8 *Advocates v. Becerra* (“*NIFLA*”) 138 S. Ct. 2361, 2371-2373 (2018), where the Supreme Court
9 rejected the notion that professional speech is treated differently from other speech (except in
10 two circumstances not applicable to this kind of speech).

11 8. Indeed, the *NIFLA* decision discussed and *specifically repudiated* by name the 9th
12 Circuit’s creation or application of this professional speech exception in *Pickup v. Brown*, 740
13 F.3d 1208 (9th Cir. 2014). Hence, *Pickup* now carries the stigma that it was “abrogated on other
14 grounds,” those other grounds being that the Supreme Court rejected a categorical exception to
15 strict scrutiny of content and/or viewpoint speech regulation just because the speaker has a
16 state license.

17 9. In its preliminary injunction order, this Court did not make a substantive ruling
18 on the First Amendment claim (in this and the related *Høeg* case), except to note that AB 2098
19 “clearly implicated the First Amendment....” *Høeg v. Newsom*, No. 2:22-cv-01980 WBS
20 AC, __ F.Supp.3d __, 2023 WL 414258, footnote 7 (E.D. Cal. Jan. 25, 2023)

21 10. Thus, the only opinion in these cases on the First Amendment issue is the
22 obviously erroneous opinion by Judge Slaughter in *McDonald v. Lawson*, No. 8:22-cv-01805-
23 FWS-ADS, 2022 WL 18145254 (C.D. Cal., Dec. 28, 2022) (Order denying Preliminary
24 Injunction) that sharing information with opinions and advice is subject to the rational
25 relationship test. Such erroneous opinion is openly inconsistent with on point case law (*Conant*
26 *v. Walters*, 309 F.3d 629, 638-639 (9th Cir. 2002)) and Supreme Court jurisprudence which
27 almost never allows any kind of content or viewpoint-based government restrictions to free
28 speech (*Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), *Rosenberger v. Visitors of Univ.*

1 of *Virginia*, 515 U.S. 819, 829 (1995)),¹ except for clearly delineated and Supreme Court
2 recognized exceptions; none of those exceptions are applicable to this case.

3 11. Furthermore, in rejecting two prior efforts by the California legislature to
4 unconstitutionally interfere with the free speech of professionals, the Supreme Court has
5 forcefully decried California (and other states) attempting to circumvent free speech
6 protections of licensed professionals by the illegitimate transformation/recharacterization of all
7 speech by professionals into patient/client unprotected professional conduct. *NIFLA*,
8 *supra*, 138 S. Ct. at 2371-2373. This is exactly what the Boards argued in their defense to the
9 four AB 2098 cases, namely, recharacterizing all physician speech to patients as
10 patient/medical care. They then plant their statutory jurisdictional flag which reads “standard
11 of care.”

12 12. Thus, despite the imminent repeal of the specific covid misinformation law, the
13 Boards are continuing to intimidate physicians and chill their speech by boasting in the media
14 that AB 2098’s repeal means nothing; that it is business as usual in the intimidation,
15 investigation, and prosecution of physicians for the same things the Boards will no longer be
16 able to do under the soon to be repealed law.

17 13. However, waiving their standard of care flag over what by all judicial authority
18 (save Judge Slaughter) is clearly fully protected speech works is simply an illegitimate attempt
19 to verbally transmute (in the alchemical sense) fully protected speech into government
20 censorable patient care/medical conduct.

21 14. This amended complaint seeks to revivify the judicial oversight which these
22 constitutionally misguided rangers are so obviously seeking to forestall.

23 15. Plaintiffs ask the Court to send a clear message to the Defendants that the
24 government does not get to “manipulate the content of doctor-patient discourse...” *NIFLA*,
25

26 ¹ See also *United States v. Alvarez*, 567 U.S. 709, 723 (2012), wherein Justice
27 Kennedy in his majority opinion striking down a statute which criminalized false but
28 fully protected free speech (the speaker falsely claimed to be a medal of honor recipient)
likening the government’s efforts to an Orwellian “Ministry of Truth”.

1 *supra*, 138 S. Ct. at 2374 by censoring and sanctioning physicians for providing information
2 and expressing opinions that the government does not want patients to hear. That is not
3 something we have ever countenanced in this country, but is quite common in the world’s most
4 repressive authoritarian regimes according to an Eleventh Circuit opinion which the Supreme
5 Court has cited and quoted.²

6 **THE PLAINTIFFS AND THEIR STANDING**

7 16. Plaintiff Le Trinh Hoang, is a pediatric osteopathic physician. Dr. Hoang has an
8 office in Los Angeles County. She had been licensed by the Board for more than twenty-five
9 years and treats children and sees adults for osteopathic muscular treatments.

10 17. Her practice includes advising her patients (and their families) about the risk
11 versus benefits of Covid vaccines and boosters, based on the patient’s age, health status, and
12 co-morbidities. The level of detail or granularity of the information she conveys to patients
13 depends on the patient (or the family member in the case of young children) and can range
14 from just the broad strokes to discussion of the latest literature on vaccines and the reported
15 deficits in the science behind FDA approved or Emergency Use Authorization (“EUA”) drugs.

16 18. Of course, her patients are informed of the exact FDA status of the vaccine or
17 drug (in the case of Covid treatment drugs) and the government’s recommendation. Dr. Hoang
18 would like to provide information to her male patients between ages 17-39 of the increased
19 risks of cardiomyopathy and other cardiac serious adverse events of the mRNA shots to this
20 patient subset. This information is evidence based and widely reported in the medical
21 literature.³ It may not be consistent with the U.S. infectious disease consensus, but the
22 increased risk is plainly evidence based. Here again, the level of detail would depend on
23

24 *NIFLA, supra*, 138 S. Ct. at 2374 *quoting* *Wollschlaeger v. Governor*, 848 F.3d 1293, 1325
25 (11th Cir. 2017) (*en banc*), W. Pryor, J. concurring)

26 ³ See, e.g., Oster et al., [Myocarditis Cases Reported After mRNA-Based COVID-19](#)
27 [Vaccination in the US From December 2020 to August 2021](#) that found the risk of
28 myocarditis after receiving mRNA-based COVID-19 vaccines was increased across multiple
age and sex strata and was highest after the second vaccination dose in adolescent males and
young men. 2021. *JAMA*. 2022;327(4):331–340. doi:10.1001/jama.2021.24110.

1 physician judgment and experience with the patient. Assuming Plaintiff Hoang provides this
2 important information (in whatever the level of detail) to a patient and recommends against the
3 vaccine for such a patient, Dr. Hoang believes she may be prosecuted for a standard of care
4 violation for her fully protected speech based on AB 2098's bill sponsor statements and the
5 fact that the medical board has filed charges against one physician for information and
6 opinions shared with a patient.

7 19. Sometimes, her patients ask her to comment on the general reliability of the
8 CDC's edicts and the fact that the edicts seem to change so frequently and sometimes in a
9 contradictory fashion.

10 20. Here again, Dr. Hoang would like to continue to provide such truthful
11 information and evidence-based advice to her patients, but since this information and advice
12 could be targeted as a violation of the standard of care, she is reluctant to do so unless this
13 Court enjoins the Boards from using prosecutorial power to chill free speech.

14 21. As of the date of the filing of this Amended Complaint, Plaintiff Hoang intends
15 to provide her patients with the best available information concerning the safety and efficacy of
16 vaccines and Covid treatments, even where such information and recommendations might fall
17 within her board's view that it violates the standard of care.

18 22. Plaintiff Pierre Kory, MD is a critical care doctor and a co-founder and president
19 of the Front Line COVID-19 Critical Care Alliance ("FLCCC"), an organization which, *inter*
20 *alia* advocates for the use of Ivermectin as a treatment for the virus.

21 23. He is a co-author of several peer reviewed articles on Ivermectin ⁴ and he has
22 written a book aptly titled *The War on Ivermectin* which is a detailed description about how
23 those in power and authority have engaged in a campaign of disparagement against Ivermectin
24
25
26

27 ⁴ See, e.g., *Review Of The Emerging Evidence Demonstrating The Efficacy Of Ivermectin*
28 *In The Prophylaxis And Treatment Of Covid-19*, AM. J. THER, 2021 May-June 28(3): E299-
E318, <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc8088823/>.

1 and personally attack pioneers like him who advocate for its use.^{5,6}

2 24 Dr. Kory and his fellow FLCCC members have successfully treated over 5,000
3 Covid patients with the drug. The medical authorities consider all these successfully treated
4 patients to be merely anecdotal evidence. However, the patients and their family members
5 would either disagree, or else do not care and are grateful that there are physicians brave
6 enough to stand up and do what they in their experience think is the best treatment. Dr. Kory
7 laments that somehow the clinical experience of scores of doctors who have treated many
8 thousands of patients has been disvalued.

9 25. Dr. Kory has testified twice before Congressional committees, as well as state
10 legislatures in Pennsylvania, Maryland, and Wisconsin. He is one of the country's leading
11 advocates for the off-label use of Ivermectin.

12 26. Dr. Kory provided important evidence in *Stock v. Gray*, No. 2:22-CV-04104-
13 DGK, 2023 U.S. Dist. LEXIS 48300, at *8-9, *23-24 (W.D. Mo. Mar. 22, 2023) where the
14 district court granted a preliminary injunction against a Missouri covid misinformation statute,
15 and pointed out that:

16 Numerous lawmakers also endorsed Dr. Kory's testimony and promoted
17 ivermectin as a COVID-19 drug.... The Court concludes Stock is likely to
18 demonstrate that the statute is unconstitutional. Because Stock has demonstrated a

19 ⁵ Like all wars where medical mavericks take on the so called “contemporary
20 scientific consensus,” there are attacks against the maverick doctors and this is no
21 exception. Recently, the private internal medicine board (“ABIM”) removed Dr. Kory
22 and two other physicians’ board certification for spreading Covid “misinformation”, but
23 of course, a private organization has no obligation to comply with the First Amendment.
24 In addition, he and other authors of a published article were forced to retract a
25 publication (not the one cited above). That all comes with the turf of fighting the
26 medical establishment, sometimes known as the church of medical orthodoxy. *See*
27 *Galileo’s Lawyer*, Richard Jaffe, 2008, Chapters 1-9.

28 ⁶ There are now 99 published studies from around the world, many of which are
fully controlled which demonstrate the benefit of the drug for Covid. A list of these
publications can be found at <https://c19ivm.org/>. A systematic review of the flaws of the
studies which have not demonstrated efficacy can be found at such reputable source,
and see the article referenced in footnote 4 above.

1 likelihood of success on her First Amendment claim, the other requirements for
2 obtaining a preliminary injunction are deemed satisfied. *Rodgers*, 942 F.3d at 456.
3 Conclusion. For the reasons discussed above, Plaintiff's motion for a preliminary
4 injunction is GRANTED. Defendants are prohibited from reviewing,
5 investigating, prosecuting, adjudicating, or enforcing violations of the second
6 sentence of Missouri Revised Statute § 338.055.7 until after a final order is
7 entered.

8 27. Dr. Korry has a telehealth medical practice providing information and advising
9 patients and maintains a California license, and consults with California based patients.

10 28. As a leading expert on Ivermectin, Dr. Kory's consulting medical practice
11 includes dealing with patients with questions and concerns about Ivermectin, and whether he
12 recommends its use.

13 29. He of course explains that the drug is FDA approved, but not specifically for
14 Covid, and hence would only be available off label. He informs patients that there are some
15 published studies and meta studies showing that the drug is not effective for Covid, but also
16 explains that currently there are 99 controlled trials, both observational and randomized from
17 around the world, the summary analysis of which demonstrates a statistically significant
18 efficacy reducing mortality, hospitalization, rates of viral clearance, and rates of clinical
19 recovery. Of note is that the WHO, in their last guideline recommendation, found that
20 ivermectin use led to an 81% reduction in mortality, yet a recommendation for use was never
21 issued. He disagrees with this decision, for obvious reasons. His patients understand that the
22 FDA, the manufacturer, and all mainstream medical associations recommend against the use of
23 the drug for Covid, but patients consult with him specifically to obtain his perspective.

24 30. Dr. Kory has significant and reasonable concerns regarding the statement by AB
25 2098 sponsor Evan Low that despite the repeal, the medical boards will continue to investigate,
26 prosecute, and sanction physicians who depart from the mainstream Covid narrative. See
27 Exhibit A hereto with the statement. Furthermore, there is at least one such medical board
28 prosecution already. See *In the Matter of the Accusation Against: Ana Rebecca Reyna, M.D.*
Medical Board of California (June 23, 2023; Case No. 800-2021-076688).

<https://www2.mbc.ca.gov/BreezePDL/document.aspx?path=%5cDIDOCs%5c20230626%5cD>

1 [MRAAJD1%5c&did=AAAJD230626153144398.DID](#)

2 31. Accordingly, Dr. Kory has a direct interest in the subject matter of this lawsuit.
3 His protected speech to his patients is being threatened and chilled, which, upon information
4 and belief, is exactly what Assemblyman Low and others who support the repression of
5 physician speech intend.

6 32. Plaintiff Brian Tyson, M.D. is a board-certified family practitioner who owns an
7 urgent care facility in Southern California. Since the beginning of the pandemic, he has
8 successively treated thousands of Covid patients with a variety of medications, on and off
9 label.

10 33. As part of his practice, he has occasion to inquire about the vaccine status of
11 patients. One specific context is providing physicals for high school and college athletes. Some
12 athletes have reported chest pains, which requires inquiring about vaccine status since a known
13 side effect of the Covid vaccines are heart related issues like myocarditis.

14 34. This inquiry almost always leads to a discussion of the safety and efficacy of the
15 vaccines and whether the reported side effects were caused by the vaccine. Dr. Tyson provides
16 information and his opinions based on his research, which is not the same as the CDC's
17 position that these side effects are exceedingly rare. Dr. Tyson's opinion is in part based on the
18 thousands of vaccinated patients he has seen since the start of the pandemic and the dozens of
19 patients who have first experienced chest pains after receiving one or more Covid shots. More
20 disturbingly, most of the patients reporting chest pains have had the original shots plus at least
21 one booster.

22 35. Once a patient reports chest pains (whether temporally associated with the Covid
23 vaccine), Dr. Tyson refers the student athlete to a cardiologist and will not clear the student to
24 play sports unless or until the cardiologist signs off.

25 36. Dr. Tyson's discussion with these patients may implicate or trigger a medical
26 board's investigation and prosecution since he is not providing the CDC and FDA's mantra
27 that vaccines are completely safe and cardiac side effects are exceedingly rare.

28 37. Another type of patient interaction which may trigger an investigation is when

1 treating Covid patients who are fully vaccinated and boosted (and most of his Covid patients
2 are in this category, he is frequently asked whether they should keep getting boosted. Since he
3 is now an urgent care doctor and not a PCP (primary care physician), he has the status not to
4 answer the question and refer the patient to his/her PCP. He does this out of an abundance of
5 caution to avoid problems with the medical board.

6 38. Dr. Tyson was previously investigated for over a year by the medical board for
7 allegedly spreading Covid “misinformation” to the public, but that investigation was
8 terminated earlier this year without any disciplinary action taken.

9 39. Based on the above, Dr. Tyson has a reasonable and grounded fear his protected
10 speech to patients might subject him to further board investigation and possible prosecution.
11 As indicated, his protected speech is being chilled by the medical boards’ conduct.

12 40. Plaintiff Physicians for Informed Consent (PIC) is a 501(c)(3) not-for-profit
13 corporation based in California whose mission is, *inter alia*, to advocate for the right of
14 physicians to provide true and evidence-based information to patients concerning the risks and
15 benefits of vaccines. Many of its members are physicians, other health care professionals, and
16 scientists who publish and speak about vaccine safety and efficacy issues.

17 41. PIC is deeply involved in identifying, collecting, and analyzing the evolving
18 *worldwide* scientific literature on vaccine safety and efficacy. It writes up summaries of these
19 studies and disseminates this information to physicians, so that they can provide their patients
20 with the best available information selected from the US and throughout the world.

21 42. The scientific evidence collected and distributed by PIC is sometimes at odds
22 with what is at any given time the view of the U.S. health authorities and what may be the U.S.
23 scientific consensus. However, such information is based on the best available worldwide
24 evidence. And frequently, PIC’s written summaries have foreshadowed changes subsequently
25 made to the mainstream scientific consensus.

26 43. PIC also supports the rights of its members to advise about and prescribe the off-
27 label use of drugs such as Ivermectin and HCQ in the treatment of Covid-19. PIC provides its
28 physician members with information about the hundreds of studies (as of the date of this

1 Complaint) which support the use of these drugs, and encourages its physician members to
2 discuss these studies (and the studies which do not show a benefit) with their patients.
3 However, PIC’s physician members are uncertain whether providing patients with studies
4 which have found a benefit would violate the Board’s stated position that it can still discipline
5 physicians for Covid “misinformation” despite the impending repeal of Bus. & Prof. Code
6 Section 2270.

7 44. Some patients ask PIC physician members specifically whether there are any
8 studies which support the use of Ivermectin. Arguably, responding to this question truthfully
9 could be considered spreading Covid misinformation to the patient, but responding in the
10 negative would be false. Some physicians respond by advising patients that in fact there are
11 many such studies, but those studies receive limited or no recognition within certain medical
12 communities for many different reasons, and the only studies the FDA currently recognizes for
13 purposes of standard of care are those studies which have not found a benefit. Would
14 conveying this information be sanctionable under the new law? Any answer would be arbitrary
15 and untethered to principle.

16 45. Because the Board still maintains that it has the right to discipline physicians in
17 violation of their (and their patients’ constitutional rights) many of PIC’s physician members
18 are faced with choosing between providing accurate and complete information about the risks
19 of the vaccine and the different Covid treatments, putting them at risk of Board investigation
20 and discipline, or reciting the latest FDA and CDC-promulgated edict. Or they can choose to
21 keep silent and refuse to answer questions about the latest Covid booster and Covid treatments.
22 This choice is a necessary but completely intolerable result of the Board’s pronouncements and
23 actions. Indeed, primary care physicians like Plaintiff Hoang (a PIC member) are especially
24 pincered under Bus. and Prof. Code Section 2234 (the very statute the Boards claim as
25 authority over misinformation), because primary care physicians are routinely expected to
26 *answer* patient inquiries and not deflect. Not only deflection but also hesitation to candidly
27 answer can and does injure the doctor-patient relationship.

28 46. Moreover, due to the boards’ broad power to investigate physicians, many of

1 PIC's physician members are afraid of speaking out in public or even to publicly support this
2 case for fear of triggering a Covid misinformation investigation. Accordingly, the boards'
3 position on providing information contrary to the government's edicts has a chilling effect of
4 PIC physicians' free speech rights.

5 47. PIC's physician members in California who wish to disseminate information to
6 their patients, like the information which the two individual Plaintiffs seek to disseminate,
7 would have standing to participate in this action.

8 48. PIC's physician rights it seeks to assert in this case are germane to and go to the
9 very heart of the organization's educational purpose "to deliver data on infectious diseases and
10 vaccines."

11 49. Neither the claims asserted herein nor the relief requested require the
12 participation of PIC's individual member physicians in this lawsuit. Accordingly, PIC has
13 associational standing to protect the constitutional rights of its physician members in
14 California.

15 50. In addition, the foregoing paragraphs regarding PIC can also be said for PIC's
16 lay members in California who wish to receive the information which is or could be deemed
17 disciplinable conduct. There is an obvious stigma and intimidation upon patients if their
18 medical records are subpoenaed by the medical board, and the patients are then called as
19 witnesses to remember what their doctor told them about Ivermectin studies the year or two
20 years earlier. History has shown a healthy doctor patient relationship needs the First
21 Amendment. Many of PIC's lay members would like to be able to candidly receive
22 information about off-label drugs for Covid-19 if they contract the virus. Therefore, PIC has
23 associational standing to sue on behalf of its lay members in California on the claims for relief
24 in this case.

25 51. Plaintiff Children's Health Defense, is a 501(c)(3) non-profit corporation whose
26 mission is to end childhood health epidemics by working aggressively to eliminate harmful
27 exposures, hold those responsible accountable, and to establish safeguards to prevent future
28 harm. Its mission also includes advocating for medical freedom, bodily autonomy, and an

1 individual's right to receive the best information available based on a physician's best
2 judgment.

3 52. CHD educates and advocates concerning the negative risk-benefit profile of the
4 Covid shots for healthy children, and concerns such as these have caused some of the countries
5 (which have had the best pandemic response outcomes) to stop recommending Covid
6 vaccination or boosters, or both, for healthy children (see recent recommendations of
7 Denmark, Sweden, the UK, and the European Medicines Agency).

8 53. CHD members include numerous of California physicians who wish to provide
9 information about the latest studies about the Covid booster shots, as well as information about
10 the off-label treatments for Covid. California parents who are CHD members want to receive
11 objective, non-coerced information from California physicians about the risk profile of the
12 Covid vaccines for the current boosters.

13 54. However, the Board's statements that it will take action against physicians for
14 providing information and opinions challenging the mainstream Covid narrative will have a
15 chilling effect and will dissuade many physicians from providing their candid opinions, which
16 creates a risk of self-censorship significantly impairing the ability of CHD physicians to
17 provide such information, which will militate against CHD lay members in California from
18 receiving such nonconforming opinions from their physicians. An actual and justiciable
19 controversy exists therefore between Plaintiff CHD and Defendants.

20 55. Plaintiff CHD sues in its own capacity and on behalf of its constituent members
21 in California who have been and will continue to be adversely affected by Defendants' actions.

22 56. CHD members would have been able to sue. The interests which CHD seeks to
23 protect are germane to and go to the heart of CHD's purpose. Neither the claims asserted nor
24 the relief requested requires the participation of CHD's individual members in this lawsuit.

25
26 **THE DEFENDANTS**

27 33. Defendant ROB BONTA is the California Attorney General and is thus the
28 ultimate decision maker in the Attorney General's office who enforces the laws of the State of

1 California, including Bus. & Prof. Code Section 2234, the general statutory standard of care
2 statute. He is a defendant in his official capacity only.

3 34. Upon information and belief, the Attorney General's office represents the two
4 medical boards in administrative actions against its licensees, including participating in initial
5 interviews with the licensees in the investigation phase of board proceedings, preparing
6 accusations against the licensees and acting as the prosecutor in disciplinary actions.
7 Accordingly, Defendant Bonta has the authority to stop the Attorney General's office from
8 preparing and filing accusations against the Board's licensees, if this Court grants the relief
9 requested.

10 35. Defendant ERIKA CALDERON is the executive director of the Osteopathic
11 Medical Board of California. She is a defendant in this case in her official capacity for the
12 requested declaratory and injunctive relief.

13 36. Upon information and belief, Defendant CALDERON is the final decision-maker
14 on the Osteopathic Board's decision to investigate physicians for providing so-called Covid
15 misinformation to patients, or at least she supervises the subordinate employee(s) who make
16 such decisions.

17 37. Upon information and belief, Defendant CALDERON has the authority to
18 implement a preliminary and permanent injunction stopping the Board from investigating and
19 filing charges against a medical doctor for an alleged standard of care violation based on the
20 licensee's exercising his/her protected speech rights to patients on the subject (content) about
21 Covid and which does not conform with the CDC's narrative, to wit, the viewpoint of the
22 speech.

23 38. Defendant REJI VARGHESE is the executive director of the Medical Board of
24 California. He is a defendant in this case in his official capacity only for the requested
25 declaratory and injunctive relief.

26 39. Upon information and belief, Defendant VARGHESE is the final decision-maker
27 on the Board's decision to investigate physicians for violations for providing Covid
28 misinformation, or at least he supervises the subordinate Board employee(s) who make such

1 decisions.

2 40. Upon information and belief, Defendant VARGHESE has the authority to
3 implement a preliminary and permanent injunction stopping the Board from investigating and
4 filing charges against a medical doctor for an alleged standard of care violation based on the
5 licensee’s exercising his/her protected speech rights to patients on the subject (content) about
6 Covid and which does not conform with the CDC’s narrative, to wit, the viewpoint of the
7 speech.

8 **FACTUAL BACKGROUND**

9 **The Origins of Nationwide Covid Misinformation Disciplinary Campaign**

10 41. By press release dated July 29, 2021, the Federation of State Medical Boards (the
11 “Federation”⁷) issued the following press release:

12 Physicians who generate and spread COVID-19 vaccine misinformation or
13 disinformation are risking disciplinary action by state medical boards, including
14 the suspension or revocation of their medical license. Due to the specialized
15 knowledge and training, licensed physicians possess a high degree of public trust
16 and therefore have a powerful platform in society, whether they recognize it or
17 not. They also have an ethical and professional responsibility to practice medicine
18 in the best interests of their patients and must share information that is factually,
19 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
thus puts all patients at risk.

20 *FSMB: Spreading Covid-19 Vaccine Misinformation May Put Medical License At Risk,*
21 FEDERATION OF STATE MEDICAL BOARDS, News Releases (Jul. 29, 2021),
22
23

24
25 ⁷ According to its website, “The Federation of State Medical Boards represents the state
26 medical and osteopathic regulatory boards – commonly referred to as state medical boards –
27 within the United States, its territories and the District of Columbia. It supports its member
28 boards as they fulfill their mandate of protecting the public’s health, safety and welfare
through the proper licensing, disciplining, and regulation of physicians and, in most
jurisdictions, other health care professionals.” *About FSMB*, FEDERATION OF STATE
MEDICAL BOARDS, <https://www.fsmb.org/about-fsmb/>.

1 <https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine->
2 [misinformation-may-put-medical-license-at-risk/](https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/).

3 42. Upon information and belief Kristina Lawson is or was the Chairman of the
4 Federation's Ethics Committee, the California medical board's representation to the Federation
5 and the President of the medical board.

6 43. The Federation's press release was one of the factors which caused the California
7 Assembly to introduce a Covid Misinformation bill on February 14, 2022 with a bill
8 designation of AB 2098. In its original form, the bill tracked the Federation's press release and
9 targeted the public speech of physicians in addition to communications between physicians and
10 patients.⁸

11 44. AB 2098 as amended was passed by the Legislature and signed into law by
12 Governor Newsom in late September, 2022 to become effective on January 1, 2023 as Section
13 2270 of the Business and Professional Code.

14 **Summary of the Legal Challenges to AB 2098 and the Results**

15 45. There were four legal challenges to AB 2098:

16 46. *McDonald v. Lawson*. This case was filed in early October 2022, in the Central
17 District. The original complaint was dismissed by Judge Fred W. Slaughter on standing
18 grounds in November 2022. The case was refiled in early December, 2022. The motion for
19 preliminary injunction was denied by order dated December 28, 2022. No. 8:22-cv-01805-
20 FWS-ADS, 2022 WL 18145254 (C.D. Cal., Dec. 28, 2022). Plaintiffs immediately appealed.
21 Oral argument was held on July 17, 2023. The case is *sub judice*.

22 47. *Høeg v. Newsom* was filed in early November 2022. A preliminary injunction
23 was granted by this Court on January 23, 2023 on the Fifth Amendment claim raised in this
24 and the following case for all plaintiffs in both cases. *Høeg v. Newsom*, No. 2:22-cv-01980
25

26
27 ⁸ AB 2098 references the Federation's July 2021 press release as justification for the bill.
28 *California Legislative Information*,
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2098#99INT,
Section 1 (f).

1 WBS AC, ___ F.Supp.3d ___, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023) (Order granting
2 Preliminary Injunction)

3 48. *Hoang v. Bonta* was filed in early December 2022. This case is related to *Høeg*
4 and the Court issued the preliminary injunction to the individual physician and all physician
5 members of the two organizational plaintiffs. Because the Attorney General decided not to
6 appeal the *Høeg/Hoang* preliminary injunction, Plaintiffs moved to intervene in the *McDonald*
7 appeal, but the motion was denied.

8 49. *Couris v Newsom*: No. 3:22-cv-01922-RSH-JLB. This case was filed in
9 December 2022, in the Southern District. The case was stayed pending the decision in the
10 *McDonald* appeal. The plaintiffs appealed the decision and moved to consolidate its appeal
11 with the *McDonald* appeal which was granted. Per the above, the consolidated appeal is
12 pending *sub judice*.

13 **The Repeal of AB 2098/Section 2270**

14 50. On September 11, 2023, the California legislature amended SB 815 to include a
15 provision repealing AB 2098. SB 815 was passed by both chambers on September 13, 2023
16 and signed by the Governor on or about September 29, 2023, the repeal to take effect on
17 January 1, 2024.

18 **Statements and Actions by the Medical Board and AB 2098's Sponsor**
19 **Demonstrating that the Medical Boards Intend to Continue Violating the Free**
20 **Speech Rights of Physicians**

21 51. News that the California legislature was repealing Section 2270 was first
22 reported in an LA Times article on September 11, 2023 (copy attached to this Complaint as
23 Exhibit A).

24 52. The Article quoted a spokesman for sponsor Evan Low as saying “Fortunately,
25 with this update, the Medical Board of California will continue to maintain the authority to
26 hold medical licensees accountable for deviating from the standard of care and misinforming
27 their patients about COVID-19 treatments.”
28

1 53. The medical board has filed at least one accusation against a physician in part for
2 information, opinions and recommendations she made to a patient about the vaccine, including
3 her opinion the vaccine was associated with increases in miscarriages and that the patient's
4 girlfriend should avoid the Covid shot if she wanted to get pregnant; and the physician shared
5 other information about the vaccines and miscarriages.

6 <https://www2.mbc.ca.gov/BreezePDL/document.aspx?path=%5cDIDOCs%5c20230626%5cDMRAAAJD1%5c&did=AAAJD230626153144398.DID>, (page 4 para. 10, ln 8 and para. 12
7
8 lns. 16-19).

9 54. Plaintiffs maintain this kind of information is protected speech. And it is
10 especially noteworthy there was no doctor patient relationship between the physician and the
11 patient's girlfriend. To be clear, this information would not have been sanctionable under
12 Section 2270 since it was not said to a patient "in the form of treatment or advice." So, the
13 medical board is exercising powers it did not even have under a specific statute.

14 55. Other examples of the conduct which the board unconstitutionally contends is
15 disciplinable include opinions that

- 16 a. masks do not stop the virus (even though recent published studies, including
17 one reported by CNN, indicates the truth of this statement).
- 18 b. Covid vaccines stop infection and transmission (this too was quickly proven
19 false, as the CDC admitted after many studies proved it; so now the shots are
20 in the category of vaccines that neither prevent infection nor stop
21 transmission).

22 56. The medical board also asserts that "all interactions that occur between a doctor
23 and a patient, particularly during a clinic visit must be conducted professionally. There may be
24 no limitation to what topics can be discussed between doctor and patient, but the discussion
25 must remain professional."

26 <https://www2.mbc.ca.gov/BreezePDL/document.aspx?path=%5cDIDOCs%5c20230626%5cDMRAAAJD1%5c&did=AAAJD230626153144398.DID>
27 at page 5 para 19, lns. 25-28. And
28 thus, the medical board attempts to revive the professional speech exception to free speech

1 which has been expressly rejected by the Supreme Court in *NIFLA*.

2 57. However, all this information and opinion expressed by the doctor and charged
3 in the Accusation involves First Amendment protected speech, according to all judicial
4 authority (other than Judge Slaughter’s opinion).

5 58. Upon information and belief, members and or employees of the medical board
6 continue to be in contact with the Federation, and they continue to push the Federation’s
7 agenda set out in its July 2021 press release, despite that clear unconstitutionality of the that
8 agenda, a constitutional fact which is known or should be known by the medical board
9 personnel as well as the Federation.

10 59. The above quoted accusation, together with the AB 2098 sponsor’s statement,
11 and the medical board’s continued adoption of the Federation’s policy/call-to-arms which
12 created this Covid misinformation board sanctioning idea, clearly establish that the medical the
13 board intends to continue to violate the free speech rights of California physicians.

14 60. These actions send a chill throughout the part of the California medical
15 community which questions the information put out by the CDC and other parts of the medical
16 establishment.

17 61. The more the public health authorities speak, the more the public loses faith and
18 trust in the information and recommendations in the public health institutions’ Covid edicts,
19 despite the almost continuous failed results and the repeated empty promises that the public
20 health authorities will do better.⁹

21
22 ⁹ “Public Trust in CDC, Fauci, and other top health officials is evaporating, polls find.” STAT,
23 9/10/2020, <https://www.statnews.com/2020/09/10/trust-cdc-fauci-evaporating/> [Redfield]

24 “Poll Finds Public Health Has a Trust Problem.” NPR 5/13/2021,
25 <https://www.npr.org/2021/05/13/996331692/poll-finds-public-health-has-a-trust-problem>
26 [Walensky]

27 “The CDC is beholden to corporations and lost our trust. We need to start our own The People’s
28 CDC, The Guardian, (Opinion) 4/3/2022.

<https://www.theguardian.com/commentisfree/2022/apr/03/peoples-cdc-covid-guidelines>
[Walenski]

1 62. Upon information and belief, the public’s lack of trust is not the result of what
2 critics of the mainstream Covid narrative say in public or to patients. Rather, it is the
3 overpromising of the benefits of the vaccines and every booster, even though they neither
4 prevents infection or transmission, and whatever effectiveness they have is extremely short-
5 lived, a fact which the public health authorities irrationally both downplay and use to justify
6 each successive booster.

7 63. Upon information and belief, between the studies which hint at a direct
8 relationship between repeated boosters and increased risk of infection, excess death statistics
9 which show increased deaths after the Covid vaccines were introduced (based on insurance
10 company data from the US and England), and the recent concern manifest from preliminary
11 studies that increased Covid vaccination are or may be associated with super cancers, plus the
12 fact that emails and public testimony from public health officials which show that they have
13 admitted or knowingly misled the public, it is no wonder that a significant percentage of the
14

15 “How To Make The CDC Matter Again; Missteps During The Pandemic Have Eroded
16 The Agency’s Reputation As Competent And Dependable” Bloomberg, **5/2/2022**,
17 [https://www.bloomberg.com/opinion/articles/2022-05-02/the-cdc-needs-reform-to-restore-](https://www.bloomberg.com/opinion/articles/2022-05-02/the-cdc-needs-reform-to-restore-public-trust-after-covid-19#xj4y7vzkg)
18 [public-trust-after-covid-19#xj4y7vzkg](https://www.bloomberg.com/opinion/articles/2022-05-02/the-cdc-needs-reform-to-restore-public-trust-after-covid-19#xj4y7vzkg) [Walensky];

19 “CDC Announces Sweeping Changes To Restore Public Trust” North Carolina Medical
20 Society, **8/18/2022**] [https://ncmedsoc.org/cdc-announces-sweeping-changes-to-restore-public-](https://ncmedsoc.org/cdc-announces-sweeping-changes-to-restore-public-trust)
21 [trust](https://ncmedsoc.org/cdc-announces-sweeping-changes-to-restore-public-trust); [Walensky]

22 “Survey finds concern of political influence leads lack of trust in health agencies” Axios **3/7/2-**
23 **23**, <https://www.axios.com/2023/03/07/trust-in-cdc-public-health-agencies> (“too many
24 conflicting recommendations”, “Private-sector influence on recommendations and policies” are
25 the second and third most common reasons for lack of trust in the CDC. [Cohen]
26 “

27 NPR one year late, same tune: “The new CDC director outlines 3 steps to rebuild trust with the
28 public [Cohen] [https://www.npr.org/2023/08/02/1191302954/the-new-cdc-director-outlines-3-](https://www.npr.org/2023/08/02/1191302954/the-new-cdc-director-outlines-3-steps-to-rebuild-trust-with-the-public)
[steps-to-rebuild-trust-with-the-public.](https://www.npr.org/2023/08/02/1191302954/the-new-cdc-director-outlines-3-steps-to-rebuild-trust-with-the-public) **8/2/2023** [Cohen]

29 “The CDC wants your trust back: It’ll ‘take time to rebuild.” Politico
30 <https://www.politico.com/news/2023/09/16/cdc-director-public-trust-00116348> **9/16/2023**
31 [Cohen].

1 public does not believe what comes out of the mouths of the public health authorities and their
2 skills. ¹⁰

3 64. Upon information and belief, there is a disinformation campaign which has
4 affected the public discourse. However, it is being orchestrated by the public health authorities
5 with the help of corporate interests to foist on the public, *inter alia*, a never-ending number of
6 boosters. Part of this disinformation campaign is to silence critics both through the Federation
7 inspired Covid misinformation laws or standard of care prosecutions. Another part of the
8 overall campaign (though beyond the scope of this lawsuit) are the federal government's direct
9 attempts to force, intimidate or cajole the social media companies to remove content which is
10 not consistent with the government's public health narrative. All the time vilifying physicians
11 and others who dare to speak up. This is straight from the Orwellian 1984 government's
12 playbook. Newspeak is now the coin of the realm promoted by the public health authorities and
13 their newspeak co-interlocutors.

14 65. The false and misleading overselling of the safety and efficacy of the Covid
15 vaccines and boosters is most poignantly demonstrated by a recent Elon Musk tweet of a video
16 which is a montage of headlines and public health officials' statements initially making
17 ludicrously false and exaggerated claims, and then having to backtrack, retract and explain
18 away the evidence, all the time insisting that every booster (tested on 8 mice or in one case, 50
19 people over a two week period of time) is safe and highly effective (because it increased
20 antibodies for as long as two weeks, and that is called a surrogate endpoint), and that everyone
21 over the six months of age needs to take every shot and ever booster to protect themselves and
22
23

24
25 ¹⁰ The individual Plaintiff physicians, the physician members of the two organizational
26 Plaintiffs, and many other physicians have the possibly quaint notion that a physician has a
27 professional obligation/duty of informed consent which would include apprising patients of
28 potential risks (and the risks listed on the vaccines' labels), rather than simply robotically
repeating the public health/standard of care mantra that the Covid shots and every booster has
been proven to be completely safe and effective for everyone including young children and
pregnant women, and everyone should take every booster (over the age of six months).

1 to protect the public. But the public is not buying it anymore, and the Musk tweeted montage
2 shows why. See and view <https://twitter.com/elonmusk/status/1706676593261785178>.

3 66. In times as these, many people go to their physicians for information, advice, and
4 recommendations about what they should do about Covid, prophylactically and for treatment.
5 It is imperative that physicians be permitted to speak their minds without fear of government
6 reprisal. This kind of physician/patient communication is within the heartland of the speech the
7 First Amendment protects. And, that is exactly the subject of this lawsuit, whether the
8 government assault on this protected speech comes from a specific (and soon to be repealed)
9 statute, or a general standard of care provision.

10
11 **FIRST CLAIM FOR RELIEF**

12 **42 U.S.C. SECTION 1983 VIOLATION OF THE FREE SPEECH CLAUSE**
13 **OF THE FIRST AMENDMENT OF THE UNITED STATES**
14 **CONSTITUTION ASSERTED AGAINST DEFENDANTS**

15 67. Plaintiffs repeat and reallege the foregoing allegations.

16 68. The First Amendment provides in relevant part: "Congress shall make no law...
17 abridging the freedom of speech." The First Amendment applies to actions by state agencies
18 such as the Board via the Fourteenth Amendment.

19 69. The individual plaintiffs and the members of organizational Plaintiffs CHD and
20 PIC's physicians have the right of free speech, including the right to freely communicate
21 information to their patients even if the government does not agree with the information
22 conveyed.

23 70. Furthermore, the patients of the individual Plaintiffs, and CHD's and PIC's non-
24 physician members have the right to receive such information and engage in a genuine free
25 speech dialogue, even if the government does not agree with the information or message
26 conveyed by these physicians.

27 71. The statements by the individual Plaintiffs and the organizational Plaintiffs
28 constitute a concrete plan to engage in activity, which based on statements and actions by the

1 Defendants and AB 2098’s sponsor, strongly suggest that Plaintiffs’ speech is within the zone
2 of prosecution under the current policy of prosecuting so called “Covid misinformation.”

3 72. These same board actions and statements communicated to the California public
4 constitute an intended specific warning or threat to initiate proceedings for the purpose of
5 dissuading physicians from saying anything to patients which is inconsistent with the
6 government messaging concerning, *inter alia*, taking every available Covid booster, and
7 limiting Covid therapeutics to on-label FDA approved drugs.

8 73. The fact that there is now at least one pending accusation against a physician for
9 alleged Covid misinformation under the pretext of a standard of care violation, in conjunction
10 with absence of any medical board statement that this prosecution is unique, is sufficient for a
11 finding of a prior history of enforcement, at least in the absence of any evidence to the
12 contrary.

13 24. Accordingly, Plaintiffs have satisfied the three requisite elements for First Amendment
14 standing. *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC, __ F.Supp.3d __, 2023 WL 414258,
15 page 6-14 (E.D. Cal. Jan. 25, 2023)(Dkt Entry 30 in *Hoang v. Bonta*) (and law of the case).

16 74. For the foregoing reasons, Plaintiffs request a declaratory judgment that it is a
17 First Amendment violation for the medical boards of California to investigate, prosecute or
18 sanction physicians based on information and opinions they provide to patients concerning the
19 safety and efficacy of Covid vaccines, FDA approved drug treatments for Covid whether on or
20 off label, or public health measures such as the benefits of masks, as long as there is some
21 published scientific evidence supporting the information and opinions. Plaintiffs seek
22 injunctive relief preventing the commencement or continuation of any such investigation or
23 prosecution.

24 75. With respect to recommendations or advice, Plaintiffs seek a declaration that the
25 medical boards do not have the First Amendment constitutional authority to investigate,
26 prosecute or sanction physicians for providing such recommendations about Covid
27 vaccines/boosters, or on or off-label FDA approved treatments for Covid, or for any other
28 Covid related subject, so long as there is some published scientific evidence supporting the

1 recommendation or advice. Plaintiffs seek injunctive relief preventing the commencement or
2 continuation of any such investigation or prosecution.

3
4 **SECOND CLAIM FOR RELIEF**

5 **BUSINESS AND PROFESSIONS CODE 2270 VIOLATES THE FIRST**
6 **AMENDMENT**

7 76. Plaintiffs repeat and reallege the allegations set forth above.

8 77. Bus. & Prof. Code Section 2270 is both content and viewpoint discriminatory.
9 As such, it is subject to and clearly fails strict scrutiny, and the Court should so hold
10 notwithstanding the fact that the statute is set to be repealed on January 1, 2024.

11 78. The matter is not moot because the evidence indicates that the medical board
12 intends to continue to prosecute physicians for the very same protected speech as allowed for
13 under the repealed law which is or could be an exception to the mootness by repeal, either
14 directly or by extension of *Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 941
15 F.3d 1195 (9th Cir. 2019) (mootness exception if there is evidence that the legislature will
16 enact the same or similar statute). Here, the same Legislature and Governor enacted and
17 repealed Section 2270 within one year, an insufficient amount of time for the judiciary to
18 complete its First Amendment review of the statute, thereby leaving the Plaintiffs in jeopardy
19 in an ongoing chilled speech environment, since it is not clear that the medical board intends to
20 carry on its unconstitutional actions by simply switching to a more general statutory
21 justification which by all judicial accounts (other than Judge Slaughter), is beyond the
22 constitutional purview of a state licensing agency.

23 79. Accordingly, Plaintiffs seek a declaration that Section 2270 of the Business &
24 Professions Code violates the free speech clause of the First Amendment. Since the law is set
25 to expire on January 1, 2024, and because there is already a preliminary injunction in place,
26 Plaintiffs do not seek a permanent injunction.

1 **THIRD CLAIM FOR RELIEF ACTION**

2 **BUSINESS AND PROFESSIONS CODE 2270, AND THE MEDICAL**
3 **BOARD’S RECENTLY ANNOUNCED OR REVEALED POLICY AND**
4 **PRACTICE OF SANCTIONING DOCTORS VIA USE OF ITS STANDARD**
5 **OF CARE POWERS VIOLATES THE FIFTH AMENDMENT**
6 **VAGUENESS PROHIBITION**

7 80. Plaintiffs repeat and reallege the allegations set forth above.

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

13 82. Section 2270 violates the heightened specificity vagueness prohibition of the Due
14 Process Clause. The inherent vagueness of Section 2270 primarily arises from the definition at
15 section (b)(4) concerning Covid “misinformation” as “false information that is contradicted by
16 contemporary scientific consensus contrary to the standard of care.”

17 83. The most critical flaw in this statutory provision is in the statutorily unanswered
18 connection between “false information” and the other two components, “contradicted by
19 contemporary scientific consensus” and “contrary to the standard of care.” These terms are too
20 vague to be applied with constitutional definiteness to free speech.

21 84. Plaintiffs maintain that the information Plaintiffs Hoang, Kory, Tyson, and PIC’s
22 and CHD’s physician members provide to their patients is true and evidence-based, i.e.,
23 supported by specific adequately controlled published studies. However, the conclusions or
24 implications of these studies, in many cases, may not be consistent with the current “scientific
25 consensus” or the standard of care (assuming arguendo that there can be a constitutionally
26 enforceable standard of care by which the government can censor or compel physicians to
27 adhere to a specific viewpoint on public health matters).

28 85. It is unclear from the statute whether Plaintiffs Hoang, Kory, Tyson, or any
California licensed physician can make recommendations and give advice based on published

1 medical evidence that contradicts the scientific consensus and the so-called standard of care for
2 Covid information (again, assuming arguendo, there can be such a thing.)

3 86. Would recommending against the vaccine for patients in certain age groups
4 because of the increased risk of myocarditis constitute Covid misinformation or a violation of
5 the standard of care, even though the information provided is true? There is no way to answer
6 that question under the statute or under the standard of care because the medical boards may
7 not recognize that there can be truthful information that is within “contemporary scientific
8 consensus” under Section 2270 or the “standard of care” enforceable under Section 2234, if it
9 opposes the public health edicts on Covid vaccines and treatments.

10 87. In fact, at least the soon-to-be repealed statute nominally contains a requirement
11 that the statement be untrue.

12 88. Upon information and belief, during the pandemic, under the evidence-based
13 model in effect in the U.S., there is no significant or operative difference between what the
14 public health authorities proclaim to be the medical scientific consensus, (quick changing that
15 it is) and edicts the medical boards might put out concerning the standard of care, or whatever
16 a board retained expert might testify to at medical board hearing. It is all the same.

17 89. Upon information and belief, this is because of the dramatic increase in relevant
18 information and scientific datapoints in conjunction with a rapidly changing virus. The
19 standard of care adopts the public health authorities’ pronouncements about best practices. In
20 this case, the only consistent message is that every person over six months of age should take
21 every booster as long as the manufacturing companies keep pumping them out, regardless of
22 any data or other countries’ different decisions to the contrary.

23 90. In short, and upon information and belief, in these days, whatever the public
24 health officials pronounce as scientific consensus and recommendations is, without further
25 thought or analysis, adopted as the standard of care. And yet, as shown above, the public health
26 authorities have repeatedly got it wrong, changed their minds, oversold their recommended
27 products, or in some cases, knowingly misled the public. And yet, they are baffled by the lack
28 of the public’s trust.

1 91. Accordingly, the same evidence supporting the Court’s prior finding that Section
2 2270’s “contemporary scientific consensus” was overly vague under the Fifth Amendment
3 applies with equal force to show that the standard of care is overly vague and meaningless.
4 (See the Musk tweet referenced at pages 21-22 para. 65; and see also the expert declaration of
5 Sanjay Verma, MD in support of the Plaintiffs’ prior motion for preliminary injunction (Dkt
6 Entry No. 4, document no. 2).

7 92. For the reasons set forth herein, Plaintiffs request that the Court issue a
8 declaratory judgment that Section 2270 of the Business and Professions Code is
9 unconstitutionally vague, and further that the medical boards’ new Covid misinformation
10 policy or practice based on Section 2234 which purportedly allows the board to prosecute the
11 same professional speech despite the repeal of Section 2270, is also a violation of Plaintiffs’
12 rights to due process of law. Plaintiffs also seek preliminary and permanent injunctive relief as
13 set forth below.

14
15 WHEREFORE the Plaintiffs request that judgment be entered in their favor and against
16 the Defendants as set forth in this First Amended Complaint and specifically that the Court:

- 17 1. Issue a declaratory judgment that it is a First Amendment violation for the medical
18 boards of California to investigate, prosecute or sanction physicians based on
19 information, opinions, recommendations or advice they share or provide to patients
20 concerning the safety and efficacy of Covid vaccines, FDA approved drug
21 treatments for Covid whether on or off label, or dietary supplements, or public
22 health measures such as the benefits of masks, based on their statutory authority to
23 enforce the standard of care, so long as there is some published peer reviewed
24 scientific evidence supporting the information, opinions, recommendation or advice.
- 25 2. Maintain the preliminary injunction on based on Fifth Amendment vagueness, and
26 expand it to include all investigations or prosecutions relating to the licensee’s
27 providing information about Covid as described about under the asserted standard of
28 care statutory basis to reach such fully protected speech.

- 1 3. Issue a permanent injunction enjoining the Defendants from commencing or
- 2 continuing any such investigation or prosecution and ordering the medical boards to
- 3 withdraw any board order in violation of the First and Fifth Amendment rights
- 4 violations set forth above.
- 5 4. Costs and attorneys' fees as permitted by law.
- 6 5. Such other and further relief as the Court deems just and proper.

7
8 Dated: October 2, 2023

9 Respectfully submitted,

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