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11 Attorneys for Plaintiffs

12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF CALIFORNIA

14 LETRINH HOANG, D.O., PHYSICIANS  
15 FOR INFORMED CONSENT, a not-for-profit  
16 organization, and CHILDREN’S HEALTH  
17 DEFENSE, CALIFORNIA CHAPTER, a  
18 California Nonprofit Corporation

19 Plaintiffs,

20 v.

21 ROB BONTA, in his official capacity as  
22 Attorney General of California and  
23 ERIKA CALDERON, in her official capacity  
24 as Executive Officer of the Osteopathic  
25 Medical Board of California (“OMBC”)

26 Defendants.

**Case No: 2:22-cv-02147-WBS-AC**

**NOTICE OF MOTION AND RULE 16  
(b) MOTION TO MODIFY THE PRE-  
TRIAL SCHEDULING ORDER AND  
RULE 15 MOTION FOR LEAVE TO  
FILE A FIRST AMENDED  
COMPLAINT, COUNSEL’S  
DECLARATION AND  
MEMORANDUM LAW**

**Date:** November 13, 2023

**Time:** 1:30 PM

**Courtroom:** 5, 14<sup>th</sup> floor

**Judge:** Hon: William B. Shubb

Action Commenced: December 1, 2022

1 **TO DEFENDANTS AND THEIR COUNSEL OF RECORD:**

2  
3 **PLEASE TAKE NOTICE THAT** on November 13, 2023, at 1:30 p.m. or as soon  
4 thereafter as the matter may be heard, at the United States District Court for the Eastern District  
5 of California, in courtroom number 5, 14<sup>th</sup> Floor, 501 I Street, Sacramento, California, the  
6 Plaintiffs will move under F.R. Civ. Pro. 16(b) and Rule 15 for leave to file a First Amended  
7 Complaint, add parties and to vacate the summary judgment deadline date.

8 This motion is based on Plaintiffs' Notice of Motion and Motion, Counsel's Declaration,  
9 the Memorandum of Law, the proposed First Amended Complaint attached to this motion, and  
10 such other papers as may be submitted prior to the time of the hearing, any oral argument and  
11 any further evidence which may be offered.

12  
13 Dated: October 2, 2023

14 Respectfully submitted,

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Attorneys for Plaintiffs

**DECLARATION OF RICHARD JAFFE**

Richard Jaffe, declares as follows.

1. I am an attorney of record in this case for the Plaintiffs. I have personal knowledge of the facts set forth herein. I submit this declaration under penalties of perjury under the laws of the state of California.

2. I submit this Declaration in support of Plaintiffs’ Rule 16(b) and Rule 15 Motion to amend the Court’s May 12, 2023 Scheduling Order in two respects. First, we seek to vacate the summary judgement schedule part of the order, under which order, the Plaintiffs were to file their summary judgment motion by October 2, 2023 and hearing to be set no earlier than January 2, 2024 (and currently set for January 8, 2024).

3. Plaintiffs will not be filing a summary judgment motion at this time because we seek permission to file an amended complaint due to changed circumstances. A copy of the Proposed First Amended Complaint is attached hereto as Exhibit A.

4. The proposed First Amended Complaint (“FAC”) makes the following party and claims changes: adds two MDs as plaintiffs, substitutes Children’s Health Defense national as a Plaintiff, removes CHD California chapter, adds the Executive Director of the Medical Board, deletes the third state constitutional claim for relief, adds a constitutional claim directly challenging the medical boards’ Constitutional authority to censor, investigate or prosecute or sanction physicians for their protected speech under the general standard of care statutes.

5. There are other substantive and fact changes in the FAC, in large part due to the changed circumstances. The FAC maintains the First and Fifth Amendment claims challenging AB2098/Section 2270 for the time being under an argued exception to mootness.

6. If the Court grants the motion for leave to amend, that would render any cross motion for summary judgment not ripe, or at least such motion would not be dispositive of the case by virtue of the new/modified claims for relief.

7. In terms of the Rule 15 part of this motion, I would point out that the procedural posture of this case is somewhat unusual because although the parties previously maintained that summary judgement was appropriate, issue has not yet been joined per a prior order on an

1 unopposed motion that the Defendants’ answer to the complaint was to be filed within 30 days  
2 of the issuance of the Ninth Circuit’s opinion in *McDonald v. Lawson*, and that decision is still  
3 pending, oral argument having been held on July 17, 2023.<sup>1</sup>

4 **The Changed Circumstances**

5 8. There are two circumstances precipitating this request. On September 13, 2023,  
6 the Legislature passed SB 815 which per the last amendment on September 11, 2023, repealed  
7 AB 2098, enacted as Section 2270 of the Business & Professions Code.

8 9. SB 815 was signed by the Governor on or about September 29, 2023. The repeal  
9 of Section 2270 will be effective January 1, 2024, seven days before the scheduled hearing on  
10 Plaintiffs’ Motion for Summary Judgment and any cross motion the Defendants may file.

11 10. I point out to the Court that we are filing this motion only a few days after the  
12 Governor signed the law repealing the Section 2270, three months before the scheduled  
13 summary judgment motion hearing, twelve months before the final pretrial conference, and over  
14 thirteen months before the scheduled trial.

15 11. Accordingly, the facts do not support an argument of delay, lack of diligence, or  
16 prejudice to the other side, especially since this motion is precipitated by the Defendants’ and  
17 their legislative allies’ apparent tactical retreat to allow the board to continue in its  
18 unconstitutional actions while evading or delaying judicial review (discussed below).

19 12. However, this maneuver obviously raises a mootness issue. But as discussed in the  
20 following brief memo of law, a reasonable extension of authority on exceptions to mootness  
21 may apply, thus permitting the Court to keep the two AB 2098/Section 2270 claims in the case,  
22 considering the second fact underlying this motion.

23 13. Despite the imminent repeal of the Covid misinformation law, the same media  
24 which reported AB 2098’s legislative repeal has also reported that the medical board and AB  
25 2098’s sponsor are taking the position the medical boards still have the constitutional authority  
26 to target the same content and viewpoint-based speech which the soon to be repealed statute  
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28 <sup>1</sup> Since issue has not yet been joined, technically, if this Court grants the requested Rule 16 (b)  
relief, Plaintiffs could amend as of course/right under Rule 15 (a).

1 covered (*See* the Los Angeles Times article attached as Exhibit B.)

2 14. Furthermore, other news media has revealed that the medical board has recently  
3 commenced a disciplinary action against at least one physician. (The relevant unconstitutional  
4 portions of which are set out in detail in the Proposed Amended Complaint.)

5 15. The Accusation in the medical board administrative proceeding is based on the  
6 argument made by the Attorney General's office in all four AB 2098 challenges, namely that all  
7 communications between a doctor and a patient are considered medical/patient care, and the  
8 boards have jurisdiction over medical care under their general powers to regulate the standard of  
9 care.

10 16. This argument is the professional speech doctrine which has been specifically  
11 rejected by the Supreme Court in *Nat'l Inst. Advocates & Life Advocates v. Becerra* ("NIFLA")  
12 138 S. Ct. 2361, 2371-2373 (2018), but accepted by Judge Slaughter in *McDonald v. Lawson*,  
13 which decision is currently under review and *sub judice* in the Ninth Circuit.

14 17. It is a reasonable speculation that the medical board is attempting to make the  
15 Ninth Circuit unwilling or unable to issue a substantive opinion reviewing Judge Slaughter's  
16 opinion. This is completely understandable given the panel's intense questioning of the Attorney  
17 General's representative on Judge Slaughter's First Amendment analysis (and his clearly  
18 erroneous finding that the rational relationship test applies, and his reviving the professional  
19 speech exception despite *NIFLA*'s rejection of the exception previously made by a prior  
20 California Attorney General.

21 18. Of course, this is just this counsel's assertion, but it certainly helps explain why  
22 the Legislature, presumably with the medical board's assent is repealing a law which it and the  
23 media felt was so important to protect the public that the law had to interfere with what prior  
24 case law held was protected speech.<sup>2</sup>

25 \_\_\_\_\_  
26 <sup>2</sup> I would point out that this tactical retreat is the second time the Defendants' have employed  
27 an odd tactic which has the probable effect of limiting judicial review. The first being their  
28 non appeal of this Court's preliminary injunction order, despite the law's dire need to protect  
the public, but not so great to seek a stay of the Court's order, or provide the Ninth Circuit the  
benefit of the record in this and the related case.

1 19. As set out in the following short memorandum, we maintain that the changed  
2 circumstances occasioned by these two new facts constitutes the good cause required for the  
3 Court to grant relief from the scheduling order under Rule 16(b).

4 20. If the Court grants the requested 16 (b) relief, then as issue has not yet been joined,  
5 Plaintiffs should be able to amend as of course/right. If not, the liberal rules on amending  
6 pleadings seems to be satisfied in this case, due the same changed circumstances which justify  
7 Rule 16(b) relief. It is accepted that the Rule 16 (b) good cause requirements are more stringent  
8 that the liberal policy behind Rule 15 amendment of pleadings. Therefore, either way, we  
9 request the Court grant to grant our Rule 16(b) motion and allow the Plaintiffs to amend the  
10 complaint.<sup>3</sup>

11 21. On Friday, September 29, 2023, I emailed Defendants' counsel Kristin Liska, Esq.  
12 and provided a detailed description of the substance on this motion. I offered to speak to her  
13 about it, but that if I did not hear back, I would be filing the motion Monday morning and  
14 assume she opposes the relief and will so indicate to the Court.

15  
16 Dated: October 2, 2023

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RICHARD JAFFE, ESQ.

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<sup>3</sup> For the Court's information, we had considered filing a new case which would have been simpler and quicker. However, this case is ultimately about the medical boards' constitutional authority to sanction protected speech by physicians. Therefore, regardless of the specific way that alleged unconstitutional power is statutorily justified, better practice may suggest to give this Court in this case the opportunity to continue the challenge via amending the complaint to include the boards' new justification after the AB 2098 plan did not work out.

1 **MEMORANDUM OF LAW IN SUPPORT OF**  
2 **PLAINTIFFS' RULE 16 (b) AND RULE 15 MOTION**

3 **PRELIMINARY STATEMENT**

4 Plaintiffs seek to change the Court's May 12, 2023 Status (Pre-Trial, Scheduling) Order  
5 to vacate the summary judgment schedule, and seek leave to add (and delete) claims and add  
6 parties in a First Amended Complaint because of unforeseen changed circumstances.

7 Plaintiffs point out that issue has not been joined yet, which means that if the Court were  
8 to grant the requested Rule 16(b) relief, Plaintiffs could amend as of course/right. However,  
9 even if leave to amend is required, since the Rule 16(b) good cause requirement is more  
10 stringent than the very liberal "leave shall be freely granted" Rule 15 standard, the facts and  
11 rationale for granting Rule 16 (b) relief would satisfy the leave to amend standard as well.

12 As indicated in Counsel's declaration, the big and unforeseen change is the tactical retreat  
13 by the medical boards and the legislature in the imminent repeal of Section 2270 of the Business  
14 and Professional Code. The repeal will be effective January 1, 2024, seven days before the  
15 currently scheduled motions for summary judgment are to be heard by this Court.

16 There is an obvious mootness question, superficially at least, since the specific statute  
17 under review is being repealed. However, fundamentally, this action challenges the medical  
18 board's constitutional authority to investigate, prosecute and sanction physicians for providing  
19 information and advice to patients about the Covid vaccines, the on and off label treatments for  
20 Covid, and other Covid issues like the necessity and efficacy of wearing masks considering  
21 studies which show that wearing masks does not have a measurable impact of public health  
22 during Covid outbreaks.

23 The second changed circumstance is that by words and actions, it is now clear that the  
24 medical boards and the law's sponsor takes the position that Section 2270 was never necessary  
25 for the medical boards to discipline physicians for Covid misinformation because it had the  
26 inherent statutory power to reach the same conduct targeted by Section 2270 under its standard  
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28

1 of care authority (Bus. & Prof. Code section 2234).<sup>4</sup>

2 There is currently at least one medical board prosecution for the very conduct which was  
3 the subject of four federal constitutional challenges. (This and the related *Hoeg* case being two  
4 of them). We repeat, the very same type of content and viewpoint speech challenged in these  
5 four lawsuits is now the subject of a board prosecution despite the specific law granting such  
6 authority is being repealed.

7 Between this Court's preliminary injunction decision and the negative response, the  
8 Defendants received at the Ninth Circuit oral argument in *McDonald v Lawson*, arguably, the  
9 medical boards and the legislators responsible for AB 2098 decided to repeal AB 2098 rather  
10 than risk the Ninth Circuit finding that the speech targeted by the statute was First Amendment  
11 protected and not sanctionable. Such a Ninth Circuit finding could undercut the medical boards'  
12 position that it has the general statutory authority to censor and sanction physicians for  
13 providing information, expressing opinions, and making recommendations contrary to the  
14 CDC's and the FDA's position on vaccine boosters and off-label Covid treatments.

15 The result of AB 2098 repeal/tactical retreat is that neither the Ninth Circuit nor this  
16 Court may likely issue a final decision ordering the boards to stop violating the First  
17 Amendment rights of physicians (and their patients) by investigating, prosecuting, and  
18 sanctioning physicians for providing information and advice which is not consistent with the

19 \_\_\_\_\_  
20 <sup>4</sup> For what it is worth, this is what SB 815 Legislative Counsel's report says about the current  
21 law versus the law after SB 815 goes into effect:

22 "Existing law provides that it shall constitute unprofessional conduct for a physician and  
23 surgeon to disseminate misinformation or disinformation related to COVID-19, as specified."  
Page 4 para 13. \*\*\*

24 "This bill would repeal the above-described provisions that provide that it shall constitute  
25 unprofessional conduct for a physician and surgeon to disseminate misinformation or  
26 disinformation related to COVID-19, as provided." *Id.* LEGISCAN, Bill Text: CA SB815 |  
27 <https://legiscan.com/CA/text/SB815/id/2842080>

28 Arguably, if the medical boards have the inherent or secret power to discipline physicians for  
covid misinformation outside of Section 2270, that might be news to the Legislative Counsel's  
department.



1 CDC's (ever changing) edicts, at least not under the live pleadings in these cases. And it is for  
2 this reason that Plaintiffs have filed the instant motion and attached the Proposed First Amended  
3 Complaint, to stop the boards from sanctioning physicians for their protective speech in this déjà  
4 vu all over again new battle.

5 **ARGUMENT**

6 **I. The Soon to Be Repealed AB 2098/Section 2270 Alone or In Conjunction with The**  
7 **Board's Actions and The Bill Sponsor's Statement Are Changed Circumstances**  
8 **Justifying the Modification of The Scheduling/Pre-Trial Order.**

9 In accordance with the Court's May 12, 2023 Pre-trial scheduling order, Plaintiffs seek  
10 Rule 16(b) relief to add parties and a claim, modify a claim, delete a claim, and delay the  
11 summary judgment deadline. To do so Plaintiffs must demonstrate good cause as set out in  
12 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir.1992) (holding that in  
13 reviewing an attempt to amend pleading after scheduling order deadline, the court must first find  
14 good cause for amendment under Rule 16(b) before considering propriety of amendment under  
15 Fed.R.Civ.P. 15).

16 As stated in the advisory committee rules quoted in *Johnson*:

17 Rule 16(b)'s "good cause" standard primarily considers the diligence of the party  
18 seeking the amendment. The district court may modify the pretrial schedule "if it  
19 cannot reasonably be met despite the diligence of the party seeking the extension."  
Fed.R.Civ.P. 16 advisory committee's notes (1983 amendment) ....

20 as quoted in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992).

21 It is not for lack of diligence that Plaintiffs are seeking to modify the Pretrial and  
22 Scheduling order. The Governor just signed SB 815 a few days ago, and the repeal of Section  
23 2270 was only reported on September 11<sup>th</sup>. The repeal, the statement attributed to the bill's  
24 sponsor in conjunction with the publication of information about a recently filed accusation for  
25 the very same conduct which is the target Section 2270 protected speech certainly constitutes  
26 changed circumstances. *See Riggins v. Walter*, 279 F.3d 422, 427-428 (7th Cir. 1995) which  
27 cites *Johnson* (and *Jones v. Coleman Co., Inc.*, 39 F.3d 749, 753-54 (7th Cir.1994)) for the  
28

1 proposition that changed circumstances constitutes good cause (in those two cases allowing a  
2 Rule 12 (c) motion after the scheduling order deadline <sup>5</sup>

3 Given the fact that this case is one year away from the pretrial conference and over 13  
4 months from the trial date, there is no possible prejudice the Defendants can suffer resulting  
5 from the amendment of the complaint, except to their efforts to forestall judicial review of their  
6 continued effort to censor and sanction their licensee's protected speech.

7 **II. Plaintiffs Can Amend as of course or the Court Should Grant leave to amend**  
8 **under Rule 15 (a)**

9 As of the date of the filing of this motion, issue has not been joined. Hence, under Rule  
10 15 (a) Plaintiff should be able to amend the complaint as of course without leave of Court.  
11 Accordingly, if the Court grants the requested Rule 16 (b) relief, Plaintiffs would not need the  
12 Court's specific permission, except as a scheduling matter to set a time frame for filing the  
13 amended pleading.

14 If leave of the Court is required, Plaintiffs note that leave shall be freely and liberally  
15 granted and only denied upon proof of (1) prejudice to the opposing party (2) sought in bad faith  
16 (3) produces undue delay in litigation, or (4) is futile. *AmerisourceBergen Corp. v. Dialysist*  
17 *West Co.*, 465 F.3d 946, 951 (9th Cir. 2006).

18 None of these four circumstances are present here. The trial is 13 plus months away, and  
19 the Defendants have not even answered the complaint, hence there can be no prejudice. This  
20 motion was precipitated by the medical boards and Legislature's surprise tactical retreat,  
21 probably caused by the combination of this Court's preliminary injunction order and the  
22

23 \_\_\_\_\_  
24 <sup>5</sup>Footnote 7 in *Riggins* is also instructive:

25 *General Elec. Co.*, 916 F.2d at 1130 n.5 (finding no prejudice because non-  
26 moving party "dramatically changed the nature of this suit" nine months before  
27 motion was filed by adding a new theory more than three years after it filed its  
28 original cross-claim motion); *Kishwaukee Community Health Serv. Ctr.*, 638 F.  
Supp. at 1495 (noting that subject of motion involved "a continually evolving  
doctrine, ... which also excuses somewhat a delayed filing of the motion.").

*Riggins v. Walter*, 279 F.3d at 428 n.7.

1 skepticism the law received at Ninth's oral argument. Plus, the recent disclosure that the medical  
2 board is continuing to prosecute doctors (at least one) for the very speech targeted by the soon-  
3 to-be repealed law, and the statement of the co-sponsor's representatives that they will continue  
4 to do what the law allowed them to do despite its repeal. There cannot be undue delay given the  
5 late 2024 trial date, that no discovery has started, and issue has yet to be joined. Finally,  
6 whatever futility argument they have is likely belied by the fact that there already has been a  
7 preliminary injunction against the same speech targeted in the statute which was the subject of  
8 the injunction. And, a futility argument would be better addressed in a 12 (b) motion.

9 For the forgoing reasons, assuming leave of Court is required, under the liberal rules of  
10 amendment to pleadings, and assuming Plaintiffs have established the much more stringent  
11 standard of Rule 16 (b) good cause, Plaintiffs request that leave to amend to file the First  
12 Amended Complaint be granted.

13 **CONCLUSION**

14 Plaintiffs request that their Rule 16 (b) and Rule 15 motion be granted.

15 Dated: October 2, 2023

16 Respectfully submitted,

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Attorneys for Plaintiffs

**CERTIFICATE OF E SERVICE**

I, Richard Jaffe affirm as follows:

1. I am an attorney at law admitted to practice in this court. I am not a party to this action and am over the age of 18. I am counsel of record for the Plaintiffs in this case. I submit this Certificate of Service under penalties of perjury.

2. This Rule 16 (b) and Rule 15 motion was E served on Defendants’ counsel Kristin Liska when it was filed.

October 2, 2023



Richard Jaffe, Esq.

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# EXHIBIT A

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9 Attorneys for Plaintiffs

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 9<sup>th</sup>  
12 Circuit’s creation or application of this professional speech exception in *Pickup v. Brown*, 740  
13 F.3d 1208 (9<sup>th</sup> 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 (9<sup>th</sup> 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)),<sup>1</sup> 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*,  
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26 <sup>1</sup> 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.<sup>2</sup>

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

26 <sup>3</sup> 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 <sup>4</sup> 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

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27 <sup>4</sup> 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. <sup>5,6</sup>

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

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19 <sup>5</sup> 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 <sup>6</sup> 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”<sup>7</sup>) 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

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24  
25 <sup>7</sup> 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.<sup>8</sup>

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

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26  
27 <sup>8</sup> 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](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.<sup>9</sup>

21  
22 <sup>9</sup> “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

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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)  
[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];

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

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

25 “NPR one year late, same tune: “The new CDC director outlines 3 steps to rebuild trust with the  
26 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]

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

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

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

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24  
25 <sup>10</sup> 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,

10 

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# EXHIBIT B

## California Misinfo Law Is Destined for the Dustbin

— Amendment repeals language, but licensing boards apparently had authority all along

by [Cheryl Clark](#), Contributing Writer, MedPage Today September 13, 2023

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California's attempt to pave a path for its physician licensing boards to discipline doctors who give false COVID information to patients appears to be headed for the dustbin of failed ideas.

Inserted two-thirds of the way down in a [bill](#) on September 5, a Senate committee amendment would repeal state law authorized by the controversial [AB 2098](#). That law had specifically defined the dissemination of COVID-19 misinformation or disinformation by a licensee as unprofessional conduct, subject to board disciplinary action.

A vote on the bill is expected this week.

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During the heaviest days of the pandemic, some board members as well as physicians fed up with misinformation -- especially about the value and safety of COVID vaccines -- said they wanted such guidance in the belief they needed a clear mandate to rein in contrarians to prevent hospitalizations and save lives.

Signed into law by Gov. Gavin Newsom on September 30, 2022 with a statement of [caution](#), AB 2098 said that a doctor who spread false or misleading information about COVID prevention and treatment or questioned the effectiveness of COVID-19 vaccines could have his or her license suspended, placed on probation, or revoked.

Newsom wrote at the time that he believed the new law "is narrowly tailored to apply only to those egregious instances in which a licensee is acting with malicious intent or clearly deviating from the required standard of care while interacting directly with a patient under their care."

But there was confusion about the bill from the start. Initially, the idea behind it was to discipline doctors who spread false information about COVID anywhere, including on social media or at [public events](#). Authors of the bill had in mind curtailing activities such as that of California licensee Simone Gold, MD, JD, who breached the U.S. Capitol during the January 6, 2021 insurrection and gave a [speech](#) opposing COVID-19 vaccine mandates and government-imposed lockdowns, and who publicly advocated unproven COVID treatments such as hydroxychloroquine.

But concerns about the First Amendment prompted lawmakers to narrow the scope, applying the language only to those physicians who convey such misinformation to a patient under the licensee's care, which is much harder to prove.

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Further, the law specified that the misinformation conveyed had to be "contradicted by contemporary scientific consensus contrary to the standard of care," which many argued was up for broad interpretation, especially given that knowledge about some aspects of the virus, its mutations, prevention, and treatment regimens were scientifically unclear and evolving.

The law immediately provoked outcries from some physicians who claimed it violated their First Amendment rights, and prompted several lawsuits challenging its constitutionality. The American Civil Liberties Union filed briefs in support of several of the legal challenges.

Opposing physicians argued that the science behind effective treatment, especially during COVID, could rapidly change, as could "contemporary scientific consensus" at any point in time.

On January 25, Sacramento U.S. District Judge William Shubb granted a [temporary injunction](#) prohibiting anyone from enforcing the law against plaintiffs, saying that the law's language was "unconstitutionally vague."

Jenin Younes, an attorney with the New Civil Liberties Alliance and lead counsel in that case, said she's pleased that requirements set forth by 2098 are likely being repealed. The state legislature, she said, is "apparently recognizing that the law is unlikely to survive court challenges," including the one

she filed on behalf of California licensees Tracey Hoeg, MD, Ram Duriseti, MD, Aaron Kheriaty, MD, Pete Mazolewski, MD, and Azadeh Khatibi, MD.

"It's a shame that these doctors had to take the state to court to see their First Amendment and Due Process rights vindicated. The clearly unconstitutional law never should have been passed in the first place," she said.

Chessie Thacher, senior attorney with the Northern California ACLU, also was glad the repeal seemed to be moving forward. "As we argued in court, that bill was dangerously overbroad and confusing. It chilled doctor speech and risked compromising the medical advice patients receive," she said. "AB 2098 was also unnecessary because the state had -- and continues to have -- numerous ways to handle doctors that practice below the standard of care."

Indeed, several members of the Medical Board of California, as well as speakers at last year's legislative hearings, said they believed the board already had the power to discipline doctors for disseminating false COVID-19 information.

As an example, the MBC filed an [accusation](#) on June 23 against Ana Rebecca Reyna, MD, a Tehachapi-based internal medicine doctor who, the board document alleges, made a number of false statements to a patient in her care in April 2021 -- nearly 18 months before the bill was signed into law.

State documents said that Reyna told her patient that available COVID vaccines "contained fetal tissue, would alter his DNA irreparably, and were linked to a significant increase in miscarriages." She also allegedly "indicated that masks do not stop COVID."

Reyna, the accusation continued, also told the same patient that "when dealing with patients who exhibited COVID symptoms she directed them to purchase veterinary ivermectin, intended for horses."

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She also told her patient that his girlfriend should "avoid the COVID vaccines if she wants to get pregnant" because the vaccines "were responsible for a 366% increase in miscarriages."

"By making one or more of the statements set forth, Respondent [Reyna] committed an extreme departure from the standard of care by providing advice about COVID-19 that was not accurate, and did not clearly relay to Patient A that the advice did not comport with the standard of care in the community," the board accusation said. The law resulting from 2098 was not mentioned.

The allegations against Reyna await a final determination by the board, and Reyna will have a chance to defend herself.

Nick Sawyer, MD, a Sacramento-area emergency physician who has been outspoken against COVID misinformation, also agreed that the legislature didn't need to pass AB 2098 to stop doctors from potentially harming patients with false medical advice.

"The Medical Board of California already had the mandate and means to address these doctors even before the pandemic," he said.

However, he said he's perplexed to see so much celebration of its repeal. "I trust that the MBC will prioritize public safety by ensuring doctors base prescriptions and their medical opinions on science, not ideology," he said.

Asked what he thought of the amendment that appears destined to repeal the law he fought hard to pass, Assemblyman Evan Low (D-Campbell), seemed to be on board.

Through a spokesman, he said, "fortunately, with this update, the Medical Board of California will continue to maintain the authority to hold medical licensees accountable for deviating

Cheryl Clark has been a medical & science journalist for more than three decades.

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4 Comments

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2002P Studies and SoTiSaR Registry.