No. 24-932

IN THE

Supreme Court of the United States

PIERRE KORY, *et al.*,

Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

RICHARD JAFFE, ESQ.
Counsel of Record
428 J Street, 4th Floor
Sacramento, CA 95814
(916) 492-6038
rickjaffeesquire@gmail.com

Attorney for Petitioners

131105

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that "... when a doctor speaks in his capacity as the patient's treating physician and incident to his provision of medical care, the physician's words constitute medical care." App. B, 16a. The Ninth Circuit tersely agreed, stating that Section 2234(c) "does not purport to regulate speech unrelated to treating patients . . . " (3a), and with equal brevity limited *NIFLA*[1] to the "required communication of a particular message." *Id.*[2]

Respondents' brief ("Opp.") attempts to soften this clearly erroneous rule by distinguishing "speech as speech" from speech which is in some unspecified way "tied to treatment." (Opp. 14.) This still directly contradicts *NIFLA*, because professional speech does not receive diminished protection merely because it arises during a regulated practice. *NIFLA* at 767–68. *See* Petition at 17-18; and Section I. B, 5-6 below. Factually, this case involves speech unconnected to treatment. Pet. 12-14, and 5-6 below.

Respondents seek to distinguish *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), *cert. granted*, No. 24-539 (U.S. Mar. 10, 2025), which dealt with treatment speech, from what Respondents argue is professional

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1. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) ("NIFLA").

2. Between this case and *Stockton v. Ferguson* (Case No. 24A440, Application Denied), nothing that comes out of a physician's mouth, computer or microphone about COVID is currently protected in the Ninth Circuit, unless it conforms to the state's narrative and viewpoint.

conduct here. Opp. 16-17. But both cases raise the fundamental constitutional question: whether state regulation of viewpoint speech by relabeling it as conduct is unconstitutional. This case is broader, as it deals with the more common issue of physicians' speech which is not treatment, but that is a reason to hear it. Deciding *Chiles* alone risks confusion on the broader question which needs answering. Granting this petition does not impose any significant additional burden. The Court should tell the country whether healthcare practitioners' speech to patients is protected—whether it involves treatment or the conveyance of information.

Petitioner physicians have satisfied the pre-enforcement standing factor analysis in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). 7-10 below. Plus, Petitioners Physicians for Informed Consent ("PIC") and Children's Health Defense ("CHD") have standing to assert the patient members' right to receive dissenting information. Pet. 29-30 and 11-12 below.

There is no facial vs. as-applied false dilemma/ Hobson's choice in this case because it challenges Respondents' multi-year campaign which has utilized both a specific COVID misinformation statute (Bus. & Prof. Code Section 2270, (repealed)), and the general standard of care statute (Section 2234(c)) to threaten and intimidate California physicians from providing information to patients inconsistent with the state's COVID-19 narrative. Pet. 26-28, below 10-11.

Respondents' actions are not insulated from constitutional scrutiny because Respondents label it an "as-applied" challenge. Enforcement programs which target protected speech are viable, despite a neutral statutory basis. Pet. 26-28, 10-11 below.

Finally, two recent government actions strongly support the Court hearing this case. On May 21, 2025, the Senate Permanent Subcommittee on Investigations majority released an interim report "Failure to Warn: How the Federal Health Agencies Downplayed the Risk of Myocarditis and Other Adverse Events Following COVID-19 Vaccination." https://static.foxnews.com/foxnews.com/content/uploads/2025/05/senate-psi-majority-staff-interim-report-may-21-2025-final-version2-1.pdf.

The report concluded that "1. U.S. health officials knew about the risks of myocarditis; 2. Those officials downplayed the health concern; and 3. U.S. health agencies delayed informing the public about the risk of the adverse event." *Id.* at 3.

On May 22, 2025, the White House issued its initial MAHA report. https://www.whitehouse.gov/wp-content/uploads/2025/05/WH-The-MAHA-Report-Assessment.pdf. The section, "Scientific and Medical Freedom" decries efforts to silence dissent by "ensur[ing] licensing boards have the authority to take disciplinary action against health professionals for spreading health-related disinformation." *Id.* at 65.[3] Federal policy now

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3. Physicians who question or deviate from the CDC's vaccine schedule may face professional repercussions, including scrutiny from licensing boards and potential disciplinary action. The American Medical Association (AMA), for example, adopted a new policy aimed at "addressing public health disinformation" in order to "ensure licensing boards have the authority to take disciplinary action against health professionals for spreading health-related disinformation." This

favors the right of physicians to speak freely to their patients.

Taken together, these reports offer powerful support for this Court to take this case, to clearly reinforce the First Amendment protection accorded to professional speech, and firmly establish the right of patients to hear this speech, now or during any future public health crises.

ARGUMENT

I. The Court Should Decide This Important First Amendment Issue

A. The Ninth Circuit Misreads *NIFLA*

At the very heart of *NIFLA* is its statement that "this Court has not recognized 'professional speech' as a separate category of speech" that is exempt from ordinary First Amendment principles. *NIFLA* at 767. However, the Court acknowledged that there are two instances in which it previously upheld restrictions to professional speech,

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dynamic discourages practitioners from conducting or discussing nuanced risk-benefit analyses that deviate from official guidelines—even when those analyses may be clinically appropriate. It also discourages physicians and scientists from studying adverse reactions. This silences critical discussion, discourages reporting to safety systems and hampers vaccine research, and undermines the open dialogue essential to protecting and improving children's health. (footnotes omitted).

or compelled specific speech.[4] But the Court stated that "Neither of those decisions turned on the fact that the speakers were professionals." *Id.* at 768.

However, in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), the Ninth Circuit ignored that limitation and characterized *NIFLA* as having "recognized that there are some situations in which speech by professionals is afforded less protection" (*id.* at 1074) and thus reopened the possibility—foreclosed by *NIFLA*—that physicians' speech can be categorically excluded from protection.

B. Respondents' Speech Distinction is Inconsistent with the Record

Respondents attempt to distinguish *NIFLA* by limiting it to "speech as speech," whereas this case involves speech "tied to a procedure" and therefore constitutes professional conduct, not protected expression. *Opp.* 14. But that factual distinction is inconsistent with the record. The complaint makes clear that the challenged policy targets physicians for providing information and recommendations, not performing procedures. ER 116 ¶ 95. Dr. Kory maintains a telehealth practice "providing information and advice to patients," including on Ivermectin. ER 99 ¶ 18-19. Dr. Hoang advises families about "the risks versus benefits for COVID vaccines and continued boostering. . . ." ER 100–101 ¶¶ 24–28. These are not treatments—they are professional judgments and scientific perspectives.

4. *NIFLA* at 768 citing *Zauderer v. Office Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) and *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 883, 884 (1992).

As summarized in the Petition, Dr. Verma confirms that patients consult physicians not for procedures or shots, but because they want trusted information about medical decisions. Pet. 13. On these facts, the case involves "speech as speech" and *NIFLA* applies.

II. This Case Should be Heard with *Chiles*

In *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), *cert. granted*, No. 24-539 (U.S. Mar. 10, 2025), the Court will decide whether the First Amendment protects the speech of therapists who employ sexual orientation change efforts (SOCE), resolving the conflict between the Ninth and Tenth Circuits and the Eleventh Circuit in *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

Respondents argue that the First Amendment question here is "materially different" from the issue in *Chiles*. Opp. 16-17. The first two questions presented in this Petition ask the Court to address the conflict between the Ninth Circuit in *Tingley* and the Eleventh Circuit in *Otto*, a conflict exacerbated by the Ninth Circuit's finding in this case that no physician speech to patients is protected. Pet. i, Questions 1 and 2, summarized.

Conveying information, general advice and recommendations—the subject of this Petition—is obviously broader than mental health related treatment speech. But that is a positive. California's enforcement program applies to all physician-supplied information, advice, risk/benefit analyses, treatment options, and medical alternatives for COVID-19. Moreover, the case will be the guiding light to what physicians can tell patients during all future public health crises.

Respondents also attempt to distinguish *Chiles* because it involved a specific statute banning therapeutic speech, whereas *Kory* involves a general professional conduct statute. Opp. 17. However, in both cases the state is punishing protected speech based on its content and viewpoint. Thus, the basic constitutional question is the same, involving the state's attempt to reclassify protected speech as professional conduct, and whether that is permissible under *NIFLA*. The only difference is the mechanism of suppression, a targeted statute in *Chiles* versus an enforcement policy in *Kory*. And California had previously used a specific statute like in *Chiles. See* discussion of AB 2098, Pet. 5-8.

III. Petitioners Have Standing

A. Speaker Standing

Respondents argue that the physician Petitioners lack Article III standing because they face no credible threat of enforcement and have not shown an intent to violate the law. Opp. 7–10. That position is legally and factually incorrect.

Speakers need not await prosecution to challenge a law or policy that chills protected speech. In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), the Court held that a credible threat of enforcement may be established considering the following three factors: 1. They intend to engage in arguably protected speech that is arguably proscribed; 2. There is a past history of similar enforcement; and 3. The government refuses to disavow future enforcement. *Id.* at 161–65.

1. Petitioners' Intended Speech is both Arguably Protected and Arguably Proscribed

The record in this case demonstrates that, starting in February 2022, Respondents have adopted the Federation's national COVID misinformation press release/policy statement with the board's president announcing that "it is the duty of the board to protect the public from misinformation and disinformation by physicians. . . ." ER 108 ¶ 65.

The Respondents consider COVID misinformation to be anything which does not further "the CDC and FDA's mantra that [the COVID] vaccines are completely safe and cardiac side effects are exceedingly rare" (Complaint, ER 102 ¶ 33), take every COVID shot and booster until the authorities say not to, and do not take Ivermectin or any other off-label drugs unless the public health authorities say so. *Id.* ER 115 ¶ 93.[5]

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5. It was widely reported that Petitioner Kory lost his internal medicine board certification for COVID misinformation relating to his public advocacy of Ivermectin. *See ABIM Revokes Certification for Two Physicians Accused of COVID Misinformation*, MEDSCAPE (Aug. 15, 2024), https://www.medscape.com/viewarticle/abim-revokes-certification-two-physicians-accused-covid-2024a1000f0w. Although not the actions of the Respondents, it shows there is no doubt about what the institutions consider to be COVID misinformation. It also undercuts Respondents' refusal to answer any judge in this case about whether any of the dozens of statements and study information contained in the complaint and declarations would be considered COVID misinformation. Here, Respondents continue to deflect by saying it is complicated, dependent on the facts and circumstances as well as standard of care issues. Opp. 8.

Petitioner Plaintiffs, including PIC's physicians, have asserted their arguably protected speech rights to recommend off-label drugs for COVID (*id*. at ER 103 ¶ 40 (PIC); *id.* at 99 ¶¶ 19-20 (Kory)), provide information about the increased risks of vaccine-induced myocarditis (*id*. at ER 100 ¶ 24-25 (Hoang)), assert that the side effects are not rare (*id*. at 101-02 ¶ 31 (Tyson)), and that these side effects were not commonly known. Verma declaration, quoted at Pet. 13.

Petitioners have stated their intent to continue offering medical advice that departs from government-endorsed views on vaccine risk, natural immunity, and early treatment. Pet. 9–12. Whether or not that speech is ultimately sanctioned or sanctionable, it is clearly arguably protected and arguably proscribed, as being at odds with state orthodoxy. That is all the *Driehaus* first factor requires.

2. The State Has Enforced its Policy; its Surrogate Reaffirmed it, and There is no Evidence of Disavowal

The record demonstrates that the medical board has disciplined one physician for an off-label COVID recommendation (Opp. 9) and has investigated Petitioner Tyson for COVID misinformation to the public. Complaint, ER 102 ¶ 35. This confirms that the threat is real, not hypothetical. This case is stronger than *Driehaus*, where

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It is unequally unpersuasive for the Respondents to make the general/historical claim that California "allows reasonable disagreements among physicians" (*id.*), given Respondents' and the Legislature's multi-year campaign threatening physicians for challenging the safety and efficacy of the COVID shots and discussing off-label treatments.

the law had never been enforced. That the policy was reaffirmed by a board surrogate despite the repeal of Section 2270 gives further credence that the enforcement policy is still in effect. Pet. 7.

Finally, Respondents have not disavowed enforcing their misinformation policy. Accordingly, Petitioner physicians have demonstrated the third *Driehaus* factor, and thus have made their Article III standing case.

B. This Lawsuit Asserts a Compelling Challenge to a "Practice and Policy" and is Neither a Facial nor an As-Applied Challenge

As set out in the complaint: "95. The Medical Board's practice and policy of investigating and sanctioning physicians for their protected speech is a violation of the First Amendment rights of physicians to convey information to patients, and the patients' First Amendment rights to receive such information. Complaint, ER 116.[6] Further, there is no relief requesting that Section 2234(c) be declared facially or as-applied to these Plaintiffs unconstitutional. ER 117. Accordingly, the complaint does not support Respondents' contention that Petitioners are "recasting" their claim as neither facial nor as an as-applied challenge. Opp. 11.

As this Court recognized in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), informal enforcement actions that deter speakers can injure both speakers and

6. The following allegation alleges "96. Further the anticipated defense that Defendants have the statutory authority to enforce the standard of care as justification would render the statute unconstitutionally overbroad." *Id.* But there is no specific or implied reference or limitation to the Plaintiff/Petitioners.

listeners by suppressing the flow of protected expression. *See also*, *NRA v. Vullo*, 602 U.S. 175 (2024). In *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757–759 (1988), the Court struck down a facially neutral licensing ordinance for newspaper racks because it gave officials discretion to suppress disfavored speech, thereby creating an unconstitutional chilling effect, even absent direct censorship. Respondents' COVID misinformation program grants Respondents the same unbounded discretion. (And Respondents have yet to answer any court's question as to whether any of the numerous speech examples cited in this case violate any articulatable, constitutional standard of care.) In short, this Court has long recognized that challenges can be made to formal and even informal enforcement practices.

Finally, we agree with Respondents that it is the substance of the claim and the relief sought—not its label—that governs. Opp. 11. Here, the nature of the case, its description, and the relief requested all center on what Respondents are saying and doing, not on the most recently asserted statutory justification for their manifestly unconstitutional policy and practice.

C. Organization Petitioners have Listener Standing

Petitioners demonstrated that they adequately alleged listener standing for PIC and CHD based on *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). (Pet. 29-30). Respondents respond by distinguishing the case on the grounds that it involved a specific prohibition of speech, whereas this case involves a challenge to Section 2234(c), an admittedly neutral statute.

Opp. 10-11. But per the previous point, Respondents have mischaracterized the claim and thus argue irrelevancies. It does not matter that Section 2234(c) is neutral, because Respondents' policy and practice is incontrovertibly viewpoint-discriminatory. Accordingly, for the reasons set forth in the Petition (29-30), PIC and CHD have listener standing.

IV. This Case is Certworthy under Supreme Court Rule 10(a)

Respondents argue that neither the standing nor their facial vs as-applied challenge reframing is certworthy under Rule 10(a) because there is no circuit conflict on those issues. However, as Justice Scalia observed in *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), "when we do grant certiorari on a question for which there is a 'compelling reason' for our review, we often also grant certiorari on attendant questions that are not independently 'certworthy,' but that are sufficiently connected to the ultimate disposition of the case. . . ." *Id.* at 1777 (Scalia, J., concurring in part).

The Petition presents a compelling First Amendment question involving a split between the Ninth (and now the Tenth) Circuits, and the Eleventh Circuit, exacerbated by the lower courts' decisions. These two threshold issues are necessary to reach and resolve that conflict. *See also Camreta v. Greene*, 131 S. Ct. 2020 (2011), granting review to resolve an important constitutional question despite the absence of a traditional circuit split or even a live controversy. There, the petitioner technically prevailed below, and the dispute could have been seen as moot. Nonetheless, the Court exercised jurisdiction, recognizing the need to clarify the governing constitutional standards.

CONCLUSION

The country is now engaged in a national conversation about the government's response to the pandemic, and specifically, whether the government illegitimately suppressed information and censored people who questioned the government's COVID edicts during the pandemic. It is now federal policy to encourage physicians to speak out against authority, and use their best judgment with information they give to patients, even if it is not consistent with medical orthodoxy.

On the other side of the debate are states like California (and Washington) which are acting as if they have the constitutional authority to censure non-conforming viewpoint speech to patients (and the public). Their actions are encouraged by national organizations like the Federation of State Medical Boards and the AMA.

Petitioners respectfully request that the Court grant this petition to resolve the conflict over the constitutional protection accorded to physician speech, and provide guidance to the country, before the next public health crisis.

Respectfully submitted,

Richard Jaffe, Esq.
Counsel of Record
428 J Street, 4th Floor
Sacramento, CA 95814
(916) 492-6038
rickjaffeesquire@gmail.com

Attorney for Petitioners