

1 RICHARD JAFFE, ESQ.
2 State Bar No. 289362
3 428 J Street, 4th Floor
4 Sacramento, California 95814
5 Tel: 916-492-6038
6 Fax: 713-626-9420
7 Email: rickjaffeesquire@gmail.com

8 Attorney for Plaintiff Douglas Mackenzie, MD

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 DOUGLAS MACKENZIE, MD.

12 Plaintiff,

13 v.

14 WILLIAM J. PRASIFKA,
15 In his official capacity as EXECUTIVE
16 DIRECTOR, MEDICAL BOARD OF
17 CALIFORNIA, and JOHN AND JANE DOES
18 1-10 being unknown state and other
19 individuals who violated Plaintiff's clearly
20 established First Amendment rights

21 Defendants.

Case No.: _____

**VERIFIED COMPLAINT FOR
DECLARATORY, INJUNCTIVE RELIEF
AND DAMAGES**

22
23 COMES NOW Plaintiff Douglas Mackenzie by his attorney and hereby alleges as
24 follows:

25 **JURISDICTION AND VENUE**

26 1. This is a 42 U.S.C. Section 1983 civil rights action for which this Court has
27 jurisdiction under 28 U.S.C. Section 1331. This Court has authority to grant the requested
28 injunction relief under 28 U.S.C. Section 1343; the requested declaratory relief under 28

1 U.S.C. Sections 2201 and 2202; money damages under Section 42. U.S.C. Section 1983, and
2 costs and attorneys' fees under 42 USC Section 1988 (b).

3 2. Venue is proper in the federal Eastern District of California pursuant to 28
4 U.S.C. Section 1391 (b). The named Defendant, and his employer, the Medical Board of
5 California have their principal place of business in this district and a substantial part of the
6 actions giving rise to this case, to wit, the Board's investigation of the Plaintiff, arose in this
7 district.

8 INTRODUCTION

9 3. This is a First Amendment challenge to the Medical Board of California's
10 attempt to intimidate by investigation, censor and sanction physicians who publicly disagree
11 with the government's ever-evolving, erratic, and contradictory public health Covid edicts.

12 4. Seventy-five years of judicial precedent has established that licensing agencies
13 cannot sanction, prosecute *or even investigate* physicians for speaking out in public about a
14 matter of public concern, regardless of the content, the expressed view point, and even if those
15 views are contrary to the opinions of the "medical establishment."¹

16 5. The courts have been extremely harsh when the government tries to suppress
17 speech because of its content and viewpoint likening such efforts as an attempt to create an
18 Orwellian "Ministry of Truth"² and analogizing government efforts to interfere with medical
19 discourse to the world's most repressive regimes.³

21
22 ¹ *Pickup v Brown* 728 F.3d 1042, 1053-1054 (9th Cir. 2013), quoting two sources. (*See*
23 discussion at pages 11-12 *infra*); and *Conant v. Walters*, 309. F.2d 629 (9th Cir. 2002). (*See*
discussion at page 13 *infra*.)

24 ² *See* G. Orwell *Nineteen Eighty-Four*, (1949) (Centennial ed. 2003). "Ministry of Truth"
25 phrase as used by Justice Kennedy in his majority opinion striking down a statute which
26 criminalized false fully protected free speech, *U.S. v. Alvarez*, 567 U.S. 709, 723, 132 S. Ct.
2537, 2547, 183 L. Ed. 2d 574. (2012).

27 ³ *NIFLA v. Becerra*, 138 S. Ct 2361, 2374, 201 L. Ed. 2d 835, (2018) *quoting Wollschlaeger*
28 *v. Governor of Florida*, 848 F.3d. 1293, 1328 (C.A. 11 2017), (Prior, J. concurring opinion,
quote set out and discussed on page 12 *infra*.)

1 6. Plaintiff Douglas Mackenzie, MD, who is a California licensed surgeon, spoke
2 for two minutes at a Zoom school board meeting and questioned some of the public health
3 edicts in response to the pandemic. Someone complained, and he is now under investigation by
4 the Medical Board of California (“MBC” or the “Board”) for spreading Covid misinformation,
5 as are at least two other physicians for questioning public health edicts (and in one case, for
6 also attending an anti-mandate rally).

7 7. The Board has tacitly deputized California residents as potential informants to
8 report physicians who criticize the government’s public health Covid edicts, so that the Board
9 can censor, sanction and reeducate them via its disciplinary process.

10 8. In this case, the Board’s abject affront to the First Amendment goes far beyond
11 the Plaintiff and the two other physicians, and even beyond the MBC itself. The Board’s
12 investigation is a response to a “call to action” by a private membership organization of state
13 medical boards (the Federation of State Medical Boards, the “Federation”) to cajole its member
14 agencies to investigate, censor and sanction physicians who challenge public health edicts.

15 9. At least two state medical boards (New Mexico and Tennessee) have enacted
16 board policies effectuating the Federation’s call-to-action to discipline physicians for spreading
17 “Covid misinformation.” However, the Tennessee board’s policy was quickly overturned by
18 the state legislature.

19 10. Many other state legislatures have proposed similar legislation barring their state
20 medical boards from charging physicians with professional misconduct based on their speaking
21 out against Covid edicts.

22 11. Unfortunately, the California legislature has gone in the direction of censoring
23 and sanctioning physicians who exercise their Free Speech rights. In February 2022, AB 2098
24 was introduced in the California Assembly. The original version of the bill made it a
25 disciplinable offense for a physician to publicly challenge public health Covid edits. (*See* pages
26 8 to 9 *infra*.)

27 12. However, the California Assembly realized that to do so would violate the First
28 Amendment. As a result, an amended bill has been narrowed to apply only to communications

1 between physicians and their patients.

2 13. And yet, despite the Legislature’s elimination of the public speech part of the
3 bill, (which is at least a tacit admission by the Legislature that the Board cannot investigate or
4 sanction physicians for expressing their views in public), the Board continues to investigate
5 Plaintiff and others.

6 14. The Board even appears to have recognized the inherent unconstitutional
7 vagueness in its attempt to investigate and sanction physicians for publicly disagreeing with
8 the vague, ever changing, sometimes contradictory Covid consensus, and has even expressed
9 concern that it could get bogged down in litigation after it sanctions physicians for Covid
10 misinformation.⁴

11 15. Whatever else can be said, it is surely true that this an important First
12 Amendment case with ramifications beyond the Plaintiff and even one state medical board. It
13 is important that this federal court clearly and firmly tell the Board, the Federation and signal
14 to medical boards around the country that the First Amendment means that licensing boards
15 cannot not stop, punish or even investigate its licensees for speaking out in public against
16 mainstream opinions about matter of great public consequence just because the agency
17 disagrees with the view point expressed.

18
19 **PARTIES**

20 16. Plaintiff DOUGLAS MACKENZIE is a plastic surgeon licensed to practice
21 medicine in the state of California. At all times relevant this action, he was a resident of Santa
22 Barbara County.

23
24

⁴ California Legislation Information [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2098)
25 [xhtml?bill_id=202120220AB2098](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2098) at 6/24/22 Bill analysis page 10, comment 5: “MBC also
26 states that ‘The definition of “misinformation” is unclear and may lead to legal challenges
27 following the imposition of discipline under the proposed law.” Of course, there is currently no
28 Board published definition of covid misinformation which makes its investigation all the more
constitutionally problematic under the Due Process violation alleged in the Second Claim for
Relief, starting at page 14 *infra*.

1 17. Defendant WILLIAM J. PRASIFKA is the executive director of the Medical
2 Board of California, and he is a defendant in this case in his official capacity for the requested
3 declaratory and injunction relief. Upon information and belief, the Defendant is the final
4 decision-maker on the Board's decision to investigate physicians for violations of Board
5 enforced laws and rules, or at least he supervises the subordinate Board employee who make
6 such decisions, and as such, he can ensure compliance with any injunction this Court imposes.

7 18. JOHN AND JANE DOES 1-10 are the individual employees of the MBC who
8 decided or help effectuate the Board's decision to process the complaint against the Plaintiff
9 and required that he submit a written response to the complaint, rather than advising the
10 complainant that the Board did not have the constitutional authority to investigate a physician
11 for speaking out in public about a matter of public interest.⁵

12 **FACTUAL BACKGROUND**

13 **A. PLAINTIFF'S SPEECH AND THE BOARD'S COMMUNICATION**

14 19. Plaintiff Douglas Mackenzie has been a California licensed physician for over 20
15 years. He has no board disciplinary history and no malpractice judgments against him.
16

17 20. Generally speaking, Plaintiff does not agree with many of the public health
18 policies and edicts enacted during the pandemic. However, his beliefs do not impact his
19 professional responsibilities as a plastic surgeon, as he follows all applicable public health
20 directives regarding masking and other matters in his medical practice.

21 21. On or about August 10, 2021, Dr. Mackenzie participated in a Zoom meeting of
22 the Santa Barbara Unified School District. During the public comment portion of the meeting,
23 he expressed his views on some Covid related public health issues. Here is what he said:

24 "My name is Douglas Mackenzie. I am a surgeon in Santa Barbara. It's time to
25 realize like some countries are, that SARS – CoV2 is endemic. We are not going
26 to get to Zero Covid ever. We can't make it disappear with a vaccine, especially
27 one that may improve symptoms, but as we are seeing won't stop reinfection or

28 ⁵ We expect that through discovery, evidence may be developed sufficient to name the Federation and some of its employees in the damage claim.

1 transmission. And despite the hype from the politicians and media, public health
2 officials and physicians should have known this from the conclusions of the
3 original studies. As far as variants, no, it's not the unvaccinated's fault, it's the
4 nature of a respiratory virus and the limitations of these vaccines. They actually
5 risk creating more virulent escape mutations. Think about the overprescribing of
6 antibiotics and the emergence of resistant bacteria. Same concept.

7 More worrisome than the virus, (which has barely budged all-cause mortality), is
8 the lack of consideration of the profound economic and psychological costs of
9 unscientific, often fanatical policies. As we just heard, unnecessary overtesting
10 now being proposed for children?! Vaccination in younger and younger people,
11 where the harms from the vaccine far outweigh the harms of the disease?! The
12 obsession for masking?! I see kids outside, playing sports, wearing masks, it's
13 absurd! There is no science or logic to support that! I worry about society's
14 descent into a mass psychosis trying to reach an impossible goal of eradicating
15 Covid. Brace yourselves for ever more cycles of fear and confusion as the next
16 variant arises, and the vilification of people unwilling to subject themselves to
17 coerced vaccines gets more hateful. This can't end well unless more people wake
18 up. Fortunately, as we see from the massive protests in the UK and France, the
19 burning of vaccine passports in Italy and the vindication of ivermectin as a safe
20 and effective treatment, people are waking up.”⁶

21
22
23 22. By letter dated December 15, 2021, the Board contacted Plaintiff and indicated
24 that a complaint had been filed against him based on the comments he made at the Zoom
25 meeting, and requested a written response. The letter noted that “if no response is received and
26 it is confirmed that a violation of the law has occurred, future action could be taken by this
27 agency.”
28

⁶ The scientific assertions expressed in his comments are supported by medical literature, public health officials or experts in different countries. Some of these statements are reporting of events in other countries. Some statements are concerns shared by many others in the medical community or feared predictions based on what Plaintiff and many other medical professionals decry as the unrealistic expectation and target of eradicating Covid. If necessary, Plaintiff is prepared to show the source for each statement. However, the case law is clear that even if every statement he made were false (and they are not), his comments to the school board would still be fully protected by the First Amendment. *See* page 2, footnote 2 *supra*, and the First Claim for Relief starting on page 10.

1 23. Plaintiff hired and paid a medical board attorney who responded on his behalf on
2 January 3, 2022 which letter asserted Plaintiff's First Amendment rights to free speech and
3 challenged the Board's investigation on First Amendment grounds. The total amount of legal
4 fees which Plaintiff will incur to defend against the Board's investigation is unknown at this
5 time.

6 24. As of the date of the filing of this action, the Board has not dismissed the
7 complaint even though it is abundantly clear from precedent in this circuit as well as Supreme
8 Court precedent that an administrative agency cannot sanction a licensee for publicly
9 expressing his or her views on a matter of public importance.

10 25. The Board's investigation has had a chilling effect on Plaintiff, and he has
11 concerns about expressing his views in a public forum in light of the Board's continuing
12 investigation of him.

13 26. Upon information and belief, the Board has taken similar investigatory actions
14 against at least two other physicians in the state. The complaint to which one of the physicians
15 was required to answer included the fact that the physician attended an anti-mandate rally.

16 27. Plaintiff is currently unaware of whether there are any other physicians who face
17 similar board investigations.

18 **B. THE FEDERATION OF STATE MEDICAL BOARD'S "CALL TO**
19 **ACTION"**

20 28. According to its web site:

21 "The Federation of State Medical Boards represents the state medical and
22 osteopathic regulatory boards – commonly referred to as state medical boards –
23 within the United States, its territories and the District of Columbia. It supports its
24 member boards as they fulfill their mandate of protecting the public's health,
25 safety and welfare through the proper licensing, disciplining, and regulation of
26 physicians and, in most jurisdictions, other health care professionals."

26 *About FSMB*, Federation of State Medical Boards, [https://www.fsmb.org/about-](https://www.fsmb.org/about-fsmb/)
27 [fsmb/](https://www.fsmb.org/about-fsmb/).

28 29. Its stated mission is to serve "as a national voice for state medical boards,
supporting them through education, assessment, data, research and advocacy while providing

1 services and initiatives that promote patient safety, quality health care and regulatory best
2 practices.” *Id.*

3 30. By press release dated July 29, 2021, the FSMB issued the following statement
4 to the public and to its board members:

5 “physicians who generate and spread Covid – 19 vaccine misinformation or
6 disinformation are risking disciplinary action by state medical boards, including
7 the suspension or revocation of their medical license. Due to the specialized
8 knowledge and training, licensed physicians possess a high degree of public trust
9 and therefore have a powerful platform in society, whether they recognize it or
10 not. They also have an ethical and professional responsibility to practice medicine
11 in the best interests of their patients and must share information that is factually,
12 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.”

13 *FSMB: Spreading Covid-19 Vaccine Misinformation May Put Medical License At Risk*,
14 Federation of State Medical Boards, News Releases (Jul. 29, 2021),
15 [https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-
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/)

16 31. The FSMB’ s press release is soliciting its member state boards to engage in
17 actions which violate physicians’ First Amendment rights.

18 **C. THE CALIFORNIA LEGISLATURE ANSWERS THE FSMB’ S CALL**
19 **TO ACTION BUT THEN RECONSIDERS**

20 32. In addition to the Board’s above-described investigations, in February 2022, the
21 California Assembly introduced AB 2098, a Covid misinformation bill which in its original
22 form would have made a physician’s public expression of his opinions which contradict the
23 “contemporary scientific consensus” about Covid, a board discipline of all offense. AB 2098
24 made specific reference to the FSMB’ s July 2021 press release as a justification for the bill.

25 *California Legislative Information*,

26 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2098#99IN

27 T, Section 1 (f).
28

1 33. However, because of expressed concerns that it would be unconstitutional for the
2 Board to discipline physicians for their public speech, the bill was amended to limit its
3 application to “treatment or advice” to a patient, which amendment solved the primary
4 constitutional defect with the original bill.⁷ *Id.* at
5 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2098#97A
6 [MD](#) and the legislative analysis at *Id.*
7 <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml>. 4/15/22 Bill analysis at page
8 12, 3rd paragraph.

9 34. The critical point here is that unlike the Board, the California Legislature
10 understands that physicians cannot be sanctioned based on their public disagreement with the
11 “contemporary scientific consensus” about Covid policy and science.

12 35. The Legislative Analysis contains another comment attributed to the Medical
13 Board admitting that the proposed statutory definition is perhaps irreparably vague and will
14 subject to Board to legal challenges after it disciplines doctors for covid misinformation.⁸

15 36. That the Board now knows that the Legislature does not think it can sanction
16 physicians for speaking out, and has concerns that it is investigating Plaintiff (and other
17 physicians) based on an unconstitutionally vague standard in violation of their due process
18 rights, evidences the Board’s bad faith, which would bar application of federal comity
19 doctrines like *Younger* abstention.

22 ⁷ Plaintiff maintains that the amended bill also violates the First Amendment by improperly
23 interfering with the right of physicians to speak candidly to their patients, and the patients’
24 right to receive such candor from their physicians. When AB 2098 is finalized, a new claim
25 may be added to this case challenging the bill.

26 ⁸ “MBC also states that ‘The definition of “misinformation” is unclear and may lead to legal
27 challenges following the imposition of discipline under this proposed law.’ *California*
28 *Legislative Information*, <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml>,
6/24/22 Bill analysis at page 10 comment 5, 2nd paragraph. Currently, the Board does not
appear to have a published definition of “Covid misinformation” for which it can investigate or
sanction physicians.

1 37. Similarly, the fact that the Board's actions involve more than the Plaintiff and is
2 part of a nationwide call-to-action to medical boards across the country constitutes exceptional
3 circumstances which is a separate reason to reject federal comity/abstention.

4 38. And of course, since (i) this case involves an important First Amendment issue
5 which should be resolved by the federal courts, and (ii) there is evidence of bad faith in the
6 Board's investigation in violation of Plaintiff's clearly established First Amendment rights, no
7 comity need be accorded to the Board or the state judicial system under *Younger* abstention or
8 failure to exhaust considerations.

9
10 **CLAIMS FOR RELIEF**

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 DEFENDANT WILLIAM J.**
15 **PRASIFKA, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR,**
16 **MEDICAL BOARD OF CALIFORNIA**

17 39. Plaintiff repeats and realleges the allegations set forth above.

18 40. The First Amendment provides in relevant part: "Congress shall make no law...
19 abridging the freedom of speech." The First Amendment applies to actions by state agencies
20 like the Board via the Fourteenth Amendment.

21 41. The First Amendment's purpose is "to preserve an uninhibited marketplace of
22 ideas in which the truth will ultimately prevail." (*FCC v. League of Women's Voters of Cal.*,
23 468 U.S. 364, 377, 104 S. Ct. 3106, 82 Led. 2d. 278 (1982).

24 42. It is a "guiding First Amendment principal that the government has no power to
25 restrict expression because of its message, its ideas, its subject matter or its content." *McCullen*
26 *v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518, 2539, 189 L. Ed. 2d 502 (2014) quoting *Police*
27 *Dept. of Chicago v. Mosely*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d. 212 (1972).
28

1 43. Upon information and belief, no federal or state court in this country has ever
2 approved the sanctioning of a physician or other health care professional for speaking out in
3 public about a public health matter.

4 44. In fact, there is an unbroken like of cases going back seventy-five years which
5 establish that the Board’s investigation of Plaintiff is a clear First Amendment violation.

6 45. In *Pickup v Brown* 728 F.3d 1042, 1053-1054 (9th Cir. 2013) the Ninth Circuit
7 quoted a law review article for the proposition that “When a physician speaks to the public, his
8 opinions cannot be censored or suppressed, even if they are at odds preponderate opinions
9 within the medical establishment.” The panel also quoted with approval a Colorado case with
10 similar language that “the First Amendment does not permit a court to hold a dentist liable for
11 statements published in a book or made during a news program, even when the statements are
12 contrary to the opinion of the medical establishment. *Id. at 1054, citing Bailey. v. Huggins*
13 *Diagnostic & Rehab. Ctr. Inc.*, 952 P.2d 768, 773 (Col. Ct App. 1997).

14 46. The *Pickup* panel used these two authorities to drive home that the very end of
15 the “continuum” of the most protected professional speech is where professionals engage in
16 “public dialogue.”

17 47. The *Pickup* opinion cites these two authorities to expand on its reference to
18 Justice Byron White concurring opinion in *Lowe v SEC* 472 U.S. 181, 232, 105 S. Ct. 2557, 86
19 Led. 2d 130 (1985), that when a professional

20 “does not purport to be exercising judgment on behalf of any particular individual
21 with whose circumstances he is directly acquainted, government regulation ceases
22 to function as legitimate regulation of professional practice with only incidental
23 impact on speech; it becomes regulation of speaking or publishing as such, subject
24 to the First Amendment’s command that “Congress shall make no laws...
25 Abridging the freedom of speech or the press.”

25 *Id.* at 1053.

26 48. Justice White’s words are a restatement of the concurring opinion by Justice
27 Jackson in *Thomas v Collins*, 323 U.S. 516, 544, 65 S. Ct. 315, 329, 89 L. Ed. 2d. 430 (1945).

28

1 While Justice Jackson recognized the right of the state to regulate the practice of a profession
2 (“pursuit of a calling”), he eloquently stated that

3 “... it is not the right, of the state to protect the public against false doctrine. The
4 very purpose of the First Amendment is to foreclose public authority from
5 assuming a guardianship of the public mind through regulating the press, speech,
6 and religion. In this field every person must be his own watchman for truth,
7 because the forefathers did not trust any government to separate the true from the
8 false for us. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63
9 S. Ct. 1178, 87 L. Ed. 1628. Nor would I. Very many are the interests which the
state may protect against the practice of an occupation, very few are those it may
assume to protect against the practice of propagandizing by speech or press. These
are thereby left great range of freedom.

10 This liberty was not protected because the forefathers expected its use would always
11 be agreeable to those in authority or that its exercise always would be wise,
12 temperate, or useful to society. As I read their intentions, this liberty was protected
13 because they knew of no other.”

14 49. Fast forward seventy plus years, the legal phraseology is different, the
15 substantive points the same, but the expression is much harsher. In *NIFLA v. Becerra*, 138 S.
16 Ct 2361, 2374, 201 L. Ed. 2d 835, (2018), the majority opinion quoted a concurring opinion
17 by an Eleventh Circuit judge who noted that "Throughout history, governments have
18 `manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress
19 minorities." The *NIFLA* opinion then continued quoting the concurring judge's examples of
20 Chinese, Soviet and Nazi doctors who "systematically violated the separation between state
21 ideology and medical discourse. German physicians were taught that they owed a higher duty
22 to the 'health of the Volk' than to the health of the individual patient." *Id. quoting*
23 *Wollschlaeger v. Governor of Florida*, 848 F.3d. 1293, 1328 (C.A. 11 2017). (Prior, J.
24 concurring opinion)

25 50. *NIFLA* dealt with government compelled speech requiring anti-abortion
26 pregnancy centers to provide patients with information about abortions. Because it dealt with
27 patients, it was far closer to professional conduct which the government can regulate.
28

1 51. If the Supreme Court thought it appropriate to liken compelling physicians to
2 deliver a government created message to *patients*, imagine (*a fortiori*) what the Supreme
3 Court majority would say about censuring and sanctioning a physician who expresses his
4 personal opinions in public.

5 52. It is abundantly clear that the Board cannot sanction Plaintiff for speaking out
6 publicly against the government's Covid edicts. But it is also clear that the Board cannot even
7 investigate him for expressing protected professional content and viewpoint speech, even if the
8 view point is controversial. So said a California district court and the Ninth Circuit in *Conant*
9 *v. Walters*, 309 F.2d 629 (9th Cir. 2002).

10 53. In that case, a preliminary and permanent injunction was issued against the
11 DEA for investigating physicians for recommending medical marijuana to patients.
12 Marijuana was (and still is federally) a schedule I illegal drug which conventional medicine
13 did not then recognize as having any therapeutic benefit. Yet, the people of California
14 decided otherwise and allowed it to be recommended (but not prescribed) by California
15 physicians. The DEA's attempt to investigate and prosecute physicians for their protected
16 speech was utterly rejected by the district and appellate court.

17 54. If the DEA was enjoined from investigating physicians from *speaking to patients*
18 about a federally illegal drug, *a fortiori*, the Board must be stopped from investigating Plaintiff
19 for speaking favorably in public about an FDA approved drug (Ivermectin) and challenging
20 other aspects of the public response to the pandemic, especially since he was relating opinions
21 held by many others and supported by the medical literature.

22 55. Although not necessary for the disposition of this case, an additional reason why
23 the Board must be stopped from investigating physicians for speaking out against Covid edicts
24 is the utter futility of its efforts. As if sanctioning a few (or many) California physicians would
25 have a significant impact on the widespread mistrust of the government's Covid edicts.

26 56. There are hundreds if not thousands of physicians around the county who speak
27 out about these edicts, most of whom are beyond the control of the Board. *It is a big internet.*
28

1 62. There is nothing in the plain meaning of this subsection which states or implies
2 that a physician speaking in public against Covid public health edicts could be included in this
3 subsection, or how such public discourse would be “substantially related to the qualifications,
4 functions, or duties of a physician or surgeon.”

5 63. Accordingly, the Board’s use of this subsection to ground its Covid
6 misinformation investigations is inconsistent with the plain meaning of the statute.

7 64. More importantly, the subsection, as interpreted by the Board, violates the
8 vagueness prohibition of the Due Process clause according to which:

9 "an enactment is void for vagueness if its prohibitions are not clearly defined."
10 *D.C. v. City of St. Louis* , 795 F.2d 652, 653 (8th Cir. 1986) (*quoting Grayned v.*
11 *City of Rockford* , 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972)).
12 Due process requires that laws provide fair notice by giving a "person of ordinary
13 intelligence a reasonable opportunity to know what is prohibited, so he may act
14 accordingly." *Id.* Due process also demands explicit standards to prevent arbitrary
15 or discriminatory actions by those charged with enforcement. *Id.* ”

16 *Hopkins v. Jegley*, 510 F.Supp.3d 1024, 1080 (E.D. Ark. 2021).

17 65. The Board’s purported use of this statute is unconstitutionally vague, at best,
18 because it is devoid of any reference or implication that prohibits physicians from speaking in
19 public, nor is there any indication who such public speech could be “substantially related to the
20 qualifications, functions, or duties of a physician and surgeon.”

21 66. Furthermore, the apparent use of a “Covid misinformation” standard is also
22 unconstitutionally vague because it is subject to being interpreted in an arbitrary and capricious
23 manner.

24 67. As the virus has evolved, and as more time has passed, the public health edicts
25 put out by the CDC has changed, sometimes contradicting earlier edicts, like the CDC’s
26 multiple positions on whether the vaccine could stop transmission, or the rarity of so-called
27 “breakthrough infections” of the vaccinated and boosted.
28

1 68. It was “Covid misinformation” to question the safety of the J&J vaccine due to
2 concerns about life-threatening heart side effects, until the FDA came out and limited the use
3 of the J&J vaccine because of the same side effects.

4 69. There is nothing wrong with government agencies or established medical science
5 changing their positions as new information is assimilated. In fact, it is a good thing. The
6 problem, especially acute, in a fast-changing public health situation like Covid, is the
7 governmental arrogance that physicians who challenge the accepted science are dishonest and
8 need to be censored, sanctioned and reeducated for expressing their opinions in public. That is
9 something the courts should not tolerate.

10 70. Based on the continuing changing public health edicts and the evolving science,
11 the Covid misinformation standard used by the Board in its investigation of Plaintiff and other
12 physicians is unconstitutionally vague and violates Plaintiff’s Due Process rights.

13
14 **THIRD CLAIM FOR RELIEF**

15 **42 U.S.C. SECTION 1983 DAMAGE CLAIM AGAINST THE INDIVIDUAL**
16 **JOHN AND JANE DOE DEFENDANTS S FOR CIVIL RIGHTS**
17 **VIOLATIONS UNDER COLOR OF STATE LAW**

18 71. Plaintiff repeats and realleges the allegations set forth above.

19 72. Plaintiff has retained board counsel to defend him in the Board’s investigation
20 and has paid and will have to continue to incur legal fees if this investigation continues.

21 73. The individual MBC employees who decided to investigate Plaintiff for Covid
22 misinformation rather than summarily dismissing the complaint acted under color of state law
23 in violation of Plaintiff’s clearly established First Amendment right to speak out in public
24 about a matter of public interest.

25 74. Plaintiff’s clearly established First Amendment rights to be free from Board
26 investigation arising from his public speech is based on seventy-five years of precedent
27 including:

- 28 **a.** *Conant v. Walters*, 309. F.2d 629 (9th Cir. 2002), wherein this Circuit
 held that the DEA’s investigation of a physician for recommending

1 medical marijuana to a patient violated the physician's First
2 Amendment rights, notwithstanding the fact that the physician
3 recommended an illegal dangerous schedule 1 drug for which the
4 consensus medical community believed there was no therapeutic value.
5 Based on the DEA's First Amendment violations, a California district
6 judge entered a preliminary and final injunction against the DEA, which
7 injunctions were upheld on appeal. If it is constitutionally illegal for a
8 licensing agency to investigate a physician for professional speech to a
9 patient recommending a federally illegal drug, it is constitutionally
10 double *a fortiori* illegal for the Board to investigate Plaintiff for his
11 public speech about the off-label use of an FDA approved drug. Any
12 reasonable Board employee would know or should have known that this
13 case means that investigating Plaintiff for his public speech violates
14 Plaintiff's First Amendment rights.

- 15 **b.** *Pickup v Brown* 728 F.3d 1042, 1053-1054 (9th Cir. 2013), wherein the
16 Ninth Circuit cited and quoted approvingly a scholarly article and a
17 Colorado Appellate decision stating that it is unconstitutional for a health
18 care licensing boards to sanction a health care practitioner for publicly
19 speaking out against the mainstream medical paradigm. These two cited
20 authorities were used to sharpen the First Amendment protection language
21 set out by Justice Byron White in 1985, in relating the position of Justice
22 Jackson in 1945 that the state does not have the right to prohibit even what
23 it considers "false doctrine" (as discussed in the First Claim for Relief.
24 Pages 10-12 *supra*.)
- 25 **c.** *NIFLA v. Becerra*, 138 S. Ct 2361, 2374, 201 L. Ed. 2d 835 (2018), the
26 Supreme Court's most recent applicable free speech case, in which the
27 court was highly critical of the government's efforts of control
28 professional speech, even when such speech was directed to patients of

1 a medical clinic. The Supreme Court’s quoting Eleventh Circuit Judge
2 Prior’s comparison to such government interference to the forced
3 propagandizing by the Soviet, Chinese and Nazi regimes should have
4 put John and Jane Doe Defendants on notice about how serious the
5 Supreme Court takes the government’s illegal attempts to control the
6 speech of health care professionals.

7 75. Further evidence that the First Amendment clearly established that it was illegal
8 for the Board to investigate or prosecute Plaintiff for Covid misinformation comes from the
9 fact that the April, 2022 amendment to AB 2098 removed the Board’s authority to sanction
10 physicians for publicly speaking out about Covid, which action was taken because of the patent
11 unconstitutionally of the original bill.

12 76. Further guilty knowledge that the individual John and Jane Doe Defendants
13 knew they were acting illegally comes from the legislative analysis statement that the Board
14 feared that the bill’s Covid misinformation standard was unconstitutionally vague, and that its
15 vagueness may cause the Board to be sued after physicians were found guilty of Covid
16 misinformation. However vague the Covid misinformation definition is in AB 2098, at least it
17 is in writing for all to see. The lack of any published standards for the Board’s current Covid
18 misinformation investigations makes its actions even more constitutionally defective under the
19 vagueness prohibition in the Due Process clause.

20
21 **PRAYER FOR RELIEF**

22 WHEREFORE the Plaintiff requests that judgment be entered in his favor and
23 against the Defendants as set forth in this Verified Complaint, and that the Court:

- 24 A. Issue a preliminary and permanent injunction enjoining the Board from
25 continuing its investigation of Plaintiff based on the public statement he made to
26 the Santa Barbara Unified School District, or any other public statement he might
27 have made or will make in the future regarding the pandemic or any other public
28 health matter.

- 1 B. Issue a preliminary injunction against the Board abating all its pending
2 investigations for “Covid misinformation” grounded on the public speech of
3 physicians, pending the final judgment in this action,
4 C. Issue a permanent injunction ordering the Board to dismiss the present
5 investigation of the Plaintiff and all other investigations against physicians for
6 Covid misinformation based on the physicians’ public speech about a public
7 health matter, and permanently barring the Board from commencing any future
8 investigation based on a physician’s public speech about a public health matter.
9 D. Actual damages in an amount to be determined at the trial of this action.
10 E. Costs and attorneys’ fees as permitted by law,
11 F. Such other and further relief as the Court deems just and proper.

12
13 Date: July 8, 2022

14 Respectfully submitted,

15
16 
17

18
19 Richard Jaffe, Esq.
20 SBN 289362
21 428 J Street, 4th floor
22 Sacramento, California, 95814
23 Telephone: 916-492-6038
24 Facsimile: 713-626-9420
25 Email: rickjaffeesquire@gmail.com

26
27 Attorney for Plaintiff Douglas Mackenzie, MD
28

1 **VERIFICATION**

2 I, DOUGLAS MACKENZIE, MD declarers the following under penalties of perjury:

3 1. I am the Plaintiff in this action and I am familiar with the facts set forth in this
4 Verified Complaint.

5 2. I believe the facts set forth in the Verified Complaint are true and correct to the
6 best of my knowledge, except for those stated fact upon information and belief and as to those
7 facts, I believe them to be true.

8 I declare under penalty of perjury of the laws of the United States that the foregoing is
9 true and correct.

10 Executed this 8th day of July 2022, in Santa Barbara, California.

11
12
13
14 

15 Douglas Mackenzie, MD
16
17
18
19
20
21
22
23
24
25
26
27
28