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

Attorney for Plaintiffs Douglas Mackenzie, MD
and Physicians for Informed Consent

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DOUGLAS MACKENZIE, MD. and
PHYSICIANS FOR INFORMED CONSENT

Plaintiffs,

v.

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

Defendants.

No.: 2:22-CV-01203-JAM-KJN

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO THE PRELIMINARY INJUNCTION MOTION

Date: September 27, 2022

Time: 1:30 PM

Judge: Judge John A. Mendez

Location: Courtroom 6

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Federal Cases

United States Constitution

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Other Authorities

Plaintiffs submit this Reply to Defendant's Response to the Preliminary Injunction Motion and would show the Court as follows:

PRELIMINARY STATEMENT

The question raised in this case and motion is whether the Medical Board of California (the "Board") can constitutionally sanction, investigate or send out a computer-generated letter to physicians asking them to answer a complaint concerning the physicians fully protected public speech. Based on seventy-five years of settled law, the answer is a hard "NO."

If the Court denies Plaintiffs' preliminary injunction motion, it will be the first time in American jurisprudence that a court has allowed the government to investigate fully protected public speech by a professional, and it would be inconsistent with what justices and judges have been saying for seven decades, namely that the government cannot restrict speech just because the speaker is a licensed professional. It would be granting the Board jurisdiction over conduct which the Legislature refused to do just a few months ago. *See* discussion at FAVC pages 13-15.[1] The basic facts are set out in the FAVC and summarized in Plaintiffs' memorandum in support of the preliminary injunction, and will be discussed in the sections as necessary.

I. Plaintiffs' Allegations Clearly State First Amendment and Due Process Violations

As a general argument, Defendant states that sections A-G and II and III show that there is neither a likelihood of success on the Merits or a Serious question going to the merits. For the following reasons, Plaintiffs respectfully disagree.

A. Plaintiffs' claims are live, continuing not Moot, and this Case is About More the Board's Investigation of him[2]

Apart from the extremely high threshold of establishing mootness in a First Amendment case (no possibility of the violation recurring), the defect in Defendant's mootness argument is that it is

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[1] For context, we remind the Court of *New York Times Company v. United States United States v. Washington Post Company,* 403 U.S. 713, (1971) where during the Viet Nam war, the federal government tried to stop the New York Times from publishing the "Pentagon Papers" on national security grounds, and failed.

[2] The arguments listed as A-G in Defendant's Opposition to the Preliminary Injunction (and which represents seven of the nine points) were asserted in Defendant's Motion to Dismiss, and responded to in Plaintiffs' response thereto. Plaintiffs request that these seven duplicated points in both parties' papers in this motion be considered at the hearing on the Motion to Dismiss, if it is held separately/prior to the injunction motion.

based on a mischaracterization of Plaintiffs' case and the relief requested. Both assert a challenge to the Board's prior, continuing, and future investigations of physicians predicated on their public speech, on pure First Amendment grounds[3] and on the grounds that the asserted statutory basis of these investigation violates the Due Process vagueness heightened specificity requirement.[4] Therefore, the allegations in the FAVC and the Request for Relief demonstrate that this case is not just about one physician. And as set forth in the Response to the Motion to Dismiss (at pages 4 and 5), mootness requires proof that the wrongful behavior cannot possibly recur.

The Defendant has not submitted any proof that the Board investigations for public speech will not recur. Board President Lawson's February 2022, statement adopting the Federation's call-to-action proves that there is an ongoing threat that the Board will continue with its unconstitutional investigations based on its reliance on a Due Process unconstitutionally vague statute. Ms. Lawson's statement dispositively disproves Defendant's mootness argument.

Finally, in her Declaration, Director of Compliance Jenna Jones did not deny Plaintiffs' contention that physicians are still at risk of Board investigation for their public speech. This creates an adverse inference admitting Plaintiffs' assertion. *See, e.g., United States v. Musk,* 719 F.3d 962 965 (8th Cir. 2013);*United States v. Pledger*, 409 F.2d 1335, 1336 (5th Cir. 1969); *cf.* CICI No 205. Failure to Explain or Deny Evidence.[5] (copy attached)

B. Plaintiffs have Standing

Standing, especially in First Amendment cases challenging statutes or government action, is a granular, highly fact specific inquiry, unlike some other defenses asserted in Defendant's papers (e.g.,

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[3] *See* FAVC page 3, para. 3 para. 9, page 5 para. 18, page 9, para. 35-37, page 11, para. 43-45, page 15 para. 60-61, page 18 para. 75, Prayer for Relief page 24, A. Seeking injunctive relief stopping all present investigations based on the public speech of physicians, B. A permanent injunction ordering the dismissal of all present and future investigations based on the public speech of physicians.

[4] See *Id.* at page 20 para. 84 to page 21. Para. 91 and the relief requested stated above.

[5] "If a party failed to explain or deny evidence against [him /her/nonbinary pronoun/it] when [he/she/nonbinary pronoun/it] could reasonably be expected to have done so based on what [he/she/nonbinary pronoun/it] knew, you may consider [his/her/nonbinary pronoun/its] failure to explain or deny in evaluating that evidence. It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party.

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absolute and sovereign which involve quite narrow factual inquiries). Thus, arguably, tossing out general statements from cases is less helpful to a court than in more narrow inquires.

And, in this case, the legal context of the Board's action is important. There is no precedent in this country for what the Board is doing or continuing to threaten to do, namely force physicians to justify the opinions they express in public. Furthermore, seventy-five years of precedent clearly and definitively prohibit medical boards from investigating or sanctioning physicians for their public speech. (FAVC page 16 para. 66 to page 16 para. 19, para. 77.)

And yet, the Board started an investigation of the Plaintiff and at least two other California physicians for their public speech. *Id*. at page 8, para. 30, page 9 para. 36, and Glaser Reply Declaration page 3 para. 8). After filing this action, Plaintiffs learned that humans are not involved in initiating the Board's investigation of online complaints. Rather, a computer spits out a demand that the physician respond to the complaint, on pain of Board discipline (Jones Declaration, page 2 para. 5). And let us not forget that the Legislature eventually rejected giving the Board the specific statutory authority to engage in the conduct with the Board is exercising based on a clearly Due Process void for vagueness general jurisdictional statute.

During the time Plaintiff Mackenzie appeared to be under investigation, Board President Kristina Lawson made a seemingly official (i.e. made with apparent, if not actual authority) direct and public threat that physicians who spoke out against the mainstream Covid narrative would be hunted-down based on complaints from the public (i.e., not patients) and sanctioned, in accordance with the publicly announced directive of the Federation of State Medical Boards, (the "Federation"), an organization in which Board President Lawson is a card-carrying member and Chairman of the "Ethics and Professionalism" committee. (FAVC at page 11, paras. 42-43.)

Board President (and Federation member) Lawson's specific threat made with apparent authority constitutes a continued threat of unconstitutional action against California physicians. The members of Plaintiff Physicians for Informed Consent ("PIC") who speak out and want to continue to educate the public about the government's mishandling of the pandemic, (Glaser Declaration page 3 para. 9, to page 9) is analogous to the critical comments made against the government in the Pentagon papers case. PIC member's speech has been unconstitutionally chilled by the Board President's threat. When

the president of a medical board states in a public board meeting that the board is going to implement the Federation's directive to discipline doctors for their public speech, physicians have every right to believe the Board will do exactly that.

The Board's response to its president's direct threat is not satisfying. First, it claims that minutes memorializing her comments (and which are published on the Board's website) are not authentic and might not be accurate. (Defendant's Objection to Plaintiffs' Motion for Judicial Notice, page 5 ln 25 to page 6, ln. 13) Two problems, first, the minutes were certified by the Defendant and the Board president on May 19, 2022. (*See* page 36 of Exhibit 3 to the Glaser Reply Declaration which contains the complete minutes.) Second, there is no sworn declaration from Ms. Lawson claiming that her recorded (and certified) statement is inaccurate. The unsworn allegation is just in Defendant's Objections.

Third, the Board claims that Ms. Lawson did not have the actual authority to issue a Board policy, i.e., her actions were *ultra vires*. (Defendant's Opposition to the Preliminary Injunction Motion, page 10, ln. 20, to page 11, ln. 4) Plaintiffs concur, and in fact argued that Ms. Lawson did not have the power to announce a new policy. (FAVC page 11 para. 45, to page 12 para. 48.)

Via the Jones Declaration, the Board now admits that it does not screen online complaints. Rather, the Board's computer just spits-out threatening letters demanding that physician respond to the complaint and justify the public speech on pain of adverse Board action. (Jones Declaration, page 2, para. 5.) This new fact is inconsistent with what the Board represents to be the initial complaint review process on its website. (Attached to Plaintiff's Response to Motion to Dismiss.) Some might argue that a state agency should not put out knowingly false statements about a government process. It could be that the Board's actual procedure of non-screening is a breach of public trust and an actionable abuse of government process. And beyond being First Amendment illegality and the possible abuse of process, the Board's stated statutory basis (Bus. & Prof. Code, § 2234) fails the Due Process vagueness heightened specificity requirement. (FAVC page 8 para 30 to page 9 para 32, 35-36 and the First and Second Claims, page 16-22.)

The above verified facts establish (1) injury in fact, (2) caused by the Defendant's conduct, and (3) that preliminary and permanent injunctive relief enjoining the Board from continuing or commencing

any investigation which is based on a physician's public speech (and started by a computer program) will redress the injury under any standard of standing. None of the cases cited and discussed by Defendant negate that the above facts satisfy the requisite elements of standing. The Defendant relates snippets of legal rules about the three requisite elements of standing *See Bates v. United Parcel Service* 511 F.3d 974 (9th Cir. 2007) discussing two other cases cited by Defendants, *O'Shea v. Littleton*, 414 U.S. 448 (1974) and *City of Los Angeles v. Lyons* 461 U.S. 95 (1983).

Bates relates that past wrongs are not enough to establish "real and immediate threat of injury" (*Bates*, 511 F.3d at 985), and cites and discusses the two Supreme Court cases cited and quoted in Defendant's response. But we do not have that problem because 1. Ms. Lawson's direct *ultra vires* but made with apparent authority threat, and 2, the Jones declaration's failure to rebut Plaintiffs' allegation of a continuing threat is an admission by adverse inference.

Both *O'Shea v. Littleton*, 414 U.S. 448 and *City of Los Angeles v. Lyons* 461 U.S. 95 are so factually dissimilar that the holding or results do not impact this case. In *O'Shea* there was no evidence that the clearly illegal past conduct complained of would be repeated, and there was no claim that a statute was unconstitutional which makes the case factually inapposite to Plaintiffs' standing. *City of Los Angeles* was a factually complicated case involving the use by police of chokeholds, with an evolving city police policy. Based on an *O'Shea* analysis of standing requiring proof of an immediate danger of future harm, the plaintiff did not have standing. But again, the facts are so different from here that the case is inapposite.

Defendant cites *California Pro-Life Council, Inc. v. Getman* 328 F,3d 1088, 1095 (9th Cir. 2003) which is a pre-enforcement case and actually supports Plaintiffs claim that they have suffered a "constitutionally recognized injury of self-censorship" citing *Virginia v. Am Booksellers Ass'n*, 484 U.S. 383, 393, (1988), (recognizing that standing only requires an intent to engage in the conduct and a credible threat that the challenged provision will be invoked against him. *Id*. The Declarations of Plaintiff Mackenzie and Gregory Glaser in conjunction with Ms. Lawson's threat and Ms. Jones refusal to deny that the Board is continuing to pursue physicians like Plaintiff Mackenzie and Plaintiff PIC's member physicians satisfy these requirements. Accordingly, the Court should reject the Defendant's standing argument both here, and in his Motion to Dismiss.

C. There is no Sovereign Immunity Covering Defendant Prasifka from the Prospective Equitable Claims Asserted in the First Amended Verified Complaint

Defendant Prasifka who is the Board's Executive Director, is being sued in his official capacity for prospective relief only. The cases cited and discussed in Point V; pages 12-15 of Plaintiffs 12(b) Response are dispositive against Defendant's claim of sovereign immunity.

Further, Plaintiffs do not seek any relief against the Board President. They request that the Board post a notice that Ms. Lawson's announcement that physicians who promote in public so-called Covid misinformation has been enjoined by the Court. (Plaintiffs' Preliminary Injunction Motion, page 15.)

Defendant makes the surprising argument that neither the Federation's press release nor Ms. Lawson's statement "articulate with any specificity what California statute would or could be implemented to pursue possible future disciplinary action." (Opposition at page 10 lns. 19-20.) That is true because there is no specific statute which gives the Board the authority to investigate physicians for their public speech. Plaintiffs maintain that Ms. Lawson's (Defendant described) "brief and opaque two sentence statement…" (*Id*. at ln. 19) threat/promise to implement the Federation's press release is an unconstitutional and *ultra vires* direct threat to continue the actions taken against physicians similar to the actions against Plaintiff Mackenzie and others. The Defendant apparently agrees that its Board president did not have the legal authority to make the threat she made, which may not be much of a defense to this motion.

D. Defendant has not proven by a preponderance of the evidence (or even alleged) that the FAVC establishes that Defendant Prasifka has absolute immunity for his supervisory role over Board Investigations

Since he is raising an absolute immunity defense pre-answer, the Defendant must prove that the First Amended Verified Complaint establishes Defendant's absolute defense as a matter of law. *Wilson v. Rackmill*, 878 F.2d 772, 776 (3rd Cir. 1989); [6] *Accord, Shmueli v. City of New York*, 424 F.3d 231, 236 (2nd Cir. 2005).

The FAVC does not allege that Defendant Prasifka performed any judicial, semi judicial

[6] "In order for the defendants to succeed on a Rule 12(b)(6) dismissal based on absolute immunity, the allegations of appellant's complaint must indicate the existence of absolute immunity as an affirmative defense; the defense must clearly appear on the face of the complaint. C. Wright and A. Miller, 5 Federal Practice and Procedure Sec. 1357 at 605-606 (1984)."

function or even a prosecuting function, only that "… he is the final-decision-maker on the Board's decision to investigate physicians for violations of Board enforced laws and rules, or at least, he supervises the subordinate Board employee(sic) who make such decision…." (FAVC page 6 para. 24, lns. 20-23.) Accordingly, the Defendant has not established that an affirmative defense of absolute immunity applies in this case for the purposes of the Preliminary Injunction Motion.

E. Business and Professions Code Section 2234 is Unconstitutionally Vague under the *Smith v. Goguen*, Heightened Specificity Requirement (or any Specificity Standard)

Here is the statutory language which the Board asserts is the statutory basis of the Board's investigation of physicians who spread so-called Covid misinformation: Bus. & Prof. Code Sec. 2234: "The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following: ****" There is no specific reference in this section (or any other section of the Business and Professions Code) that the medical board can discipline physicians for speaking out in public about matters of public interest.

"Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

There is no California case, nor any case in the United States that holds that a medical board can discipline physicians for their public speech. In fact, the holding and result in *Conant v. Walters*, 309 F.2d 629 (9th Cir. 2002), the words in *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014), and Supreme Court Justices over many decades have said that boards and the government in general cannot discipline or even investigate physicians for their protected speech (even to patients in the case of *Conant v Walters*).

The Defendant's reliance of cases which generally and vaguely discuss standards of care and ethical precepts do not put reasonable physicians on notice that their fully protected speech could subject them to unwanted Board scrutiny which could result in the loss of their livelihood unless they justify their speech. The Board cited authority does not satisfy the greater specificity requirement. Section 2234 is unconstitutionally vague as an asserted jurisdictional basis for these Board

investigations. If this statute in not unconstitutionally vague under heightened specificity (or any specificity level), then Due Process vagueness constitutional protection is meaningless.

F. Irreparable Injury is Presumed in this First Amendment Challenges

Defendants argue that "it is well established that delay in seeking preliminary injunctive relief, although not necessarily dispositive is 'nonetheless relevant in determining whether relief is truly necessary….'" and then cites a number of irrelevant cases involving business or labor disputes. (Opposition papers page 14 20-22)[7]

As stated in Plaintiffs' motion, in a constitutional challenge involving a fundamental right like free speech, irreparable harm is presumed, especially on a strong showing of likelihood of success of the merits. (Plaintiffs' Injunction Motion, page 3 ln. 22 to page 4. ln. 2, *citing Elrod v Burns* 427 U.S. 347, 373 (1976) and *S.O.C. v County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). *See also, World Wide Rush, LLC v. City of Los Angeles*, 563 F.Supp.2d 1132, 1152 (C.D. Cal. 2008) citing *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction.)[8]

G. Effective Injunctive Relief Can Be granted against the head of an administrative agency

Under Federal Rule of Civil Procedure 65(d)(2), a preliminary injunction binds "(A) the parties (B) the parties' officers, agents, servants, employees, and attorneys, and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." Thus, the requested preliminary injunction would cover Defendant Executive Director Prasfika's subordinate employees. Two of the cases cited by Defendant to support his argument are not relevant to this issue. [9] *Zepeda v.*

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[7] *N.L.R.B. v. Cal. Pac. Med. Ctr*., 991 F.2d 536 (9th Cir. 1993), *Garcia v. Google, Inc*. 786 F.3d 733 (9th Cir. 2015) (copyright claim where the plaintiff was trying to restrict free speech by forcing Google to remove content over which she claimed a copyright.)

8 Defendant's *Younger v. Harris* 401 U.S. 37, 51 (1971) argument that an alleged chilling effect not in and of itself a basis for an injunction is misplaced and irrelevant to the dispositive point that in a First Amendment challenge, the requisite irreparable injury is presumed and on the alleged and proven facts of this case.

[9] *Mayfield v United States*, 599 F.3d 964, 969 (9th Cir. 2010), the issue was whether a former suspect in a Madrid train bombing had standing to challenge the US FISA law. *Summers v. Earth Island Inst.*,129 S. Ct. 1142, 492-493 (2009), is also a decision dealing with standing.

United States Immigration Services, 753 F.3d 719, 725 (9th Cir. 1985) is not to the contrary, and states that "Federal district courts have equitable power to enjoin law enforcement agencies when such have engaged in a persistent pattern of misconduct."

II. The Balance of Equities and the Public Interest Overwhelming Favors Enjoining the Board's Illegal conduct where jurisdiction is claimed based on unconstitutionally vague statutory authority which is being used to intimidate fully protected First Amendment Speech

This case and this motion have established the following facts:

1. The Investigation of physicians for their public speech is illegal under seventy-five years of Supreme Court and Ninth Circuit precedent.
2. There is no specific statutory authority allowing the Board to investigate physicians' public speech, and the Board's reliance the Board's general disciplinary authority renders its actions otherwise unconstitutional under the Due Process prohibition against vague government enforcement statutes implicating First Amendment rights.
3. The Board now claims that the Board President's public statement threatening to discipline physician public speech was not an official policy, and but rather a spontaneous (not on the agenda) *ultra vires* threat by her.
4. The Director of Compliance, Jenna Jones had the opportunity to deny that the Board is continuing its investigations of physicians' public speech, but failed to do so, creating an adverse inference that the Board continues to engage in illegal activity.
5. The Legislature ultimately decided not to grant the Board the authority to do what it is currently doing without statutory authority, due to concerns that the First Amendment prohibited the Board from asserting jurisdiction over its licensees' public speech.
6. And finally, the Board represents on its website that humans analyze and screen complaints, yet Ms. Jones under oath defends against injunctive relief by admitting that for on-line complaints (like the one filed against Plaintiff Mackenzie), there is no human screening, but only a computer-generated letter which threatens the licensee with discipline if he fails to respond.

Plaintiffs suggest that these facts together the other facts demonstrated this motion and cited cases

show that the equities tip in Plaintiffs' favor and the public's interest is to stop the Board from continuing its illegal actions and its violation of the public trust for misrepresenting to public how it initiates investigations.

III. The Court has the Discretion to Waive a Preliminary Injunction Bond and Should do so in this Case

District courts have the discretion to waive the F. R. Civ. P. Rule 65(c) bond requirement when the enjoined party is the government such that "the Defendant's compliance would not create a risk of monetary loss and or when there is a "finding of a strong likelihood of success on the merits", "no realistic likelihood of harm to the Defendants resulting from the issuance of the injunction" and that the "'equities of the potential hardships to the parties 'weigh in favor Plaintiff.'" *Potts v. Cty. of Trinity*, No. 2:12-CV-01793 JAM-CMK, 2012 U.S. Dist. LEXIS 119920 (E.D. Cal. Aug. 22, 2012) (page 2 of Order Granting Preliminary Injunction, attached as Appendix 4 to Plaintiffs' Motion for Judicial Notice), (citations omitted). Since this is a facial challenge to clearly First Amendment and Due Process vagueness unconstitutional government action, Plaintiffs request that no bond be required because they comply with the factors set out by this Court in *Potts v. Cty. of Trinity.*

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court issue the requested preliminary injunction against the Defendant.

Dated: September 1, 2022

Respectfully submitted,

Richard Jaffe, Esq.
SBN 289362
428 J Street, 4th floor
Sacramento, California, 95814
Telephone: 916-492-6038
Facsimile: 713-626-9420
Email: rickjaffeesquire@gmail.com
Attorney for Plaintiffs Douglas Mackenzie, MD, and Physicians for Informed Consent

Judicial Council of California Civil Jury Instructions

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* Pronounced "Casey"

As approved at the
Judicial Council's Rules Committee October 2021 Meeting
and Judicial Council November 2021 Meeting

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Judicial Council of California

Series 100–2500

Judicial Council of California
Advisory Committee on Civil Jury Instructions

Hon. Martin J. Tangeman, Chair

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205. Failure to Explain or Deny Evidence

If a party failed to explain or deny evidence against [him/her/*nonbinary pronoun*/it] when [he/she/*nonbinary pronoun*/it] could reasonably be expected to have done so based on what [he/she/*nonbinary pronoun*/it] knew, you may consider [his/her/*nonbinary pronoun*/its] failure to explain or deny in evaluating that evidence.

It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party.

New September 2003; Revised December 2012

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This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

Sources and Authority

- Failure to Explain or Deny. Evidence Code section 413.

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 129

7 Witkin, California Procedure (5th ed. 2008) Trial, § 302

Cotchett, California Courtroom Evidence, § 11.04 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93[3] (Matthew Bender)

4 California Trial Guide, Unit. 90, *Closing Argument*, § 90.30[2] (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 11.10 (Cal CJER 2019)