

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NOV 27 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PIERRE KORY, M.D.; LE TRINH
HOANG, D.O.; BRIAN TYSON,
M.D.; PHYSICIANS FOR INFORMED
CONSENT; CHILDREN'S HEALTH
DEFENSE,

Plaintiffs - Appellants,

v.

ROB BONTA, in his official capacity as
Attorney General of California; REJI
VARGHESE, in his official capacity as
Executive Director of the Medical Board of
California; ERIKA CALDERON, in her
official capacity as Executive Officer of the
Osteopathic Medical Board of California,

Defendants - Appellees.

No. 24-2946

D.C. No.

2:24-cv-00001-WBS-AC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted November 4, 2024
Pasadena, California

Before: SCHROEDER, W. FLETCHER, and CALLAHAN, Circuit Judges.
Concurrence by Judge CALLAHAN

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Plaintiffs-Appellants are California physicians and non-profit organizations with which they are affiliated. They filed this 42 U.S.C. § 1983 action against the California Attorney General and the executive officers of the boards that regulate the medical profession in California. Pursuant to California Business & Professions Code § 2234(c), the boards are to take disciplinary action against physicians who engage in “unprofessional conduct” by deviating from the “standard of care.” Plaintiffs raised First Amendment challenges to prevent any enforcement that might arise from Plaintiffs’ expression of views regarding Covid-19 treatment and vaccination. The district court denied a preliminary injunction because Plaintiffs failed to establish a likelihood of success on either a facial challenge or a challenge to the statute as applied to Plaintiffs.

To the extent that Plaintiffs on appeal seek to maintain a facial challenge, we must affirm, because the statute regulates conduct, not speech. *See Tingley v. Ferguson*, 47 F.4th 1055, 1072, 1074 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023). It provides for enforcement of the standard of care, which is the standard for physicians’ treatment of patients. *See Flowers v. Torrance Mem’l Hosp. Med. Ctr.*, 884 P.2d 142, 145 (Cal. 1994) (explaining that the standard of care creates requirements for “treatment of [the] patient” (citation omitted)). The statute does not purport to regulate speech unrelated to treating patients or require any particular communication. It is therefore unlike the statute in *National Institute of*

Family and Life Advocates v. Becerra, which required communication of a particular message “regardless of whether a medical procedure [wa]s ever sought, offered, or performed.” *See* 585 U.S. 755, 770 (2018). Plaintiffs have not established any likelihood of success on a facial challenge, and in their reply brief and at oral argument, they have disclaimed pursuing one.

To establish standing for their as-applied challenge, Plaintiffs must show a credible threat that the Defendants will prosecute them under the statute. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). None of the Plaintiffs have been prosecuted under the statute, and Defendants have not threatened enforcement against them. So far as the record discloses, the only disciplinary proceedings against a physician related to Covid-19 communications or treatment involved a physician encouraging her patient to use veterinary ivermectin and resulted in the stipulated surrender of her license.

Plaintiffs nonetheless contend there is a threat that Defendants may prosecute them under the statute for making protected speech. To determine whether a purported threat is sufficient to establish an injury for Article III standing, we consider three factors: (1) whether Plaintiffs have a “‘concrete plan’ to violate the law”; (2) whether Defendants have “communicated a specific warning or threat to initiate proceedings” against them; and (3) whether there is a “history of past prosecution or enforcement.” *See Tingley*, 47 F.4th at 1067

(quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). Plaintiffs have not shown that any of these factors are present here. The district court therefore correctly ruled Plaintiffs lack standing to bring an as-applied challenge to § 2234(c).

AFFIRMED.

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CALLAHAN, Circuit Judge, Concurring in the Judgment:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I believe Plaintiffs have standing to bring an as-applied challenge, but
concur in the judgment because Plaintiffs have not established a likelihood of
success on the merits at this stage of the proceedings.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

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