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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TRACY HØEG, M.D., Ph.D., **RAM DURISETI, M.D., Ph.D.**, **AARON KHERIATY, M.D.**, **PETE MAZOLEWSKI, M.D.**, and **AZADEH KHATIBI, M.D., M.S., M.P.H.**,

Plaintiffs,

v.

GAVIN NEWSOM, Governor of the State of California, in his official capacity; **KRISTINA LAWSON**, President of the Medical Board of California, in her official capacity; **RANDY HAWKINS, M.D.**, Vice President of the Medical Board of California, in his official capacity; **LAURIE ROSE LUBIANO**, Secretary of the Medical Board of California, in her official capacity; **MICHELLE ANNE BHOLAT, M.D., M.P.H.**, **DAVID E. RYU**, **RYAN BROOKS**, **JAMES M. HEALZER, M.D.**, **ASIF MAHMOOD, M.D.**, **NICOLE A. JEONG**, **RICHARD E. THORP, M.D.**, **VELING TSAI, M.D.**, and **ESERICK WATKINS**,

Case No. 2:22-cv-1980 WBS AC

Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction

Date: January 23, 2022
Time: 1:30 p.m.
Location: Courtroom 5
Judge: William B. Shubb

Thirty minutes oral argument requested

members of the Medical Board of California, in their official capacities; and **ROB BONTA**, Attorney General of California, in his official capacity,	)
Defendants.	)

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INTRODUCTION

California Assembly Bill 2098, 2022 Cal. Stat., ch. 938 ("AB 2098"), which will subject physicians to discipline for disseminating "misinformation" about Covid-19 to patients, adds section 2270 to California Business and Professions Code, effective January 1, 2023. The statute defines "misinformation" as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care."

In their principal brief, Plaintiffs contended: (1) that the law imposes a quintessential viewpoint-based restriction, because it burdens speech that the Board determines diverges from the "contemporary scientific consensus"; and (2) that AB 2098 is void for vagueness under the Fourteenth Amendment's Due Process Clause because the term "contemporary scientific consensus" is undefined in the law and undefinable as a matter of logic in the context of a new disease like Covid-19.

Defendants' efforts to protect AB 2098 from this constitutional challenge are unpersuasive. First, they contend that Plaintiffs lack standing to bring this case because they have not provided specific examples of advice they have given patients in the past and intend to give in the future that would subject them to discipline. But Plaintiffs submitted declarations (both with their principal brief and this one) describing information they have conveyed and plan to convey, for instance advising some patients against Covid-19 vaccination and mask-wearing, that they reasonably believe might violate AB 2098. *See Tingley v. Ferguson*, 47 F.4th 1055, 1067-68 (9th Cir. 2022) (holding that plaintiff had standing to challenge a law prohibiting psychotherapists from practicing conversion therapy on minors, as he alleged past practices and expectations of future practices that sought to reduce his clients' "unwanted same-sex attractions"). Indeed, the legislative history of AB 2098, not to mention the text of the bill, establishes that the law aims to suppress precisely such speech. Even if the law did not mean to target such communications, Plaintiffs' attestations that practicing under it will leave them in fear of professional discipline suffice to establish a chilling effect, given the reasonableness of such fear in light of AB 2098's lack of clarity, as well as the stated intent of some of its primary proponents to weaponize it against Plaintiffs. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

Second, Defendants' contention that AB 2098 punishes only *conduct*, rather than *speech*, and so does not implicate fundamental First Amendment rights, fares no better. The pertinent cases—indeed, those upon which Defendants rely—distinguish speech that *is* the treatment and therefore may be regulated (for example, psychotherapy)—from doctors' verbal recommendations and advice, which receive First Amendment protection. AB 2098 applies to the latter as well as the former; otherwise, it would not have defined "disseminate" as "treatment *or advice*" (emphasis added). *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (holding that a federal policy subjecting doctors to discipline for *recommending* medical marijuana, as opposed to actually treating patients with it, violated physician plaintiffs' First Amendment rights).

Finally, Defendants' attempts to construe AB 2098 as a sufficiently clear instruction to the regulated profession are wholly unconvincing. To the contrary, because the phrase "contemporary scientific consensus contrary to the standard of care" is not defined, and arguably not definable in the context of Covid-19, the law is void for vagueness. Defendants' argument is premised on the claim that "standard of care" is a term with which doctors are familiar in the medical malpractice context, and therefore Plaintiffs should be able to abide by it when dispensing advice to patients. But the syllogism fails for the simple reason that Defendants conflate the terms "standard of care," and "contemporary scientific consensus." And as Plaintiffs argued before, a "scientific consensus" is not knowable in the context of a three-year-old virus such as Covid-19; even if the concept were discernible, doctors should not be hamstrung by a supposed "contemporary scientific consensus" when often it is those in the minority who are responsible for progress in science and medicine. Finally, "standard of care" is a term of art that applies to professional *conduct* in medical malpractice cases, not to conveyance of *information*, as it does here.

In order to protect Plaintiffs' First Amendment and Due Process rights, which are in jeopardy as of January 1, 2023, the Court should grant the requested injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (observing that the balance of equities and public interest favor those whose First Amendment rights are being chilled); *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) ("Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish

irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.").

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE AB 2098

Defendants claim that Plaintiffs "have not alleged a 'concrete plan' to engage in conduct in violation of AB 2098" and thus have not demonstrated an injury—an element necessary to satisfy the standing inquiry. (Resp. Br. at 7). Defendants' conceptualization of standing in pre-enforcement First Amendment challenges is contrary to well-settled law.

An injury may be established in pre-enforcement cases by showing "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and that there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). In assessing the existence of such an injury, the court asks whether: (1) the plaintiff has a concrete plan to violate the law; (2) the enforcement authorities have communicated a specific warning or threat to initiate proceedings; and (3) there is a history of past prosecution or enforcement. *Tingley*, 47 F.4th at 1067 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)).

Defendants' reliance on *Tingley* is misplaced. In fact, *Tingley* supports *Plaintiffs*' position. In *Tingley*, the Ninth Circuit held that the plaintiff possessed standing to challenge a Washington State law prohibiting licensed therapists from practicing conversion therapy on minors. The plaintiff there satisfied the first component of the above inquiry because he alleged past practices and expectations for future work focused on reducing his clients' "unwanted same-sex attractions," precisely the conduct the statute prohibited. *Id.* at 1067-68. The Ninth Circuit rejected Washington State's arguments that the plaintiff was required to "specify 'when, to whom, where, or under what circumstances' [he] plan[ned] to violate the law." *Id.* at 1068 (quoting *Thomas*, 220 F.3d at 1139).

Plaintiffs have identified, in sworn declarations supporting their motion for a preliminary injunction ("MPI"), specific types of information they have shared, intend to share, or would share

were it not for fear of discipline under AB 2098.

For example, Dr. Ram Duriseti, an emergency room physician, explained that he has explicated his concerns about the risks of myocarditis from the Covid-19 vaccines to his patients. (*See* 10/20/22 Declaration of Ram Duriseti, MD, *attached to* MPI as Exhibit B, ¶15 [hereinafter Duriseti Decl.]). Likewise, Dr. Høeg wrote that data from her own research found that the risk-to-benefit ratio for vaccinating individuals between 18 and 29 years old with a booster dose may be unfavorable and that she planned to incorporate that data into her recommendations. AB 2098, however, "puts [her and other] physicians who are simply trying to give appropriate and individualized recommendations in a difficult position, particularly considering they may not know what the California Medical Board's 'consensus' is at the moment." (10/31/22 Declaration of Tracy Høeg, MD, *attached to* MPI as Exhibit A, ¶¶24-25 [hereinafter Høeg Decl.]). As another example, Dr. Høeg swore that, although she was unpersuaded that masking is protective against Covid-19, she did not know whether saying as much "may run afoul of the 'scientific consensus' as interpreted by the Medical Board." (*Id.* ¶19).

Both Drs. Duriseti and Høeg expressed reasonable concern that conveying their considered views and advice consistent with those views to patients could subject them to discipline. The Centers for Disease Control and Prevention ("CDC"), after all, recommends universal Covid-19 vaccination for everyone 6 months and older,[1] and universal masking in areas where cases are on the rise.[2] Plaintiffs' own past advice and planned continued future advice contradicts these recommendations. Defendants' examples even acknowledge that recommending against vaccination could land Plaintiffs before the Board for a disciplinary hearing. (*See* Resp. Br. at 20 ("A practitioner of ordinary intelligence can distinguish between the situations covered by this provision (e.g., providing advice to one's patient about whether to receive the Covid-19 vaccines) from those that are not (e.g., publishing a journal in a scientific article about the effectiveness of

[1] *Immunization Schedules*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 17, 2022), https://www.cdc.gov/vaccines/schedules/index.html.

[2] *Mask Guidance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2022), https://www.cdc.gov/coronavirus/2019-ncov/easy-to-read/mask-guidance.html

the Covid-19 vaccines.")). In other words, *according to Defendants themselves*, advising patients not to get a Covid vaccine is precisely the sort of speech AB 2098 was designed to squelch, or at the very least it is not unreasonable for Plaintiffs to believe that is the case. Thus, Defendants' own arguments—inadvertently—buttress Plaintiffs' claim of standing. Of course, none of this comes as a surprise given that one of the reasons cited in support of this law's passage was that "the [alleged] spread of misinformation and disinformation about Covid-19 vaccines has weakened public confidence and placed lives at serious risk." AB 2098 §1(d).[3]

Defendants assure this Court that nothing Plaintiffs have said in their declarations will subject them to discipline and even say that they are free to "weigh[] the pros and cons of a patient obtaining a vaccine for Covid-19[.]" (*See* Resp. Br. at 7-8, 12). But such assurances have no legal effect; the language of AB 2098, not Defendants' representations in a response brief, controls this inquiry. The Board has not promulgated any binding rules that would limit its ability to discipline physicians on the basis of their speech. And even if these assurances carried legal weight, Plaintiffs have no way of knowing in advance when and in what kind of cases such forbearance will be exercised. This law, therefore, "preclude[s] [the Plaintiffs] from properly and freely communicating with and treating [their] patients according to [their] best judgment." (Duriseti Decl., ¶16); *see infra*, at 7-8.

To the extent Plaintiffs avoided explicit and detailed admissions of an intent to break the law, that does not divest them of standing. Dr. Høeg, for example, stated that:

> Because my primary duty is and will always remain the well-being of my patients, I will most certainly continue to tell them the truth

[3] Ironically, Defendants' brief—often in the course of echoing the justification for AB 2098—contains its own misinformation, including that the Covid vaccines prevent transmission of the virus and that unvaccinated individuals are 11 times more likely to die from Covid-19, without acknowledging that figure is entirely inaccurate for the tens of millions of Americans with naturally acquired immunity. (*See* Resp. Br. at 11); Hiam Chemaitelly et al., *Protection from Previous Natural Infection Compared with mRNA Vaccination*, 3 LANCET MICROBE e944 (2022) (finding that vaccinated people are *at least three times* as likely to become infected with Covid-19 than unvaccinated with prior infections); Eric Sykes, *CDC Director: Covid Vaccines Can't Prevent Transmission Anymore*, MSN (Jan. 10, 2022), https://bit.ly/3cyqOH6 (last visited Dec. 22, 2022); Faye Flam, *Ron DeSantis Vaccine Complaint Exploits Public Health Gaffes*, WASH. POST (Dec. 17, 2022, 12:10 PM), http://bitly.ws/yc9q ("[M]isleading messaging from public health experts and from the White House has created confusion …. It's well past time to talk honestly about the downsides of the Covid-19 vaccines. They don't do much to prevent people from getting mild cases…. They don't do much to stem community transmission."); Leana S. Wen, Opinion, *A Compromise on the Military Covid Vaccine Mandate*, WASH. POST (Dec. 18, 2022) ("[W]e need to be upfront that nearly every intervention has some risk, and the coronavirus vaccine is no different. The most significant risk is myocarditis[.]").

> about their conditions and treatments to the best of my ability. Nevertheless, since the passage of AB 2098 I have found myself in a difficult position. I am afraid of saying something to my patients that I know is consistent with the current scientific literature but may not yet be accepted by the California Medical Board.

(Høeg Decl., ¶ 30-34).

This statement establishes standing. As the Supreme Court has explained:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, *when there is a danger of chilling free speech*, *the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged*.

Munson, 467 U.S. at 956 (emphasis added); s*ee also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."); *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010) (holding that "where a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a 'constitutionally sufficient injury' as long as it is based on 'an actual and well-founded fear' that the challenged statute will be enforced"); *Ariz. Right to Life PAC v. Bayless,* 320 F.3d 1002, 1006 (9th Cir. 2003) (finding that an entity that was "forced to modify its speech and behavior to comply with the statute" had suffered injury even though it had "neither violated the statute nor been subject to penalties for doing so[.]").

In any event, several Plaintiffs have supplemented their initial declarations to erase any doubt that they have provided advice to patients in the past that they believe would have subjected them to punishment under AB 2098, and that they either will continue to provide such advice despite the risks, or may not in the future for fear of disciplinary consequences.[4] For instance, Dr.

[4] Plaintiffs respectfully request that the Court permit them to submit these attached supplemental declarations, which seek to address deficiencies in the initial briefing that Defendants allege. Plaintiff Høeg also requests to testify to these facts at the hearing, which Defendants have stated they oppose. Plaintiffs submit that they should be permitted to provide this additional evidence to address the concerns about standing Defendants have raised in the interest of judicial economy. *Cf. McDonald v. Lawson*, No. 8:22-cv-1805, (C.D. Cal. Nov. 21, 2022), ECF Nos. 66, 71-77 (dismissing

Høeg has counseled young men previously infected with Covid-19 that vaccination or boosting was unnecessary and might entail more risk than benefit. (*See* 12/20/22 Declaration of Dr. Tracy Beth Høeg, *attached as* Exhibit 1, ¶¶4-5 [hereinafter Supplemental Høeg Decl.]). Similarly, she has told a patient, in response to his questions about a mask policy at his private club, that she believes cloth and surgical face coverings may give a false sense of security to high-risk members. (*Id.* at ¶6). She worries that delivering such advice in the future could subject her to punishment under AB 2098; indeed, she is concerned that acknowledging these past communications here may expose her to disciplinary proceedings, yet more evidence of a chilling effect. (Nevertheless, she is making these admissions because of her conviction that AB 2098 presents a grave danger to physicians and patients alike). (*Id.* at ¶¶8-10).

Much like Drs. Duriseti and Høeg, Dr. Kheriaty has advised some patients, *inter alia*, that the risks of masking children may outweigh any benefits because the practice interferes with their linguistic, cognitive, and emotional development. (*See* 12/20/22 Declaration of Dr. Aaron Kheriaty, *attached as* Exhibit 2, ¶¶5-6 [hereinafter Supplemental Kheriaty Decl.]). Similarly, he has told patients with certain anxiety disorders aggravated by masking that the risk-benefit ratio disfavors masking. (*Id.* at ¶¶ 3-4, 6).

Dr. Mazolewski has also informed patients that he does not believe surgical masking is an effective means of preventing infection, and recommends against Covid-19 vaccination around the time of a surgery because of the elevated risk of thromboembolism, which he believes outweighs any benefits of vaccination. (*See* 12/20/22 Declaration of Dr. Peter Mazolewski, *attached as* Exhibit 3, ¶¶3-5 [hereinafter Supplemental Mazolewski Decl.]). Both Drs. Kheriaty and Mazolewski intend to continue to provide the same advice that they have been giving patients, though they believe they risk punishment under AB 2098 for doing so. (*See* Supplemental Kheriaty Decl., ¶¶6-7; Supplemental Mazolewski Decl., ¶¶3-5). In short, Plaintiffs have alleged "past work" and "expectations for future work," *Tingley*, 47 F.4th at 1067, both of which potentially subject them to discipline under AB 2098. Again, this advice suffices to establish standing. *Id.*

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lawsuit challenging AB 2098 on standing grounds, with leave to amend, resulting in another round of briefing and second hearing on the preliminary injunction motion).

Furthermore, Dr. Azadeh Khatibi, who found herself in the role of patient after being diagnosed with a life-threatening disease, explains that her own doctor, as well as numerous physician colleagues and friends, have told her that they no longer provide patients with honest advice on Covid-19-related subjects because they fear discipline under AB 2098. (*See* 12/21/22 Declaration of Dr. Azadeh Khatibi, *attached as* Exhibit 4, ¶¶5-11 [hereinafter Supplemental Khatibi Decl.]). Dr. Khatibi, having been deprived of her right to receive information about Covid-19 from her doctor, also has standing to bring this case on those grounds. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (holding that the right to receive information is "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution" because "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them."); *id.* ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." (quoting *Lamont v. PMG*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring))).

Defendants point to *McDonald v. Lawson*, No. 8:22-cv-1805 (C.D. Cal. Nov. 21, 2022), ECF No. 66, in which the district court dismissed a pre-enforcement challenge to AB 2098. Of course, *McDonald* is not binding on this Court. Further, the dismissal in *McDonald* was erroneous because the court employed an incorrect First Amendment standing analysis. But regardless, the facts in *McDonald* differ in crucial ways from the instant case. The court found that the *McDonald* Plaintiffs lacked standing because their "allegations pertain to the public statements they have made rather than advice they wish [to] provide in a doctor-patient relationship." *Id.* at 8.[5] Plaintiffs' initial declarations here established that they intended or wanted to provide advice to patients in the future that they believe will jeopardize their medical licenses under AB 2098. While Plaintiffs maintain those declarations were clear on this point, to eliminate any doubt, they have reiterated and clarified their allegations through the supplemental declarations attached to the present brief.

Plaintiffs have also satisfied the second prong of the *Tingley* inquiry, which requires a

[5] The court's dismissal with leave to amend simply resulted in another round of briefing and argument. *See McDonald*, No. 8:22-cv-1805, ECF Nos. 71-77. *See supra*, fn. 4.

showing that enforcement authorities have communicated a specific warning or threat to initiate proceedings. *Tingley*, 47 F.4th at 1067. "[I]n the context of pre-enforcement challenges to laws on First Amendment grounds, a plaintiff 'need only demonstrate that a threat of potential enforcement will cause him to self-censor.'" *Id.* at 1068 (quoting *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014)). An "alleg[ation] that the law has chilled [plaintiff's] speech and that he has self-censored himself out of fear of enforcement" leading to an inability "to freely and without fear speak what [the plaintiff] believes to be true" suffices. *Id.* As discussed just above and in Plaintiffs' original and supplemental declarations, they have clearly stated that they must choose between practicing medicine to the best of their abilities, and possible loss of their medical licenses. (*See* Høeg Decl., ¶¶ 30-34; Duriseti Decl., ¶¶ 15-18; 10/21/22 Declaration of Peter Mazolewski, MD, *attached to* MPI as Exhibit D, ¶¶14-16 [hereinafter "Mazolewski Decl."]; Supplemental Høeg Decl., ¶¶ 3, 8-10; Supplemental Kheriaty Decl., ¶¶8-9, 15; Supplemental Mazolewski Decl., ¶6). This chilling effect alone suffices to meet the standing requirement.[6] *See Munson*, 467 U.S. at 956; *see also Hum. Life of Wash.*, 624 F.3d at 1000 ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, 'the Supreme Court has dispensed with rigid standing requirements.'") (quoting *Cal. Pro-Life Council Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003)).

Moreover, "the state's refusal to disavow enforcement … is strong evidence that the state intends to enforce the law and that [plaintiffs] face a credible threat." *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021). Here, Defendants have neither displayed nor asserted an intent to refrain from enforcing AB 2098, warranting a presumption that they intend to do so beginning January 1, 2023.

The third prong of this inquiry warrants little discussion. Quoting *Tingley*, 47 F.4th at 1069, Defendants acknowledge that the history of enforcement "admittedly 'carries "little weight" when

[6] Defendants cite a single case, *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) to substantiate their claim that "plaintiffs' general assertion of a chilling effect caused by AB 2098 cannot fill the gap in showing an actual or imminent injury." (Resp. Br. at 10). But *Laird* involved a critically different set of circumstances. There, the plaintiffs sought to enjoin a surveillance program that could *potentially* infringe their free speech rights, as opposed to alleging a direct regulation of speech. 408 U.S. at 10. It is therefore entirely unsurprising that the standing requirement was harder to meet in that case. In relying on *Laird*, Defendants ignore the robust body of case law establishing that, in First Amendment cases, a chilling effect endows plaintiffs with standing.

the challenged law is "relatively new,"'" but go on to make the astonishing assertion that the "sparse enforcement history" "weighs against standing." (Resp. Br. at 9). Defendants naturally do not explain what this "sparse enforcement history" is and how it "weighs against standing," given that AB 2098 naturally has *no* enforcement history whatsoever because it has not yet taken effect.

In short, Plaintiffs have standing to bring this case.

II. THE COLORABLE FIRST AMENDMENT CLAIM PLAINTIFFS HAVE PUT FORTH WARRANTS ISSUING A PRELIMINARY INJUNCTION

A. Defendants Misstate the Legal Standard for First Amendment Cases

Defendants' rendition of the legal standard governing this claim is incorrect. (*See* Resp. Br. at 6). As explained in Plaintiffs' MPI, the Ninth Circuit has collapsed the four preliminary injunction factors (likelihood of success on the merits as well as necessity of preliminary relief to prevent irreparable harm, balance of equities, and public interest) in First Amendment cases, requiring Plaintiffs only to put forth a "colorable First Amendment claim" to establish entitlement to a preliminary injunction. (Plaintiffs' Br. at 13); *see, e.g.*, *Warsoldier*, 418 F.3d at 1001 ("Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment case can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim."). Defendants ignore this entire doctrine, relying instead on irrelevant case law. Their misleading arguments should be rejected. Because, as explained above and in Plaintiffs' principal brief, Plaintiffs have raised a "colorable First Amendment claim," *Warsoldier*, 418 F.3d at 1001, they have established entitlement to preliminary injunctive relief, (*see* Plaintiffs' MPI at 23-24).

B. AB 2098 Regulates Constitutionally Protected Speech in a Viewpoint-Discriminatory Manner, Violating Plaintiffs' First Amendment Rights

Plaintiffs argued in their principal brief that AB 2098 imposes a viewpoint-discriminatory burden on their First Amendment rights and thus is unconstitutional. (*See* Plaintiff's Br. at 13-20). In response, Defendants contend that Plaintiffs do not have a likelihood of succeeding on the merits of their First Amendment claim because the State may regulate conduct and care provided by

medical professionals without running afoul of the First Amendment. (*See* Resp. Br. at 10-14).

Notably, Defendants do not address Plaintiffs' primary contention that AB 2098 is a viewpoint-discriminatory law. Instead, Defendants' entire argument is predicated on conflating *conduct* with *speech*. It is not surprising that the State wishes to elide distinctions between the two. After all, strict scrutiny generally applies to the latter, while rational basis applies to the former. *See Tingley*, 47 F.4th at 1064, 1072("States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel."). Regulations that only "incidentally involve[] speech," such as laws regulating medical malpractice, are aimed at *conduct* and therefore are reviewed only using rational basis analysis. *Id.* at 1074 (quoting *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*")). In contrast, doctors' advice and recommendations are considered speech, and receive the full panoply of First Amendment protections. *See Conant*, 309 F.3d at 636-37 (holding that a federal policy prohibiting doctors from recommending medical marijuana to patients violated the First Amendment, because it punished pure speech).

Consistent with this doctrine, in *Tingley*, 47 F.4th at 1082-83, and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated in part by NIFLA*, 138 S. Ct. 2361,[7] the Ninth Circuit upheld state laws (Washington's and California's, respectively) subjecting state-licensed mental health providers to discipline for practicing conversion therapy on gay minors. The basis for this determination was that when it comes to a mental health professional practicing such therapy, the treatment and the speech are inextricably intertwined. Put otherwise, the speech *is* the treatment, because "psychotherapy … uses words to treat ailments." *Tingley*, 47 F.4th at 1081; *Pickup*, 740 F.3d at 1227. Indeed, one feature of the California law that factored into the court's determination that it did not target speech was that therapists could still "discuss conversion therapy with patients, recommend that patients obtain it (from unlicensed counselors, from religious leaders, or from out-

[7] *NIFLA* overruled *Pickup*'s holding that professional speech is entitled to less protection. *See Tingley*, 47 F.4th at 1074 ("All parties agree that *NIFLA* abrogated the part of *Pickup* in which we stated that professional speech, *as a category*, receives less protection under the First Amendment. There is no question that *NIFLA* abrogated the professional speech doctrine[.]").

of-state providers, or after they turn 18), and express their opinions about conversion therapy or homosexuality more generally." *Tingley*, 47 F.4th at 1073 (citing *Pickup*, 740 F.3d at 1229).

The *Tingley* Court convincingly explained that its decision was consistent with *Conant* because the law in question was solely aimed at treatment and did not impinge on the expression of medical opinions: "We distinguished prohibiting doctors from *treating* patients with marijuana—which the government could do—from prohibiting doctors from simply *recommending* marijuana. A prohibition on the latter is based on the content and viewpoint of speech, while the former is a regulation based on conduct." *Id.* at 1072 (citations omitted).

Furthermore, both *Tingley* and *Pickup* concerned regulations aimed at treatment *of minors only*. That is a relevant distinction, as First Amendment protections in such contexts are often reduced. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that government may regulate otherwise protected speech to protect minors' well-being and "shield[] minors from the influence of literature that is not obscene by adult standards."). For example, laws prohibiting distribution of pornography to minors are constitutionally permissible even while pornographic speech as such is protected by the First Amendment. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002) (stating that there is a compelling interest in shielding children from pornographic material, but government cannot restrict speech available to law-abiding adults "simply because it may fall into the hands of children"). Put otherwise, the mere fact that the State can restrict availability of certain speech to minors does not mean that it can restrict the availability of the same speech to adults. Indeed, both *Tingley* and *Pickup* recognized that therapists could "recommend that patients obtain [conversion therapy] … after they turn 18." *Tingley*, 47 F.4th at 1073.

Neither of the justifications for upholding the facial challenges to the statutes in *Tingley* or *Pickup* applies here. First, the present law, unlike those addressed in *Tingley* and *Pickup*, is not restricted to speech directed at minors.[8] Second, AB 2098 targets speech *qua* speech, rather than

[8] Plaintiffs would still oppose a version of AB 2098 that applied only to treatment and advice given to minors; the conversion therapy laws are aimed to *protect* minors' mental health, while AB 2098 harms young people (arguably, even more than adults because they benefit least and risk the most from getting vaccinated and boosted) since it deprives them of their rights to receive their doctors' honest opinions.

only speech that is also *treatment*.[9] Were it otherwise, AB 2098 would not threaten to discipline doctors for conveying "treatment *or advice*" deemed to constitute "false information that is contradicted by contemporary scientific consensus contrary to the standard of care." AB 2098 § 2(b)(3),(4) (emphasis added). If the legislature, in enacting AB 2098, did not intend to target speech (as opposed to merely conduct), it would not have needed to include the word "advice" alongside "treatment" in defining what is prohibited. That it chose to include this word—"advice"—is a matter of legal significance. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker,* 533 U.S. 167, 174 (2001)); *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.").

Under *Tingley* and *Conant*, laws that punish doctors for *advice*, which is speech and not conduct (especially in the context of this law that also includes the word *treatment*—the conduct), are subject to strict scrutiny. For the reasons stated in Plaintiffs' principal brief, AB 2098 cannot withstand such a searching inquiry. (*See* Plaintiffs' Br. at 20-21); *see also NAACP v. Button*, 371 U.S. 415, 438, 439 (1963) (explaining that the "State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights" and that "[b]road prophylactic rules in the area of free expression are suspect").

AB 2098's legislative history provides further evidence that it is not narrowly tailored to serve a compelling state interest. Rather, it is a thinly veiled attempt to silence perceived dissidents. Indeed, the original bill introduced to the state legislature sought to police the *public speech* of physicians on the topic of Covid-19. That attempt was abandoned in light of First Amendment Concerns. *See* Comm. on Bus. & Pros., Cal. State Assembly, Summary & Analysis of AB 2098, at 11 (Apr. 15, 2022), https://tinyurl.com/bdftnaek.

[9] Plaintiffs do not contest that *treatment* is subject to regulation (it already is under preexisting law), and that in treating patients, they are required to abide by the standard of care as the term is used in malpractice law.

Among the bases cited for enacting AB 2098 in its current form was the unsubstantiated claim that conspiracy theories abound "of everything from inventing or exaggerating the pandemic to suppressing natural remedies," as "[a]ntigovernment cynics and vaccine skeptics cohere to the opinions of those few physicians who will reinforce their beliefs as they seek to appeal to authority in service of their confirmation bias." Defs.' Req. for Judicial Notice ("RJN"), Ex. B, ECF 23-3, Assembly Comm. on Bus. & Prof. Report at 7 (Apr. 19, 2022).[10] The bill as originally drafted sought to silence dissent on matters related to Covid-19, including those experts that continue to vigorously debate such as the seriousness of the virus or efficacy of certain preventative measures, *outside of the context of the doctor-patient relationship.* And though the final product is less problematic than the bill first introduced, the intent betrayed by the legislative record is clearly to suppress core political speech and foreshadows AB 2098's future weaponization to silence doctors such as Plaintiffs. *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("Debate on public issues should be uninhibited, robust, and wide-open[.]"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.").

The bill's history also makes Plaintiffs' articulated fears of discipline under AB 2098 all the more warranted. In fact, Plaintiffs are not the only ones who perceive AB 2098 to be a tool for suppressing speech. As discussed more extensively in the principal brief, some of the bill's primary proponents, among them licensed physicians, have directly threatened to get Plaintiffs' licenses revoked using AB 2098. (*See* Plaintiffs' Br. at 11-12, Exhibits F-J). To give two examples, of which there are many, a Dr. Chris Hickie tweeted at Dr. Høeg, on October 19, 2022, "If you are still licensed in California on Jan 1, 2023, when AB 2098 becomes law, you are being reported to the Medical Board of California for spreading medical disinformation as a physician." (MPI,

[10] Defendants' RJN includes portions of the legislative record, which contain various unsubstantiated and inaccurate assertions that Defendants treat as uncontested fact. Along with those discussed *supra*, n.3, such assertions include that two to 12 million people in the United States did not get vaccinated because of Covid-19 misinformation and disinformation and that "individuals predisposed toward skepticism of the government and incredulity toward vaccines have sought to validate those views[.]" *See* RJN, Ex. B at 6-7. Plaintiffs do not accept these baseless contentions as fact.

Exhibit K). On November 1, 2022, Dr. Hickie tweeted, "Please ask @ABPMR and @ABMSCert to sanction Hoeg for disinformation in pediatrics, including COVID-19." (MPI, Exhibit L). Were AB 2098 as benign as Defendants portray it, other physicians familiar with the law would not think that its enactment will provide them with an opportunity to report Plaintiffs to disciplinary authorities in order to get their licenses taken away. In short, AB 2098 is facially unconstitutional, and the legislative record, which is revealing as to the law's true purpose, substantiates Plaintiffs' contentions.

III. PLAINTIFFS' DUE PROCESS ARGUMENT ALSO WARRANTS ISSUING A PRELIMINARY INJUNCTION

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim Because AB 2098 Is Unconstitutionally Vague

In their opening brief, Plaintiffs alleged that AB 2098 is unconstitutionally vague because the term "false information that is contradicted by contemporary scientific consensus contrary to the standard of care" is not further defined and is not definable in the context of a new virus such as Covid-19. Defendants refute this claim because "a practitioner of ordinary intelligence can distinguish between the situations covered by this provision (e.g., providing advice to one's patient about whether to receive the Covid-19 vaccines) from those that are not (e.g., publishing a journal in a scientific article about the effectiveness of the Covid-19 vaccines)." (Resp. Br. at 20).

Initially, Plaintiffs have attested under penalty of perjury that they do not know how to apply these terms to their practice, although they fear discipline under AB 2098 if they continue to communicate with patients as they have been, all of which results in a severe chilling effect. (*See* Høeg Decl., ¶¶13, 18, 21-22, 25, 30-31; Duriseti Decl., ¶¶7, 9, 13, 14, 16; Kheriaty Decl., ¶¶ 6, 7, 10, 14; Khatibi Decl., ¶¶27, 30-31; Høeg Supplemental Decl., ¶¶3, 7-10; Khatibi Supplemental Decl., ¶¶5-11). That Defendants fault them for failing to identify "whatever advice they intend to give contrary to the standard of care" (Resp. Br. at 9) misses the mark (and also is not accurate, *see supra*, Part I), given that one of Plaintiffs' key points is that they do not know what speech is permitted and what speech is prohibited. This lack of understanding is a direct result of the law's failure to define crucial terms. And if Plaintiffs—graduates from some of the top medical schools in the country and celebrated in their fields—are unable to discern the law's meaning and limits,

then surely it flunks the "practitioner of ordinary intelligence" test.

But this Court need not rely on Plaintiffs' attestations alone. A simple analysis of the statutory language establishes the law's unconstitutional vagueness. Plaintiffs discussed extensively in their opening brief the problematic nature of using the "contemporary scientific consensus" to assess the professionalism of physicians' conduct. (*See* Plaintiffs' Br. at 16-17, 22-23). In summary, the phrase raises more questions than it answers:

> [T]he term "scientific consensus" is undefined and, because it is ever-shifting, arguably undefinable. Is it the position of health authorities, and if so, state, local, or federal? Is it the position of a certain percentage of practicing doctors? What percentage? An absolute majority? A mere plurality? If a consensus is to be determined this way, how are Plaintiffs to know what the consensus stance is, given that there are not daily polls of all American (or California) physicians on every subject pertaining to Covid-19? Even if such a poll could theoretically be taken, can all doctors and scientists participate, or only those in certain fields? Or only those treating Covid-19 patients?

(*Id.* at 22).

That "standard of care" is included in the statute's definition of "misinformation" does not mean the law is not unconstitutionally vague. Under California law, "standard of care" includes following opinions of a "respectable minority" of physicians. *See, e.g.*, *Flores v. Liu*, 274 Cal. Rptr. 3d 444, 454 (Cal. Ct. App. 2021). In California, it is well established that "the mere fact that there is a disagreement within the relevant medical community does not establish that the selection of one procedure as opposed to the other constitutes ordinary medical negligence." *Mathis v. Morrissey*, 13 Cal. Rptr. 2d 819, 826 (Cal. Ct. App. 1992). In other words, one can meet the "standard of care" even though the majority of physicians disagrees with the adopted approach. *See Sim v. Weeks*, 45 P.2d 350, 354-55 (Cal. Ct. App. 1935) ("A charge of negligence in a choice of treatment is refuted, as a matter of law, by showing that a respectable minority of expert physicians approved the method selected."). Not only is following a "respectable minority" school of thought not considered to be a deviation from the standard of care, but the law is clear—a physician is not even required to inform the patient "of 'schools of thought' based upon views of

other health care providers because such duty 'would impose an excessively onerous burden upon treating physicians.'" *Parris v. Sands*, 25 Cal. Rptr. 2d 800, 803 (Cal. Ct. App. 1993) (quoting *Mathis*, 13 Cal. Rptr. 2d at 827). The traditional definition of "standard of care" recognizes that "[m]edicine is not a field of absolutes so different doctors may disagree in good faith upon what would encompass the proper treatment of a medical problem in a given situation." *Flores*, 274 Cal. Rptr. 3d at 453 (cleaned up). For these reasons, Plaintiffs do not challenge and have no quarrel with the well-established California law regarding the duty physicians owe their patients.

The strictures of AB 2098, however, go far beyond the traditional definition of "standard of care" by conflating that concept with "contemporary scientific consensus." The new law prohibits providing *information* that is contrary to "contemporary scientific consensus." Not only is the term ill-defined, but it leaves no room for different "schools of thought." In contrast to California's traditional recognition that "[m]edicine is not a field of absolutes so different doctors may disagree in good faith," *id.*, AB 2098 seeks to have all physicians fall in line with the government-approved view. And it does so in the context of a barely three-year-old virus and related disease that are far less well understood than older maladies. That is a crucial distinction from the examples Defendants provide, such as that apples contain sugar and measles is caused by a virus. (*See* Resp. Br. at 21). Thus, under AB 2098 a physician can simultaneously avoid committing malpractice (*i.e.*, meet the standard of care) *and* engage in "unprofessional conduct" simply because he is providing his good-faith opinion regarding efficacy or safety of Covid-19 vaccines or the drawbacks of masking children. It is AB 2098's divergence from the traditional definition of "standard of care," and application of that standard to *speech* as opposed to *conduct*, *see supra*, Part II, that makes Defendants' assurances that the new law does not fundamentally alter physicians' obligations entirely unconvincing.

Finally, Defendants obscure the difference between "standard of care" and "scientific consensus" by equating the terms: Misinformation is defined as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care." AB 2098 § (2)(b)(4). Contrary to Defendants' representations, this language does not treat the two as distinct concepts, *both* of which must be proven. (*See* Resp. Br. at 20). Rather, by using the two terms

without separation by a conjunction (here, "and") it suggests that "standard of care" and "scientific consensus" are synonymous. If the Legislature intended the law to require proof of two separate elements, then it ought to have made that clear; this is yet another strike against the law for vagueness.

B. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

To satisfy the irreparable harm requirement, Plaintiffs need only demonstrate that absent a preliminary injunction, they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). The deprivation of a constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *Associated Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm.").

That this statute violates Plaintiffs' due process rights is an irreparable harm in and of itself. Moreover, they have explained that they cannot treat patients to the best of their abilities while operating under AB 2098's restrictions, yet another injury that cannot be remedied with monetary damages.

C. The Balance of Equities and Public Interest Favor Appellants

A preliminary injunction is proper when "the balance of equities tips in [plaintiff's] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) ("[P]ublic interest lies in a correct application of the" law and "upon the will of the people ... being effected in accordance with [the] law"); *Republican Party of Minn. v. White*, 416 F.3d 738, 753 (8th Cir. 2005) ("It can hardly be argued that seeking to uphold a constitutional protection ... is not per se a compelling state interest."). Defendants have no legitimate interest in continuing to enforce and promote an unconstitutional initiative. Likewise,

the public has an interest in seeing Plaintiffs' constitutional rights vindicated. Accordingly, the balance of equities weighs solidly in Plaintiffs' favor.

CONCLUSION

For the other reasons stated in Plaintiffs' principal brief as well as those given herein, the Court should grant their request for preliminary injunctive relief as to AB 2098.

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Respectfully submitted,

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