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NCLA Amicus Brief Supports Doctors' Suits Against California Law Censoring Covid Medical Advice

Mark McDonald, et al. v. Kristina D. Lawson, et al.; Michael Couris, et al. v. Kristina D. Lawson, et al.

Washington, DC (February 10, 2023) – The New Civil Liberties Alliance has filed an [amicus curiae brief](#) in the U.S. Court of Appeals for the Ninth Circuit in support of plaintiffs challenging a California law. Assembly Bill 2098 empowers the Medical Board of California to discipline physicians who “disseminate” information regarding Covid-19 that departs from the “contemporary scientific consensus.” Last month, NCLA obtained a preliminary injunction on behalf of five doctors in a successful challenge to the same law in [Høeg, et al. v. Newsom, et al.](#) The State of California is not appealing that loss. It apparently prefers to defend appeals against the unsuccessful plaintiffs in *McDonald v. Lawson* (from the Central District of Calif.) and *Couris v. Lawson* (from a stay in the Southern District of Calif.). NCLA’s *amicus* brief will ensure that the Ninth Circuit sees the arguments that prevailed before Judge William Shubb in the Eastern District of Calif. in *Høeg v. Newsom*.

The stated purpose and legislative history of AB 2098, which went into effect January 1, 2023, establish that it was enacted to prevent doctors from speaking openly to patients about Covid-19 prevention and treatment if their views conflict with the government’s. The statute subjects doctors to discipline for disseminating “misinformation,” which it defines as “false information that is contradicted by contemporary scientific consensus contrary to the standard of care.” But the law provides no way to determine the meaning of contemporary scientific consensus. As the *Høeg* court recognized, the term “contemporary scientific consensus” is not only undefined in the law, but undefinable, especially in the context of a new illness like Covid-19, in which the science is constantly evolving. Physicians in California cannot possibly know what the scientific consensus is at any given moment, making them fearful of being honest with patients. This quandary chills physicians’ speech, preventing them from advising patients to the best of their ability and jeopardizing the venerable doctor-patient relationship.

The law’s vagueness also infringes California physicians’ Fourteenth Amendment right to due process of law. AB 2098 does not treat “contradicted by contemporary scientific consensus” and “contrary to the standard of care” as distinct concepts, each of which must be proven. Rather, the terms are used without a conjunction, which suggests they are synonymous. The *Høeg* court called this provision “grammatically incoherent.” The law, as written, does not provide a discernible standard by which doctors can operate medical practices and treat patients.

NCLA’s brief argues that the Ninth Circuit should also reject the *McDonald* court’s fatally flawed First Amendment analysis, which ignored the law’s severe viewpoint-discriminatory aspect. The district court also conflated *speech* with *conduct* and disregarded precedent from the Ninth Circuit and the Supreme Court on that distinction. Because the new law is unconstitutionally vague and viewpoint discriminatory, NCLA urges the U.S. Court of Appeals for the Ninth Circuit to reverse the district court and enter a preliminary injunction.

NCLA released the following statements:

“California’s AB 2098 is nothing more than an intimidation measure designed to silence physicians who dare to express dissent from the State on Covid-19. The *Høeg* court saw that the ‘grammatically incoherent’ statute seeks

to confuse doctors so that they refrain from speaking rather than risk losing their licenses. The Ninth Circuit should likewise recognize how impossible it is for California doctors to discern what the contemporary scientific consensus is about Covid-19 at any point in time.”

— **Jenin Younes, Litigation Counsel, NCLA**

“A law like AB 2098 which aims to suppress speech and interfere with doctors’ ability to provide honest advice to their patients, cannot stand. California’s doctors and patients deserve better.”

— **Greg Dolin, M.D., Senior Litigation Counsel, NCLA**

For more information visit the *amicus* brief page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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