Nos. 22-56220, 23-55069

In the United States Court of Appeals for the Ninth Circuit

MARK MCDONALD AND JEFF BARKE,
Plaintiffs-Appellants,

v.

KRISTINA D. LAWSON, *et al.*,
Defendants-Appellees.

AND

MICHAEL COURIS, *et al.*,
Plaintiffs-Appellants,

v.

KRISTINA D. LAWSON, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Courts for the Central District of California, No. 8:22-cv-1805 *and* the Southern District of California, No. 3:22-cv-1922

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the New Civil Liberties Alliance certifies that it is a nonprofit organization, has no parent corporation and has no shares or securities that are publicly traded.

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and freedom of speech. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—because legislators, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA is deeply concerned about the degradation of free speech protections in recent years. One of the most insidious manifestations of this trend has arisen in the context of Covid-19 related subjects: state and federal government officials have, throughout the pandemic, attempted to silence perspectives that differ from government-sanctioned views on topics ranging from naturally acquired immunity to the virus's fatality rate to lockdowns and mask and vaccine mandates. The result has been to stifle the debate that should have taken place in a healthy democracy. Speech suppression, in turn, may well have led to adopting harmful policies predicated on the appearance of an artificially manufactured "scientific consensus" that did not actually exist.

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus* paid for this brief's preparation or submission. All parties have consented to filing of this brief.

California Assembly Bill (AB) 2098[2]—the law at issue in this case—took effect January 1, 2023, and exemplifies this suppression of speech. NCLA represents five California physicians who have filed a First Amendment and Due Process of law (vagueness) challenge to the same statute in the Eastern District of California. Last month, that court preliminarily enjoined the law in question as to those plaintiffs and others in a related case. *Høeg v. Newsom*, __ F. Supp. 3d __, Nos. 22-cv-01980, 22-cv-02147, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023). The State has conveyed to media outlets that it does not plan to appeal Judge Shubb's injunction. *See* Jennifer Henderson, *California's Medical Misinformation Law Facing Legal Challenges*, MEDPAGETODAY (Feb. 3, 2023), https://bit.ly/3RM3jdE.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

"Throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities[.]" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) ("*NIFLA*") (internal citations and quotation marks omitted). One need look no further than AB 2098 to find a statute purposefully designed to "manipulate the content of doctor-patient discourse" in order to "increase state power" and "suppress minorit[y]" views. *Id.*

Governor Gavin Newsom signed AB 2098 into law on September 30, 2022. The law empowers the Medical Board of California ("Board") and the Osteopathic Medical

[2] 2022 Cal. Legis. Serv. Ch. 938 (AB 2098) (West) (codified at Cal. Bus. & Prof. Code § 2270 (West 2022)).

Board of California to discipline physicians who "disseminate" "misinformation" about Covid-19 in the context of the doctor-patient relationship. *See* AB 2098 § 2(a).

Section 1 of the statute lays out the ostensible justification for its enactment: reduction of Covid-19's death toll; promotion of Centers for Disease Control and Prevention ("CDC") data showing that unvaccinated individuals are at significantly higher risk of dying than those who are vaccinated; bolstering the public confidence that was allegedly weakened[3] by spread of "misinformation" and "disinformation" about Covid-19 vaccines; and punishing health care professionals who, according to "[m]ajor news outlets," are "some of the most dangerous propagators of inaccurate information regarding the COVID-19 vaccines." *Id.* § 1.

To carry out these goals, Section 2 deems it "unprofessional conduct for a physician and surgeon to disseminate misinformation or disinformation related to COVID-19, including false or misleading information regarding the nature and risks of the virus, its prevention and treatment; and the development, safety, and effectiveness of COVID-19 vaccines." Cal. Bus. & Prof. Code § 2270(a).

The statute defines "misinformation" as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care," *id.* § 2270(b)(4), but it neither defines nor explains the meaning of "contemporary scientific consensus." "Disseminate" is defined as "the conveyance of information from the licensee to a

[3] The section fails to mention what, specifically, public confidence was weakened in.

patient under the licensee's care in the form of treatment or advice." *Id.* § 2270(b)(3).

AB 2098's chief proponent, the California Medical Association, argued that this law is needed because of physicians who "call[] into question public health efforts such as masking and vaccinations." Assem. Comm. on Bus. & Pros., Analysis of Assem. Bill No. 2098, at 10 (Cal. 2021-2022 Reg. Sess.), as introduced Feb. 14, 2022. Likewise, the bill analysis from the Senate Committee refers to the problem of "misinformation about the safety and effectiveness of the COVID-19 vaccine and the use of masks for prevention." S. Comm. on Bus., Pros. & Econ. Dev., Analysis of Assem. Bill No. 2098, at 4 (Cal. 2021-2022 Reg. Sess.), as amended June 21, 2022.

Several California physicians have challenged AB 2098 in four separate federal lawsuits, all raising First Amendment and Due Process of law (vagueness) claims and moving for preliminary injunctions, with conflicting results to date. *See Høeg*, 2023 WL 414258, at *12 (holding that law is unconstitutionally vague and granting plaintiffs' motion for preliminary injunction); CourisER-3–4 (staying case pending Ninth Circuit ruling in the present case); [4] McDonaldER-3–32 (denying motion for preliminary injunction on ground that plaintiffs were unlikely to succeed on the merits of their claims).[5]

[4] "CourisER" refers to Couris's excerpts of the record in Appeal No. 23-55069; "McDonaldER" refers to McDonald's excerpts of the record in Appeal No. 22-56220.
[5] The *Couris* Plaintiffs argued that the stay amounted to a denial of the motion, and on that basis appealed to this Court, where their case has been consolidated with *McDonald*. *See* Dkt. 5 at 2.

Standing

Plaintiffs have Article III standing to bring their claims, as the *McDonald* court below correctly held, because they have been injured by AB 2098. First, they have raised concerns about the Covid-19 vaccines with patients in the past and made recommendations with respect to Covid-19 treatment and prevention that differ from the CDC's and the State of California's articulated policies. *See* McDonaldER-9–13. The court recognized that such advice appeared to be the type of speech that AB 2098 seeks to deter. *See Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (holding that plaintiff's members who "maintain[ed] polices that '[were] presently in conflict with' [the challenged California Assembly Bill]" had "articulated a concrete plan to violate it") (quoting *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1237 (9th Cir. 2018)). Likewise, California has not disavowed enforcement of AB 2098 against Plaintiffs, even during the pendency of this litigation, a further indication that they are suffering an ongoing injury-in-fact. McDonaldER-12. These circumstances have had a chilling effect on Plaintiffs' communications with their patients, to which they have attested, further substantiating their claims to have Article III standing. McDonaldER-46–58; CourisER-76–84.

Viewpoint Discrimination

This Court should reject *McDonald*'s fatally flawed First Amendment analysis, which conflated *speech* with *conduct*, ignored the grave viewpoint discrimination concerns the law presents, and stands at odds with recent binding precedent from this Court and

the Supreme Court. McDonaldER-3–32; *see also NIFLA*, 138 S. Ct. at 2371 ("[T]his Court has not recognized 'professional speech' as a separate category of speech" subject to different rules); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022) (differentiating speech that itself constitutes medical treatment and thus may be regulated from "pure" speech, including advice and recommendations, which the First Amendment fully protects); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (holding that First Amendment prohibits government from disciplining doctors for recommending, as opposed to prescribing, medical marijuana; such professional speech is "entitled to 'the strongest protection our Constitution has to offer'") (quoting *Florida Bar v. Went For It, Inc.*, 515 US. 618, 634 (1995)).

The purpose and effect of AB 2098 is to silence doctors who dissent from the State's opinions and approaches on Covid-19-related matters; any contention to the contrary by the State is disingenuous. The law's suppressive purpose may be discerned from its language and the legislative record, as well as from documented threats that the *Høeg* plaintiffs have received from other doctors on social media who played a crucial role in AB 2098's passage. *See* Notice of Motion and Memorandum in Support of Motion for Preliminary Injunction at 11-13, *Høeg v. Newsom*, __ F. Supp. 3d __, Nos. 22-cv-01980, 22-cv-02147, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023), ECF No. 5.

Vagueness

The district court in *Høeg* correctly held that AB 2098—specifically its definition of "misinformation"—is unconstitutionally vague and thus contravenes the Fourteenth

Amendment's Due Process requirements. *Høeg*, 2023 WL 414258, at *7-10. *Amicus curiae* urges this Court to adopt Judge Shubb's reasoning, which was doctrinally sound, in contrast to the *McDonald* court's cramped analysis.

As the *Høeg* court recognized, the term "contemporary scientific consensus" is not only undefined in the law but undefinable, particularly in the context of a new virus where the "scientific consensus" has rapidly evolved and changed. *Id.* at *9. Physicians in California cannot possibly know what the "scientific consensus" is on any particular day, making them fearful of providing their best professional and honest advice and making individualized recommendations to their patients. The addition of the phrase "contrary to the standard of care" does not save the statute from unconstitutional vagueness. Rather, it makes it even *less* understandable because, as the *Høeg* court recognized, the locution employed by the California legislature is "grammatically incoherent." *Id.* at *10.

In sum, AB 2098 is an alarming law masquerading as a reasonable regulation of professional conduct. If upheld, it will set a dangerous precedent. It vests the State with power to serve as a final arbiter of truth and empowers those who seek to quash dissenting medical opinions with legal tools to carry out their censorious mission. Moreover, it has the insidious effect of fracturing trust between patients and their personal physicians. California doctors now fear providing patients with their honest opinions on Covid-related matters, and therefore patients can no longer be assured that they are receiving their physicians' learned, individualized advice, as opposed to State-

approved shibboleths. In sum, the law discriminates based on the speaker's viewpoint, is unconstitutionally vague, and jeopardizes the sacred doctor-patient relationship. Accordingly, *amicus curiae* urges this Court to reverse the district court's denial of Plaintiffs-Appellants' motion for a preliminary injunction.

ARGUMENT

I. THE PLAINTIFFS HAVE STANDING TO BRING THIS CASE[6]

An Article III 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 act in a manner likely to be deemed a violation of 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)). Especially when the law is unconstitutionally vague and so plaintiffs allege they are not entirely sure what conduct or speech it proscribes—as Plaintiffs allege here—they need only show it is

[6] The court below ultimately found that Plaintiffs possessed standing after they amended their complaint, but because the case was initially dismissed with leave to amend for lack of standing, *see* McDonaldER-33–44, *amicus curiae* is reinforcing it.

"plausible that the Boards will determine that their conduct violates AB 2098." *Høeg*, 2023 WL 414258, at *4 .

This Court in *Tingley* held that the plaintiff possessed standing to challenge a Washington State law prohibiting licensed therapists from practicing conversion therapy on minors. 47 F.4th at 1069. 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. This Court rejected Washington State's arguments that the plaintiff was required to provide greater specificity, such as "'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).

Here, and as the *McDonald* court correctly held in its second opinion, Plaintiffs plausibly established a concrete plan to act in a manner likely to be deemed a violation of the law. They attested to having raised concerns with patients about Covid-19 vaccines, "a position in tension with AB 2098's legislative findings that the safety and efficacy of COVID-19 vaccines have been confirmed, and reduce the risk of death elevenfold," and had made recommendations to patients that were not aligned with the position of the CDC and the State of California. *See* McDonaldER-9–12 (internal citations and quotation marks omitted); *see also Høeg*, 2023 WL 414258, at *3-4 (explaining that plaintiffs' attestations to having provided patients with advice about risks of vaccines and boosters, as well as detriments of masking, and articulated intent

to continue doing so, established a concrete plan to violate the law). No greater particularity was required. *See Tingley*, 47 F.4th at 1068.

The second component of the injury-in-fact inquiry necessitates a showing that enforcement authorities have communicated a specific warning or threat to initiate proceedings. *Id.* at 1067. "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*, 996 F.3d at 653. "[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.'" *Tingley*, 47 F.4th 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" fulfills this requirement. *Id.*; *see Index Newspapers v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) ("As the Supreme Court has recognized, a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury.") (quoting *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)).

The district court rightly held that Plaintiffs satisfied this component, since the State neither displayed nor asserted an intent to refrain from enforcing AB 2098 against them during litigation, warranting a presumption that they faced prosecution beginning January 1, 2023. *See* McDonaldER-9–12; *see also Høeg*, 2023 WL 414258, at *4 ("Based

on plaintiffs' explanations of the advice and treatment they provide contrary to public health recommendations, it is plausible that the Boards will determine that their conduct violates AB 2098. This fear is especially reasonable given the ambiguity of the term 'scientific consensus' and of the definition of 'misinformation' as a whole.").

The *McDonald* court recognized that, according to their declarations, AB 2098 "will force [plaintiffs] to choose between providing their best medical judgment and censoring that judgment to comply with the law," which further substantiated their claim to have standing. McDonaldER-12; *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("[W]hen 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.").

As further evidence that AB 2098's enactment inflicted an injury-in-fact on Plaintiffs, doctors explicitly threatened to use the new law to revoke the licenses of the *Høeg* plaintiffs, who expressed disfavored views on Covid-19-related subjects. Notably, many of these threatening doctors belong to a nonprofit organization called "No License for Disinformation" ("NLFD"), which was among AB 2098's primary proponents and key to its passage. *See* Notice of Motion and Memorandum in Support of Motion for Preliminary Injunction, *supra*, at 11-13.

That bears on the question of whether enforcement authorities communicated "a specific warning or threat to initiate proceedings" in two ways. First, it provides evidence that some of the bill's crafters understood it to apply to physicians like

Plaintiffs who have, for example, advised patients belonging to certain demographics to refrain from getting vaccinated. McDonaldER-47, -55. Second, these intimidation tactics have naturally contributed to the chilling effect on physicians, as Dr. Høeg especially has attested; she even worries that a decoy patient will be sent to her office to get her in trouble. *See* Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction at 5-7, *Høeg v. Newsom*, __ F. Supp. 3d __, Nos. 22-cv-01980, 22-cv-02147, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023), ECF No. 26. Indeed, Plaintiffs in this case have declared, under penalty of perjury, that they fear discipline and even loss of their medical licenses should they continue to communicate with their patients on Covid-19 related subjects freely and honestly as they have in the past. McDonaldER-51, 57; CourisER-75–79; *see also Høeg*, 2023 WL 414258, at *4 ("Some of the physician plaintiffs intend to continue providing such advice and treatment to patients in the future [as in the past]. Others indicate that their conduct will be chilled by AB 2098."). Given the above-described environment, this concern is entirely reasonable.

Finally, since this was a pre-enforcement challenge, and a court preliminarily enjoined the law three weeks after it took effect, the third part of the injury inquiry—history of enforcement—carries "little weight." *Tingley*, 47 F.4th at 1069; *see also Høeg*, 2023 WL 414258, at *4 ("AB 2098 has been in effect for less than a month, and this action was initiated prior to AB 2098 coming into effect. Unsurprisingly, the parties have presented no history of enforcement.").

II. THE DISTRICT COURT'S HOLDING THAT PLAINTIFFS WERE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM MISAPPREHENDED THE PREVAILING CASE LAW

Laws that discriminate based on viewpoint—that punish expression of certain ideas or opinions—are presumptively unconstitutional. *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in judgment) ("[T]he essence of viewpoint discrimination" is legal prohibitions that "reflect[] the Government's disapproval of a subset of messages it finds offensive."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (holding that viewpoint discrimination is an "egregious form of content discrimination" and therefore "presumptively unconstitutional"); *Child. of the Rosary v. City of Phoenix*, 154 F.3d 972, 980 (9th Cir. 2019) (explaining that viewpoint discrimination exists when "the government targets … particular views taken by speakers on a subject") (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)). This near-blanket prohibition on viewpoint discrimination reflects the fundamental principle that governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *NIFLA*, 138 S. Ct. at 2371 (internal citations and quotation marks omitted).

AB 2098's text and legislative history establish that it is a thinly veiled attempt to silence dissidents and therefore presumptively contravenes First Amendment strictures. The bill as originally drafted sought to stamp out physicians' airing of state-unapproved views on matters related to Covid-19 in public appearances and on social media. Both

as initially drafted and in its final form, the bill applied to communications on subjects such as the efficacy of masks and vaccines—matters over which experts continue to vigorously disagree even *to the present day*. *See* Jacob Sullum, *Surprise: The CDC Grossly Exaggerated the Evidence for Mask Mandates*, N.Y. POST (Feb. 7, 2023), https://bit.ly/3YyKmxc. In an unsuccessful effort to alleviate First Amendment concerns, the legislature redrafted AB 2098 to apply only in the context of the doctor-patient relationship. *See* Assem. Comm. on Bus. & Pros., Analysis of Assem. Bill No. 2098, *supra*, at 11. Though the final product is somewhat less problematic than the initial version, the legislative record betrays an intent to suppress core political speech and foreshadows AB 2098's future weaponization to silence doctors such as Plaintiffs.

The language of the statute itself further reveals its viewpoint-discriminatory nature. AB 2098 describes as the rationale for its enactment the ostensibly eleven-times-greater risk of dying of Covid-19 among the unvaccinated,[7] which is allegedly exacerbated by the spread of "misinformation," "disinformation," and "false and misleading information" about the "nature and risks of the virus, its prevention and treatment; and the development, safety, and effectiveness of COVID-19 vaccines." Cal. Bus. & Prof. Code § 2270(a). Parts of the legislative record depict the law as designed to address the "problem" of doctors who "call[] into question public health efforts such

[7] Countless Americans with naturally acquired immunity question this figure. *See* Hiam Chemaitelly, *et al.*, *Protection from Previous Natural Infection Compared with mRNA Vaccination*, 3 LANCET MICROBE 944 (2022) (finding vaccinated people are *at least three times* as likely to become infected with Covid-19 as unvaccinated with prior infections).

as masking and vaccinations" as well as the "problem" of "misinformation about the safety and effectiveness of the COVID-19 vaccine and the use of masks for prevention." Assem. Comm. on Bus. & Pros., Analysis of Assem. Bill No. 2098, *supra*, at 10. One reason cited for enacting AB 2098 in its current form was the unsubstantiated claim that conspiracy theories abound regarding "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." *Id.* at 7.

In other words, the Act is explicit in stating its purpose and effect—suppression of speech that, according to the State, leads the public to mistrust government pronouncements. Leaving aside the fact that these pronouncements allegedly backed up by "scientific consensus" have changed numerous times over the course of the pandemic, *compare* Brit McCandless Farmer, *March 2020: Dr. Anthony Fauci Talks with Dr Jon LaPook About COVID-19*, CBS NEWS (Mar. 8, 2020), https://cbsn.ws/3Yh2uMq ("[P]ublic health officials have been clear: Healthy people do not need to wear a face mask to protect themselves from COVID-19."), *with* Jade Scipioni, *Dr. Fauci Says Masks, Social Distancing Will Still Be Needed After a Covid-19 Vaccine—Here's Why*, CNBC MAKE IT (Nov. 16, 2020), https://cnb.cx/3XlbdvE ("Those fundamentals [of Covid prevention] include: universal wearing of masks …."), the First Amendment's entire *raison d'être* is to prevent the government from stifling speech that might cause citizens

to question government's actions. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (the First Amendment "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."); *Creighton v. City of Livingston*, 628 F. Supp. 2d 1199, 1214 (E.D. Cal. 2009) ("[S]tatements concern[ing] the functioning of government and public health and safety issues … are entitled to the highest degree of First Amendment protection.").

The apparent aim of the law is to silence doctors who, for example, question the efficacy of masks, advise certain patients not to get vaccinated, or tell patients belonging to various demographics that Covid-19 infections do not present a serious risk to them. There could hardly be a clearer example of a viewpoint-discriminatory law. *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 or force citizens to confess by word or act their faith therein."). Indeed, the district court itself stated the fact that Plaintiffs had raised concerns about the vaccines and had differed from the CDC and the State of California on various Covid-related subjects furnished them with standing. McDonaldER-32. In other words, the court recognized that expression of these viewpoints was precisely

what the law seeks to silence.[8] *See also Høeg*, 2023 WL 414258, at *3-4 (finding that plaintiffs had standing because they had advised patients against wearing masks and about detriments of vaccines and boosters, which implied that speech was proscribed by the statute).

The district court in this case mistakenly concluded that AB 2098's viewpoint discriminatory nature was not relevant, because the law regulates *medical treatment* and its effect on speech is merely incidental. McDonaldER-19–23. To the contrary, the governing jurisprudence unequiviocally establishes that AB 2098 implicates speech *qua* speech—*i.e.*, physicians' advice and recommendations—that both this Court and the Supreme Court recognize receive the full panoply of First Amendment protections.

In *NIFLA*, the Supreme Court expressly rejected a claim that "professional speech" gets a reduced level of First Amendment protection: "[T]his Court has never recognized 'professional speech' as a separate category of speech" subject to different rules and "speech is not unprotected merely because it is uttered by professionals." 138 S. Ct. at 2371-72. While casting disapproval on such an exception to the First Amendment, the Court explicitly criticized *Pickup v. Brown*, 740 F.3d 1208 (9th Cir.

[8] That many of the people responsible for getting this bill written and through the legislature have threatened to use it to revoke medical licenses of physicians similarly situated to Plaintiffs (*see supra*, Part I) supplies additional evidence that the law means to suppress dissent from state orthodoxy. Were AB 2098 truly benign, physician scolds familiar with it would not think that its enactment provides them an opportunity to report physician Plaintiffs to disciplinary authorities and strip their medical licenses.

2014), which involved a challenge to a California law prohibiting licensed mental health proivders from performing gay conversion therapy on minors. *See NIFLA*, 138 S. Ct. at 2371.[9]

Though this Court subsequently upheld an almost identical law from Washington State in *Tingley*, it did so by distinguishing medical treatment that incidentally involves speech—in that case, conversion therapy—from doctors' recommendations and advice, which are "pure" speech and not subject to reduced protection under the First Amendment. *See Tingley*, 47 F.4th at 1081-83 (holding that the speech is the treatment because "psychotherapy … uses words to treat ailments"); *see also Conant*, 309 F.3d at 636-37 (holding that a federal policy prohibiting doctors from recommending medical marijuana to patients violated the First Amendment).

What saved the Washington statute in *Tingley* was that it *expressly* exempted speech itself: Under the law, therapists could still "discuss conversion therapy with patients, recommend that patients obtain it (from unlicensed counselors, from religious leaders, or from out-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). That exemption avoided any conflict with *NIFLA* and *Conant*: "We distinguished prohibiting doctors from treating patients with

[9] *NIFLA* abrogated *Pickup*'s professional speech holding. *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[.]").

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).

Courts are highly protective of speech uttered in the context of the doctor-patient relationship for good reason: physicians simply cannot do their jobs if being candid with their patients about prevention and treatment methods could lead to professional discipline. *See Conant*, 309 F.3d at 637 ("Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege."); *see also NIFLA*, 138 S. Ct. at 2374 ("'Take medicine, for example. 'Doctors help patients make deeply personal decisions, and their candor is crucial.'") (quoting *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017)).

The district court's determination here arose from inherently flawed reasoning, as it confused *conduct* with *advice* and in doing so, failed to follow *NIFLA, Tingley*, and *Conant*. Unlike the law in question in *Tingley*, AB 2098 obviously targets speech itself, rather than only speech that is incidental to treatment. 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." Cal. Bus. & Prof. Code § 2270(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.").

In short, AB 2098 is facially unconstitutional under the First Amendment, and its own language as well as the legislative history reveal the law's true purpose, which substantiates Plaintiffs' position.

III. AB 2098 VIOLATES PLAINTIFFS' FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BECAUSE IT IS UNCONSTITUTIONALLY VAGUE

Due process of law requires legal prohibitions to be clearly defined. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws may trap the innocent by failing to provide fair warning and lead to arbitrary and discriminatory enforcement by delegating basic policy decisions to police, judges, and juries. *Id.* at 109. A law is vague if it "does not give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* at 108-09; *see also Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391

(1926) ("[D]ue process clause requires a statute to be sufficiently clear so as not to cause persons of common intelligence … [to] guess at its meaning and differ as to its application[.]"); *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1995) ("A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited.").

Vague laws are of particular concern when they implicate speech because they "operate[] to inhibit the exercise of" First Amendment rights; put otherwise, they have a chilling effect. *Grayned*, 408 U.S. at 109 (quoting *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961)); *see also Gammoh v. City of La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005) ("A greater degree of specificity and clarity is required when First Amendment rights are at stake."). Where a statute "clearly implicates free speech rights," a facial vagueness challenge is appropriate. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). It is sufficient that the challenged statute regulates and potentially chills speech that, in the absence of any regulation, receives some First Amendment protection. *Id.* In the vagueness inquiry, the requirement that laws be precise is aimed at preventing "chill"; *i.e.*, a situation where citizens will steer far wider than necessary to avoid engaging in prohibited speech rather than risk sanctions. *Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158 (C.D. Cal. 2009).

AB 2098's definition of "misinformation"—that which must not be disseminated to patients—is unconstitutionally vague. Initially, and as the *Høeg* court recognized, the concept of a "contemporary scientific consensus" on a subject such as

Covid-19, where the "science" is constantly evolving, is a misnomer. As the court pointed out:

> [W]ho determines whether a consensus exists to begin with? If a consensus does exist, among whom must the consensus exist (for example practicing physicians, or professional organizations, or medical researchers, or public health officials, or perhaps a combination)? In which geographic area must the consensus exist (California, or the United States, or the world)? What level of agreement constitutes a consensus (perhaps a plurality, or a majority, or a supermajority)? How recently in time must the consensus have been established to be considered "contemporary"? And what source or sources should physicians consult to determine what the consensus is at any given time (perhaps peer-reviewed scientific articles, or clinical guidelines from professional organizations, or public health recommendations)? The statute provides no means of understanding to what "scientific consensus" refers.

Høeg, 2023 WL 414258, at *8; *see also Cohen v. California*, 403 U.S. 15, 25 (1971) ("'[D]isturb[ing] the peace … by … offensive conduct' failed to give sufficient notice as to what was prohibited"); *Thomas v. Collins*, 323 U.S. 516, 535 (1945) (striking down state statute that failed to distinguish between union membership, solicitation, and mere discussion or advocacy, leaving "no security for free discussion"); *Conant*, 309 F.3d at 639 ("[T]he government has been unable to articulate exactly what speech is prescribed … . Thus, whether a doctor-patient discussion of medical marijuana constitutes a 'recommendation' depends largely on the meaning the patient attributes to the doctor's words. This is not permissible … ."); *Wunsch*, 84 F.3d at 1119 ("Clearly, 'offensive personality' is an unconstitutionally vague term in the context of this statute").

Indeed, the traditional approach in California has been to eschew the idea that physicians must abide by a supposed "consensus": "[m]edicine is not a field of absolutes, so different doctors may disagree in good faith." *Flores v. Liu*, 274 Cal. Rptr. 3d 444, 454 (Cal. Ct. App. 2021) (citation omitted). Yet, eschewing this wisdom, AB 2098 seeks to have all California physicians simply parrot government-approved mantras, even in the context of a barely three-year-old virus and related disease that are far less understood than older maladies. That is a crucial distinction from the examples the State has provided, such as that apples contain sugar or measles is caused by a virus. *See Høeg*, 2023 WL 414258, at *9 (distinguishing State's examples from Covid-19, which "scientists have only been studying for a few years, and about which scientific conclusions have been hotly contested. COVID-19 is a quickly evolving area of science that in many aspects eludes consensus."). In short, "contemporary scientific consensus" "does not have an established technical meaning in the medical community," certainly not with a new disease, so "physician plaintiffs are unable to determine if their intended conduct contradicts the scientific consensus, and accordingly 'what is prohibited by the law.'" *Id.* at *7, *9 (quoting *Tingley*, 47 F.4th at 1089).

Nor is that the only problem with the statute. The phrase "false information that is contradicted by contemporary scientific consensus contrary to the standard of care" is "grammatically incoherent," *id.* at *10, and fails to provide doctors with a discernible standard by which they can operate medical practices and treat patients. The *McDonald*

court's conclusion that AB 2098's definition of "misinformation" was not unconstitutionally vague misread the statute. The court construed the law to require the State to prove three separate elements in order to discipline a doctor: (1) that information is false; (2) that it contradicts the scientific consensus; *and* (3) that it is contrary to the standard of care. McDonaldER-13–17. Because physicians already must abide by the standard of care, the definition of "misinformation" is not impermissibly vague, the court declared. McDonaldER-16–17.

But as the *Høeg* court recognized, that interpretation was based on inserting punctuation or conjunctive terms into the statute that are not, in fact, present. *See* 2023 WL 414258, at *10 ("If the Legislature meant to create two separate requirements, surely it would have indicated as much—for example, by separating the two clauses with the word 'and,' or at least with a comma."). Put otherwise, AB 2098 does not treat "contradicted by contemporary scientific consensus" and "contrary to the standard of care" as distinct concepts, both of which must be proven. Rather, by using the two terms without separation by a conjunction (here, "and") it has created a meaningless (or, in the *Høeg* court's words, "grammatically incoherent") term. If the Legislature intended to require proof of two separate elements, then it ought to have made that clear; its failure to do so further proves the law is unconstitutionally vague. *See ibid.* ("[T]he inclusion of the term 'standard of care' only serves to further confuse the reader. … [T]o qualify as 'misinformation,' the information must be 'contradicted by contemporary scientific consensus contrary to the standard of care' … . It is impossible

to parse the sentence and understand the relationship between the two clauses[.]").

Assuming *arguendo* that the *McDonald* court had the authority to alter the statute's language—it did not—defining "misinformation" to cover only speech that is "contradicted by contemporary scientific consensus" *and* "contrary to the standard of care" does not save the law. First, separating the phrases with an "and" does not clarify the meaning of "contemporary scientific consensus." Second, it is not at all obvious why the addition of "and" is any more appropriate than the addition of the word "or." Though inserting either word would render the statute more grammatically palatable, "or" appears more plausible because the addition of "and" renders the new prohibition superfluous and thus legally meaningless, since doctors already must abide by the standard of care. Yet, all evidence suggests that the California Legislature meant AB 2098 to have an effect beyond just reiterating the non-controversial proposition that doctors must practice medicine in accordance with the standard of care.

In short, the *McDonald* court's construction of "misinformation" in AB 2098 flies in the face of common sense, especially when read in light of AB 2098's stated purpose and its legislative history.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court in *McDonald*, grant Plaintiffs' motion for a preliminary injunction, and remand these cases to their respective district courts so that Plaintiffs may prosecute their claims.

February 9, 2023

Respectfully submitted,

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9th Cir. Case Number(s) 22-56220; 23-55069

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