LAURA B. POWELL (SBN 240853)
2120 Contra Costa Blvd. #1046
Pleasant Hill, CA 94523
Telephone: (510) 457-1042
laura@laurabpowell.com

GREGORY DOLIN (*Pro Hac Vice*)
greg.dolin@ncla.legal
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: (202) 869-5210
Facsimile: (202) 869-5238

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**, members of the Medical Board of California, in their official capacities; and **ROB BONTA**, Attorney General of California, in his official capacity, *Defendants*.	**Case No. 2:22-cv-1980-WBS-AC** **Memorandum in Support of Motion for Summary Judgment**

NOTICE OF MOTION AND MOTION TO THE HONORABLE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that pursuant to scheduling order entered on May 12, 2023, *see* ECF 47, on January 8, 2024, at 10:00 a.m., Plaintiffs hereby move for summary judgment against Defendants. As explained in detail in the accompanying memorandum, AB 2098 is facially unconstitutional under the First Amendment because it imposes a viewpoint-based restriction on Plaintiffs' speech, and additionally because it is void for vagueness, violating their Fourteenth Amendment rights to due process of law. Accordingly, this Court should grant Plaintiffs summary judgment and permanently enjoin Defendants from enforcing AB 2098.

DATED: September 29, 2023 /s/ *Gregory Dolin*

Gregory Dolin
Attorney for Plaintiffs

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INTRODUCTION

Plaintiffs Drs. Tracy Høeg, Ram Duriseti, Aaron Kheriaty, Pete Mazolewski and Azadeh Khatibi move for summary judgment in their favor. On January 25, 2023, this Court granted Plaintiffs' motion for a preliminary injunction (ECF 35), holding that the challenged law's definition of "misinformation" was unconstitutionally vague, so they had a substantial likelihood of success on the merits of their challenge, and that they had established the other elements necessary to obtain this relief. *Høeg v. Newsom*, __ F. Supp. 3d ___, Nos. 22-cv-01980, 22-cv-02147, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023). Because the parties do not dispute the material facts, and the only points of contention are legal interpretations, Plaintiffs are entitled to summary judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

The parties agree on the pertinent facts: Assembly Bill (AB) 2098, signed into law on September 30, 2022, and effective January 1, 2023[1] empowers the Medical Board of California and the Osteopathic Medical Board of California[2] (collectively "the Board") to discipline physicians who "disseminate" "misinformation" to patients about Covid-19 in the form of "treatment or advice." Cal. Bus. & Prof. Code § 2270(a). "Misinformation" is defined as "false information that contradicts the contemporary scientific consensus contrary to the standard of care." *Id.* § 2270(b)(4). Plaintiffs are five allopathic physicians licensed by the Board to treat patients in the state of California.

[1] In California, "non-urgent" statutes go into effect on the January 1 following the enactment date. Cal. Const. art. IV, § 8(c). Of course, this Court enjoined the law as to Plaintiffs in this and its companion case, *Hoang v. Bonta*, __ F. Supp. 3d __, No. 22-cv-02147, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023), on January 25, 2023.

[2] The Osteopathic Medical Board licenses and regulates physicians who hold a Doctor of Osteopathy (D.O.) degree, while the Medical Board licenses and regulates allopathic physicians who hold the "M.D." degree. Though the distinctions between the two degrees have historical roots, in modern practice, these distinctions have all but disappeared and both types of physicians practice the full range of medical specialties and are subject to nearly identical licensure and disciplinary requirements and processes. *See* Cal. Bus. & Prof. Code § 2453(a) ("It is the policy of this state that holders of M.D. degrees and D.O. degrees shall be accorded equal professional status and privileges as licensed physicians and surgeons."); *Osteopathic Physicians & Surgeons of Cal. v. Cal. Med. Ass'n*, 224 Cal. App. 2d 378, 397 (Ct. App. 1964) ("[D]octors of osteopathy receive training and education equal in all respects to allopathic medicine. Under the law (Medical Practice Act), licensed osteopaths and allopaths have the same authority in the practice of their professions—they are authorized, by virtue of their licenses, to administer drugs, perform surgery, and to use all other methods of treatment of diseases and injuries of human beings.")

Plaintiffs contend that the law imposes a quintessential viewpoint-based restriction because it burdens speech that the Board determines diverges from the State's opinions and approaches on Covid-related matters. The law's suppressive purpose may be discerned from its language and the legislative record, as well as from documented threats that Plaintiffs have received from other doctors on social media who played a crucial role in AB 2098's passage. Viewpoint-based restrictions are presumptively unconstitutional, and therefore must be narrowly tailored to achieve a compelling government interest, which cannot be shown here.

Plaintiffs also contend—and the Court thus far has agreed—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. Moreover, the statue's definition of "misinformation" is incoherent because it does not clarify how the terms "false information" "contemporary scientific consensus" and "contrary to the standard of care" relate to each other. *Høeg*, 2023 WL 414258, at *10.

AB 2098 is an alarming law masquerading as a reasonable regulation of professional conduct. If not permanently enjoined, 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 those 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.

For these reasons, as well as those set forth below, Plaintiffs ask the Court to grant summary judgment in their favor on both counts and to enjoin the law on behalf of all doctors and patients in the State of California. *See* Fed. R. Civ. P. 56(a); *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 970 (C.D. Cal. 2006), *aff'd in relevant part*, 657 F.3d 936, 942 (9th Cir. 2011) (en banc) (enjoining City from enforcing challenged code in perpetuity in its entirety, not merely on behalf of the plaintiffs).

STATEMENT OF MATERIAL FACTS

I. THE REGULATION OF PHYSICIANS IN CALIFORNIA

The Board is tasked with issuing medical licenses and certificates in California, hearing disciplinary actions against licensees, and suspending, revoking, or otherwise limiting certificates, among other responsibilities. Cal. Bus. & Prof. Code §§ 2004 & 2220.5.[3] California Business and Professions Code section 2001.1 requires the Board to assign the "highest priority" to protection of the public, and mandates that "[w]henever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." The Board's members are appointed by the Governor and state lawmakers. *Id.* § 2001(b). Seven of the Board's 15 members are designated as "public members," who are not (and can never have been) licensed physicians. *Id.* §§ 2001(a) & 2007.

Section 2234 requires the Board to discipline doctors who engage in "unprofessional conduct." The statute enumerates seven grounds, which include a single act of gross negligence, repeated acts of negligence, and incompetence. Other sections provide additional, specific standards for unprofessional conduct. Cal. Bus. & Prof. Code § 2236 *et seq*.

However, California Business and Professions Code section 2234.1 provides that a doctor may not be subject to discipline "solely on the basis that the treatment or advice he or she rendered to a patient is alternative or complementary medicine," subject to several conditions. "Alternative or complementary medicine" is defined as "those health care methods of diagnosis, treatment, or healing that are not generally used but that provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method."

Subdivision (c) of California Business and Professions Code section 2234.1 notes: "Since the National Institute of Medicine has reported that it can take up to 17 years for a new best practice to reach the average physician and surgeon, it is prudent to give attention to new developments not

[3] Unless otherwise noted, the statutes cited here and throughout this brief relate to the Medical Board. However, the Osteopathic Board is governed by identical provisions. *See* Cal. Bus. & Prof. Code § 2451 ("The words 'Medical Board of California,' the term 'board,' or any reference to a division of the Medical Board of California as used in this chapter shall be deemed to mean the Osteopathic Medical Board of California, where that board exercises the functions granted to it by the Osteopathic Act.").

only in general medical care but in the actual treatment of specific diseases, particularly those that are not yet broadly recognized in California."

On September 30, 2022, Governor Gavin Newsom signed AB 2098 into law after it was passed by the state legislature. (Complaint, ¶ 18). AB 2098 amended section 2270's definition of "unprofessional conduct" to include "dissemination of misinformation or disinformation related to the SARS-CoV-2 coronavirus, or 'COVID-19.'" (Complaint, ¶ 19).

Section 1 of AB 2098 lays out the ostensible justification for the bill: the death toll of Covid-19; that Centers for Disease Control and Prevention ("CDC") data shows that unvaccinated individuals are at significantly higher risk of dying from infection by the virus; that the spread of misinformation and disinformation about Covid-19 vaccines has weakened public confidence[4] and placed lives at serious risk; and that "major news outlets" have reported that health care professionals are "some of the most dangerous propagators of inaccurate information regarding the COVID-19 vaccines." (Complaint, ¶ 20). 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." (Complaint, ¶¶ 19, 21).

"Misinformation" is defined as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care." Cal. Bus. & Prof. Code § 2270(b)(4); (Complaint, ¶ 22). The Act neither defines nor provides guidance for determining the meaning of "contemporary scientific consensus." *Høeg*, 2023 WL 414258, at *7-10; (Complaint, ¶ 23). "Disinformation" is defined as "misinformation that the licensee deliberately disseminated with malicious intent or an intent to mislead." Cal. Bus. & Prof. Code § 2270(b)(2); (Complaint, ¶ 24). "Disseminate" is defined as "the conveyance of information from the licensee to a patient under the licensee's care in the form of treatment or advice." Cal. Bus. & Prof. Code § 2270(b)(3); (Complaint, ¶ 25).

[4] The section pointedly omits mention in what specifically public confidence was weakened.

Physicians who are negligent and commit malpractice (for example, a doctor who advises a patient to inject himself with bleach to treat Covid-19) are already subject to tort lawsuits and disciplinary actions by the Board under existing state law. For example, the Board is empowered to investigate, and if necessary take enforcement action against, "any physician and surgeon where there have been any judgments, settlements, or arbitration awards requiring the physician and surgeon or his or her professional liability insurer to pay an amount in damages in excess of a cumulative total of thirty thousand dollars."[5] Cal. Bus. & Prof. Code § 2220(b).

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. Com. 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. Com. on Bus., Pros. & Econ. Dev., Analysis of Assem. Bill No. 2098, at 4 (Cal. 2021-2022 Reg. Sess.), as amended Jun. 21, 2022.

As is evident from these statements, the initial impetus for the bill was speech *qua* speech, whether uttered in the context of the doctor-patient relationship or on social media or during public appearances. Although the final version of the Act is narrower, applying only where there is a "conveyance of information from the licensee to a patient under the licensee's care," Cal. Bus. & Prof. Code § 2270(b)(3), it still treads on physicians' and patients' speech rights. Governor Newsom recognized as much when he signed AB 2098 into law with the following caveat:

> I am signing this bill because it is narrowly tailored to apply only to those egregious instances in which a licensee is acting with malicious intent or clearly deviating from the required standard of care while interacting directly with a patient under their care. To be clear, this bill does not apply to any speech outside of discussions directly related to COVID-19 treatment within a direct physician patient relationship. I am concerned about the chilling effect other potential

[5] It should be noted that $30,000 is an almost laughably small amount in the medical malpractice context. Recent studies have estimated than an average medical malpractice settlement is well in excess of $300,000. *See, e.g.*, Adam C. Schaffer *et al.*, *Rates and Characteristics of Paid Malpractice Claims Among US Physicians by Specialty, 1992-2014*, 177 J. Am. Med. Ass'n Intern. Med. 710 (2017), *available at* https://bit.ly/3Dy65xA. This means that the Board's attention is already called to even the smallest cases of alleged malpractice.

> laws may have on physicians and surgeons who need to be able to effectively talk to their patients about the risks and benefits of treatments for a disease that appeared in just the last few years. However, I am confident that discussing emerging ideas or treatments, including the subsequent risks and benefits does not constitute misinformation or disinformation under this bill's criteria.

(Complaint, ¶ 27). Despite Governor Newsom's attempts to further limit the bill's reach, his commentary in the form of a signing statement has no legal effect under California law, and so the law will be enforced as it is written, not as the Governor believes it should be interpreted. (Complaint, ¶ 28).

II. THE PLAINTIFFS AND THEIR ETHICAL CONCERNS RELATED TO AB 2098

Plaintiffs are physicians residing, operating practices, and licensed to practice in the State of California. (Complaint, ¶¶ 32-51).

Dr. Høeg is a Physical Medicine and Rehabilitation Physician who also holds a Ph.D. in Epidemiology and Public Health. (10/31/22 Decl. of Dr. Tracy Høeg, ECF 6, Exh. A, ¶¶ 2-3 [hereinafter "Høeg Decl."]). She has published, as senior or first author, nine epidemiological analyses of topics pertaining to the Covid-19 pandemic. (*Id.*, ¶ 8). Dr. 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 Decl. of Dr. Høeg, ECF 26-1, ¶¶ 4-5 [hereinafter "Supplemental Høeg Decl."]).[6] Similarly, she 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.*, ¶ 6). As she would render similar advice in the future, Dr. Høeg worries that, under AB 2098, she could face discipline. (*Id.*, ¶¶ 8-10).

Dr. Ram Duriseti is a practicing Emergency Room physician at Stanford Department of Emergency Medicine and Mills-Peninsula Hospital. (10/20/22 Declaration of Dr. Ram Duriseti, ECF 6, Exh. B, ¶¶ 2-3 [hereinafter "Duriseti Decl."]). Dr. Duriseti also earned a Ph.D. in engineering from Stanford University. (*Id.*, ¶ 2). His dissertation and subsequent research and

[6] The Court accepted these supplemental declarations as evidence at the hearing on the motion for preliminary injunction, held January 23, 2023, and so they are part of the factual record for consideration at the summary judgment stage.

publications focused on computational modeling of complex decisions and optimizing complex medical decisions. (*Id.*). He has treated hundreds of Covid-19 patients, read and analyzed hundreds of journal articles on Covid-19 and related topics, co-authored academic analyses of Covid-19 mitigation policies and their impacts, and written multiple evidence-based expert declarations on Covid-19 related topics submitted them to courts. (*Id.*, ¶ 5).

Dr. Aaron Kheriaty is a professor of Psychiatry and Medical Ethics, and publishes papers, books, and articles for lay audiences as well. (10/18/22 Declaration of Dr. Aaron Kheriaty, ECF 6, Exh. C, ¶¶ 2-3 [hereinafter "Kheriaty Decl."]). During the early months of the Covid-19 pandemic, Dr. Kheriaty co-authored the pandemic ventilator triage guidelines for the University of California, Irvine ("UCI"), where he was a Professor of Psychiatry and Director of the Medical Ethics Program and consulted for the California Department of Health on the state's triage plan for allocating scarce medical resources. (*Id.*, ¶ 4). When demand for Covid-19 vaccines outpaced the supply, Dr. Kheriaty helped develop UCI's vaccine-allocation policy. (*Id.*, ¶ 4). Dr. Kheriaty has advised certain patients against masking, especially children and patients with some anxiety disorders. (*See* 12/20/22 Declaration of Dr. Aaron Kheriaty, ECF 26-2, ¶¶ 5-6 [hereinafter "Supplemental Kheriaty Decl."]).

Dr. Pete Mazolewski is a trauma and general surgeon for John Muir Health and has handled the highest volume of acute and general trauma surgeries in his health care system without having a single lawsuit filed against him. (10/21/22 Declaration of Dr. Pete Mazolewski, ECF 6, Exh. D, ¶ 5 [hereinafter "Mazolewski Decl."]). Dr. Mazolewski has 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, ECF 26-3, ¶¶ 3-5 [hereinafter "Supplemental Mazolewski Decl."]). Both Drs. Kheriaty and Mazolewski intend to continue to provide the same advice they have been giving patients, though were AB 2098 in effect as to them, they believe they would risk punishment for doing so. (*See* Supplemental Kheriaty Decl., ¶¶6-7; Supplemental Mazolewski Decl., ¶¶3-5).

Dr. Azadeh Khatibi is an ophthalmologist with a Master's degree in public health, who has cared for numerous patients with infectious diseases. (10/27/22 Declaration of Dr. Azadeh Khatibi, ECF 6, Exh. E, ¶¶ 2-5 [hereinafter "Khatibi Decl."]). Dr. Khatibi is also a patient: she suffered from a serious, life-threatening illness, and was given a 25% chance of surviving five years at the time of diagnosis. (*Id.*, ¶ 6). After consulting with numerous doctors, Dr. Khatibi decided to adopt the approach of one whose views bucked consensus that she should opt for a less aggressive treatment. (*Id.*, ¶¶ 13-15). Not only did she survive, but her "results were remarkable, to the surprise and delight of all [her] doctors. Doctors were eager to find out [her] protocol when they realized [she] was doing so well." (*Id.*, ¶ 16). She has lingering immune system issues from her illness. (*Id.*, ¶ 6). Furthermore, Dr. Khatibi attests 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. (12/21/22 Declaration of Dr. Azadeh Khatibi, ECF 26-4, ¶¶5-11 [hereinafter "Supplemental Khatibi Decl."])

Plaintiffs all attest to the severe chilling effect that enactment of AB 2098 has had and will continue to have on them. The doctor-patient relationship is predicated upon trust, which is built when patients know that they can obtain honest, up-to-date advice from their physicians that is tailored to their individual circumstances and needs, as opposed to merely parroting an apparent state-approved "consensus." (*See, e.g.*, Kheriaty Decl., ¶ 6). In Dr. Høeg's words, "one of the reasons my patients place deep faith in me is that I am fully honest and transparent about their diagnoses, prognoses and potential treatments, and because prior to arriving at my recommendations, I take the time to thoroughly review the relevant scientific literature." (Høeg Decl., ¶ 10).

As a result of their training and experience as scientists and physicians, Plaintiffs strongly believe that the concept of "scientific consensus" is problematic and represents a misunderstanding of the scientific process. (Complaint, ¶¶ 53-73). Plaintiffs know from experience that one day's "consensus" may be tomorrow's malpractice. For example, at the beginning of the pandemic, the standard treatment for patients with severe Covid-19 was intubation. (Duriseti Decl., ¶ 8). Dr. Duriseti resisted intubating his patients because he believed it was more harmful than beneficial,

although the consensus called for this intervention. Then the "consensus" changed and his approach became the prevailing one. (*Id.*, ¶ 8). Using the same example, Dr. Kheriaty observes that "[y]esterday's minority opinion often becomes today's standard of care." (Kheriaty Decl., ¶ 10).

Likewise, the "scientific consensus" for some time was that the Covid-19 vaccines prevented transmission to third parties; two years later, it is clear they do not, or do so only minimally. (*See* Duriseti Decl., ¶¶ 14-15). And emerging data has indicated that the risk of vaccination-induced myocarditis in certain age categories may outweigh the benefits of vaccination. (Høeg Decl., ¶¶ 23-24). For that reason, several European countries, including Sweden, Denmark, Norway, and Finland, are recommending the newest bivalent booster only for those over 50 or 65 (depending on the specific country) or otherwise high-risk. (*Id.*, ¶ 23). Denmark has explicitly prohibited children under 18 from getting vaccinated absent a medical evaluation from a physician who concludes it is advisable in the specific case. (*Id.*). As Dr. Høeg explains, "[t]his puts 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." (*Id.*, ¶ 24).

Outside of the Covid-19 context, in the 1990s, Dr. Mazolewski was taught that every case of appendicitis should be operated on as quickly as possible. (Mazolewski Decl., ¶ 9). But around 2000 it became clear to him, based on his professional clinical experience, that immediate appendectomy should not be the standard treatment for all patients diagnosed with appendicitis, as those with complicated cases have high negative sequela rates following surgery. (*Id.*, ¶ 9). Dr. Mazolewski found that practicing medicine in accordance with his discovery was not easy, as he faced enormous professional peer pressure to follow the "consensus." (*Id.*, ¶ 10). But he did not waver, because he believed that his approach was in his patients' best interests. (*Id.*, ¶ 10). Today, Dr. Mazolewski's approach is standard practice. (*Id.*, ¶ 11). Put in his own words:

> [S]cience is always evolving and starts with the clinician who recognizes an improvement over the standard of care and implements that into his or her practice. This new approach then undergoes scrutiny with rigorous clinical trials which can take years to

> complete, and by virtue, the "contemporary scientific consensus" lags behind what is being observed by the physician treating patients every day.

(*Id.*, ¶ 12). In the meantime, before new information attains "consensus" status, doctors are obligated to treat and advise their patients according to their best judgment, whether or not that aligns with any ostensible consensus. (Complaint, ¶¶ 66-73; *see* Høeg Decl., ¶ 22).

Indeed, Dr. Khatibi's personal experience with a potentially terminal illness elucidates just how critical it is that physicians remain unbound by an ostensible or actual "contemporary scientific consensus." In her own words:

> If the lone doctor had been afraid of getting investigated or having his license revoked for suggesting a "non-consensus opinion," I wouldn't have heard about options for aggressive treatment. Had my doctor's speech been chilled to only advise and offer "consensus" treatments, I might not be alive today. Moreover, the medical advancements that come from noticing my excellent results and then applying it to others would have never happened.

(Khatibi Decl., ¶ 17).

Not only do rules of medical ethics require doctors to exercise their own judgment in treating patients rather than following a "consensus," especially if they are ahead of the curve when it comes to experience and research. The concept of a "consensus" is highly problematic because professionals who dissented from orthodoxy of health officials on various matters related to Covid-19 (and in other medical contexts as well) have been silenced socially as well as by mainstream and social media, while those who tend to promote government-approved policies and narratives are amplified by the same sources. (Complaint, ¶ 71; Duriseti Decl., ¶ 9). Thus, an apparent consensus may not translate into an actual consensus.

Plaintiffs Høeg, Duriseti, Kheriaty, Khatibi, and other doctors have directly experienced threats, including from other doctors, in response to expressing their opinions on topics related to Covid-19, sometimes with direct references to AB 2098. (Complaint, ¶¶ 74-81; ECF 6, Exhs. F-L). Many of these threats have emanated from physicians associated with a nonprofit organization called "No License for Disinformation" ("NLFD").[7] NLFD was among AB 2098's primary

[7] NLFD's website has been taken down since filing of the complaint in this case. Since it has no public information

proponents. (Complaint, ¶ 76). During legislative hearings, the bill's author twice invited NLFD's executive director to testify as one of two lead witnesses in support of the bill. (Complaint, ¶ 76). Its members frequently encourage other Twitter users to report licensed physicians to their medical boards for making any statements about Covid-19 that NFLD considers inaccurate. (Complaint, ¶ 76).

For example, on January 1, 2022, Dr. Chris Hickie, an Arizona physician associated with NLFD,[8] tweeted a screenshot depicting a portion of a study by Plaintiff Dr. Høeg that contained the phrase: "the risk of myocarditis following vaccination is consistently higher in young males," and remarked, "You deserve to lose your medical license, Hoeg," and commented months later: "I look forward to reporting you to your medical board once a certain law is passed in California." (ECF 6, Exh. F).

On August 10, 2022, Dr. Hickie tagged Dr. Høeg along with another doctor in a tweet that read, "Since you are also in California, Mantz, I can report you now alongside quack Høeg for spreading medical disinformation once that law passes in California." (ECF 6, Exh. G).

In response to a tweet from Dr. Høeg sharing an op-ed she published advocating against AB 2098, Dr. Nichols tweeted on June 29, 2022, "Why so defensive, Tracy? Scared?" (ECF 6, Exh. H). Dr. Hickie responded the same day to a September 29, 2022, tweet from Dr. Kheriaty asserting that the mass Covid-19 vaccination campaign was reckless with "Can't wait to see you lose your license." (ECF 6, Exh. I). Dr. Khatibi received a threat from an individual named Adrian Egli, who stated, "I will take great pleasure in seeing #AB2098 become law and seeing your license to practice medicine in California gone!" (ECF 6, Exh. J). On October 19, 2022, Dr. Hickie tweeted at Dr. Høeg, "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

available, it is unclear whether or not the organization has officially disbanded.

[8] Dr. Hickie was one of five physicians representing NLFD in an op-ed published in the *Washington Post* on September 21, 2021 "call[ing] on our country's regulatory bodies, primarily the state medical boards, to take the requisite disciplinary measures—including suspension or revocation of … licenses to practice medicine" of physicians who "undermine the public health response." Nick Sawyer *et al.*, *State Medical Boards Should Punish Doctors Who Spread False Information About Covid and Other Vaccines*, Wash. Post (Sept. 21, 2022, 12:18 PM), *available at* https://wapo.st/3DeYLFK.

disinformation as a physician." (ECF 6, Exh. K). On November 1, 2022, Dr. Hickie tweeted, "Please ask @ABPMR and @ABMSCert to sanction Hoeg for disinformation in pediatrics, including COVID-19."[9] (ECF 6, Exh. L). While Plaintiffs recognize that neither NLFD nor any of the aforementioned doctors are state entities, the behavior of the very audience at whom AB 2098 is directed shines light on what the relevant public understands the reach and meaning of that law to be.

In mid-September 2023, the Legislature repealed AB 2098, perhaps to avoid the humiliation of being defeated in this case and in the Ninth Circuit in *McDonald v. Lawson*. The latter case was argued in July of this year. At oral argument, two of the three judges appeared poised to deem the law unconstitutional.[10] Governor Newsom has not yet signed the amendment that would repeal the law.

LEGAL STANDARD

A party is "entitled to summary judgment as a matter of law" if it "shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). An issue of fact is genuine only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party, while a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. THIS CASE PRESENTS NO GENUINE DISPUTES AS TO ANY MATERIAL FACT

This case involves a facial challenge to the constitutionality of a statute. In the parties' briefings at the preliminary injunction phase, no facts were contested; only interpretations of the law.[11] Accordingly, summary judgment is appropriate in this case. *See Comite de Journaleros de*

[9] @ABPMR is a Twitter handle of the American Board of Physical Medicine and Rehabilitation—a body that certifies physicians in that field. @ABMSCert is a Twitter handle of the American Board of Medical Specialties—an umbrella organization of 24 medical specialty boards.

[10] Oral Argument, *McDonald v. Lawson*, No. 22-56220 (9th Cir. Jul. 17, 2023), https://www.courtlistener.com/audio/87569/mark-mcdonald-v-kristina-lawson/.

[11] Although Defendants have not yet filed an answer to the Complaint, they have stipulated that they "will not oppose … a motion [for summary judgment] on the grounds that they have not yet filed an answer or other responsive pleading," though they "reserve[d] the right to ask the Court to stay proceedings pending the mandate in" *McDonald v. Lawson*, No. 22-56220 (9th Cir. 2023), and *Couris v. Lawson*, No. 23-55069 (9th Cir. 2023). ECF 40, ¶ 8. Should such a stay be sought, Plaintiffs will respond in due course.

Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (affirming grant of summary judgment in Plaintiffs' favor in case involving facial challenge to city ordinance on First Amendment grounds); *Speet v. Schuette*, 726 F.3d 867, 871-72 (6th Cir. 2013) (upholding district court's grant of summary judgment in facial, First Amendment challenge to state statute as there was no genuine issue of material fact).

II. AB 2098 IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT IS VIEWPOINT DISCRIMINATORY

A. AB 2098 Flagrantly Violates Plaintiffs' First Amendment Rights to Free Speech and Free Expression, and Plaintiff Khatibi's First Amendment Right to Receive Advice and Treatment Options

The First Amendment to the United States Constitution, incorporated against the States through the Fourteenth Amendment, prohibits Congress from making laws "abridging the freedom of speech." U.S. Const. amend. I; *see also Ashcroft v. A.C.L.U.*, 535 U.S. 564, 573 (2002) ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience … . And the rights of free speech and free press are not confined to any field of human interest.").

"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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). For that reason, laws that discriminate based on viewpoint—that is, due to the ideas or opinions the speech in question conveys—are "presumptively unconstitutional." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("[T]he essence of viewpoint discrimination" is legal prohibitions that "reflect[] the Government's disapproval of a subset of messages it finds offensive."); *see also 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. & 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." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (internal citations and quotation marks omitted).

As the Supreme Court recognized in 2018, "[t]hroughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities[.]" *NIFLA*, 138 S. Ct. at 2374 (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.

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.[12] 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,[13] which is allegedly exacerbated by the spread of

[12] Both in its initial iteration 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*. *Compare* Tom Jefferson, *et al.*, *Physical Interventions to Interrupt or Reduce the Spread pf Respiratory Viruses*, Cochrane Database Systematic Revs. (Jan. 30, 2023), https://bit.ly/3TN5lvf (observing that "[t]here were no clear differences between the use of medical/surgical masks compared with N95/P2 respirators in healthcare workers when used in routine care to reduce respiratory viral infection," and cautioning that "[t]here is uncertainty about the effects of face masks"), *with* Timo Mitze, *et al.*, *Face Masks Considerably Reduce COVID-19 Cases in Germany*, 117 Proceedings of Nat'l Acad. Sci. 32293 (Dec. 3, 2020), https://bit.ly/3ZowDsP.

[13] Countless Americans with naturally acquired immunity, not to mention the vastly disparate risk between the young and old from Covid-19 infections, 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); Kelly Krohnert, *et al.*, *Statistical and Numerical Errors Made by the US Centers for Disease Control and Prevention During the COVID-19 Pandemic*, SSRN (2023), *available at* https://bit.ly/3JYNKvD (finding that CDC repeatedly overstated risk to children

"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 demonstrate that its proponents in the legislature believed it was designed to address the "problem" of doctors who "call[] into question public health efforts such 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. Setting aside the fact that these proclamations allegedly backed up by "scientific consensus" have changed numerous times over the course of the pandemic,[14] 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."); *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("Debate on public issues should be uninhibited, robust, and wide-open[.]"); *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.").

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due to flawed statistical analysis).

[14] *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 ….").

That "suppress[ing] unpopular ideas or information" is the true goal of AB 2098 may be inferred from the fact that some of its most vocal proponents as well as many of those responsible for crafting the law have explicitly threatened to use it to punish Plaintiffs for expressing unpopular views on social media, and even for conducting and sharing scientific studies that go against the grain. These doctors have tweeted such things as "I look forward to reporting you to your medical board once a certain law is passed in California" and "Can't wait to see you lose your license." (*See* ECF 6, Exhs. F-L).

This special solicitude for the doctor-patient relationship fits well with the right to receive information, which is a well-known First Amendment corollary to the right to speak and express oneself. "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 127 S. Ct. 1730, 1735 (2017); *see also Martin v. EPA*, 271 F. Supp. 2d 38, 47 (D.D.C. 2002) ("[W]here a speaker exists …, the protection afforded is to the communication, to its source and to its recipients both.") (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976)); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (holding 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)).

To illustrate why the First Amendment protects not only speakers but listeners, especially in the doctor-patient context, one need look no further than Dr. Khatibi's declaration. Had there been a law that prevented doctors from offering treatment options that bucked "consensus" at the time that Dr. Khatibi sought treatment for her potentially terminal illness, she might very well never have learned of the treatment course she ended up adopting, and as a result she might not be alive today. (Khatibi Decl., ¶ 17). In contrast to Dr. Khatibi's prior experience of obtaining a wide range

of medical opinions and being able to choose one that proved most beneficial to her, under the regime ushered in by AB 2098, patients in the state of California will be deprived of their right to receive treatment advice unfettered by physicians' concerns about professional discipline. Such a deprivation is unconstitutional, and Plaintiffs are entitled to a judgment to that effect. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

In sum, there could hardly be a clearer example of a viewpoint-discriminatory law, because AB 2098 privileges speech that is consistent with the "scientific consensus" (however ill-defined that phrase may be) and punishes speech that diverges from it. Such a law cannot survive the exacting constitutional scrutiny to which all viewpoint discriminatory rules must be subject. *See, e.g.*, *Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014) ("[I]t is axiomatic that [courts must] 'apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.'" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994))). Accordingly, Plaintiffs are entitled to judgment in their favor.

B. AB 2098 Does Not Constitute a Permissible Regulation on Conduct

In *NIFLA*, the Supreme Court expressly rejected a claim that "professional speech" receives 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. 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.[15]

After *NIFLA*, the Ninth Circuit upheld a Washington state statute that was almost identical

[15] *NIFLA* abrogated *Pickup*'s professional speech holding. *See Tingley v. Ferguson*, 47 F.4th 1055, 1074 (9th Cir. 2022) ("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[.]").

to the one it considered in *Pickup*. *See Tingley*, 47 F.4th at 1081-83. 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 First Amendment protection. In other words, under the *Tingley* analysis, *treatment* (which is "conduct") can be regulated, but *advice* (which is "speech") cannot. *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 v. Walters*, 309 F.3d 629, 636-37 (9th Cir. 2002) (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." 47 F.4th at 1073 (citing *Pickup*, 740 F.3d at 1229). That exemption avoided any conflict with *NIFLA* and *Conant* where the Ninth Circuit "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).

AB 2098 is not akin to the statute that survived constitutional challenge in *Tingley*. Unlike that law, AB 2098 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.").

For these reasons, AB 2098 cannot be saved by reclassifying its prohibitions as a permissible regulation of professional conduct, rather than impermissible regulation of professional speech.

C. AB 2098 Cannot Survive Strict Scrutiny

Because AB 2098 discriminates based on viewpoint, it is subject to strict scrutiny. Under that exacting standard, it can survive judicial review *only* if the government proves that it is narrowly tailored to achieve a compelling state interest. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Such an exacting standard is almost never met. *Id.* (strict scrutiny "is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000))). The State must identify a specific, compelling, "actual problem" in need of solving, *Playboy*, 529 U.S. at 818, and demonstrate not only that the curtailment of speech is necessary to resolve that problem, *see R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992), but also that curtailment is the narrowest means of solving the problem, *see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

AB 2098 neither addresses a compelling government interest, nor is narrowly tailored to do so. Instead, the law *jeopardizes* the societally and constitutionally recognized sacred doctor-patient relationship. *See Conant*, 309 F.3 at 636 (explaining that courts recognize "[t]he doctor-patient privilege" because it "reflects 'the imperative need for confidence and trust' inherent in the doctor-patient relationship.") (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). As Plaintiffs attest, patients trust them because they are forthcoming and often "ahead of the curve." With the threat of discipline hanging over their heads, they will be more likely to self-censor on any Covid-related topic, even if they believe that the information they are withholding would be in their patients' best interests.

The justification contained in the bill for its passage is that "major news outlets" have

reported that health care professionals are "some of the most dangerous propagators of inaccurate information regarding the Covid-19 vaccines." *See* Assem. Bill 2098, 2021-2022 Reg. Sess., ch. 938, 2022 Cal. Stat (Section 1). "Major news outlets" making assertions—not substantiated in the text of AB 2098—is hardly proof that Californians are dying because doctors are spreading "misinformation" about the Covid-19 vaccines, warranting viewpoint discriminatory laws. Indeed, the flimsiness of this rationale casts doubt on the genuineness of the Government's purported interest.

Even assuming, *arguendo*, that protecting the public from incompetent treatment of Covid-19 is a compelling state interest, California cannot show that AB 2098 is narrowly tailored to effectuate that aim. The State already has tools to discipline incompetent doctors, *see* Cal. Bus. & Prof. Code § 2220(b), and there is no evidence whatsoever that these existing methods are insufficient to meet the State's interest. Indeed, Cal. Bus. & Prof. Code § 2234(b)-(e) provides for the Medical Board to take action against any licensee charged with unprofessional conduct: gross negligence, repeated acts of negligence, incompetence and acts involving dishonesty. As the American Civil Liberties Union ("ACLU") explained in its *amicus* brief in support of a preliminary injunction in this case, the State has "fail[ed] to explain or offer evidence demonstrating why that system has proven 'ineffective to achieving its goals.'" *Amicus* Br. of ACLU of No. & So. Cal. at 16-18, *Høeg v. Newsom*, No. 2:22-cv-1980 (E.D. Ca. 2023), ECF No. 31-1 (quoting *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1228 (9th Cir. 2019)). In fact, the State has not *even tried* to use the tools available to it, as there is not a single case of a licensee who (a) has endangered a Covid patient through the choice of treatment, (b) was subjected to investigation for doing so, and yet (c) was able to evade discipline because the State could not punish such conduct under the existing disciplinary framework.

None of that is surprising because, as the ACLU points out, the State proffers only *one* type of physician conduct that both can be regulated consistent with First Amendment principles *and* arguably is not covered by long-existing section 2234, *viz.*, "a single incident of ordinary negligence." *Id.* at 18. Yet, neither the legislative record nor the publicly available Board records identify any actual incidents where section 2234 proved inadequate. Thus, there is nothing in the

public record that can "justif[y] enacting a new, overbroad law that sweeps in protected speech only to get at single acts of negligence." *Id.* Nor is there an explanation for why it is crucial to punish "single acts of negligence" in the context of Covid-19, but not any other ailment. That in itself is sufficient proof that AB 2098 fails the narrowly tailored prong of the strict scrutiny inquiry. *See Victory Processing*, 937 F.3d at 1228 ("While narrow tailoring requires that a statute not cover *more* speech than is necessary to serve a compelling government interest, a statute can also fail strict scrutiny if it covers *too little* speech. 'Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015)) (emphasis in original)).[16]

It is well-settled that "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 804. That alternative—encompassed in section 2234—already exists. Accordingly, AB 2098 cannot survive strict scrutiny.

III. AB 2098 CONTRAVENES THE DUE PROCESS VOID FOR VAGUENESS DOCTRINE

Due process of law requires that 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[]

[16] To be clear, Plaintiffs are not advocating promulgation of laws restricting physicians' speech outside the Covid-19 context. Rather, they point to the under-inclusivity of AB 2098 as evidence that its true purpose is suppression of First Amendment protected speech as opposed to ensuring doctors' practices do not endanger patients.

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 "chilling" of speech; *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 this Court already recognized in granting Plaintiffs' preliminary injunction motion, the concept of a "contemporary scientific consensus" on a subject such as Covid-19, where the "science" is constantly evolving, is a misnomer. As this 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.").

Even if the "scientific consensus" could be and were defined, physicians should not be hamstrung by the beliefs of a certain percentage of their peers. As discussed extensively above (*see supra*, Statement of Facts, Part II at p. 3-12), "contemporary scientific consensus" is often behind the curve; indeed, progress in science and medicine occurs as a result of some doctors and scientists finding, in the course of research, critical thinking, or treating patients, that the current consensus is *not* the best approach. As discussed earlier, Dr. Duriseti defied the then-prevailing wisdom at the beginning of the pandemic by refusing to intubate individuals suffering severe Covid-19 symptoms. (Duriseti Decl., ¶ 8). Now, the dominant view is that intubation is not appropriate and subjects the patient to unwarranted harm. (*Id.*, ¶ 8). Outside of the Covid-19 context, Dr. Mazolewski determined after years of practice that surgery for appendicitis (then the standard treatment) was inappropriate for those presenting with complex cases, as it resulted in needlessly high complication rates. (Mazolewski Decl., ¶¶ 9-10). Dr. Mazolewski resisted peer pressure to follow the consensus, knowing that acting in accordance with the knowledge he had developed through professional practice was in his patients' best interests. Now, Dr. Mazolewski's approach is standard care. (*Id.*). Had Drs. Duriseti and Mazolewski feared legal repercussions for utilizing their own expertise to diagnose, advise, and treat patients, the methods they developed that ultimately proved superior might never have come to light, resulting in poorer outcomes for and unnecessary harm to patients. *See NIFLA*, 138 S. Ct. at 2374 ("[W]hen the government polices the content of professional speech, it can fail to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014))).

Indeed, the traditional approach in California has been to eschew the idea that physicians

must abide by a supposed "consensus." As the California Court of Appeals wrote, "[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, in contrast to this wisdom, AB 2098 seeks to have all California physicians simply parrot government-approved mantras, even in the context of a 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, meaning that "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 statute's only problem. 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. While the State has urged the Court to construe the law to require proof of 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—that interpretation is based on inserting punctuation or conjunctive terms into the statute that are not, in fact, present, as this Court previously observed. *See id.* at *10 ("If the Legislature meant to create two separate requirements, surely it would have indicated as such—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 this 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 id.* ("[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 State can simply alter the statute's language so as to make it comprehensible (though it cannot *actually* do so), defining "misinformation" to cover only speech that is "contradicted by contemporary scientific consensus" *and* "contrary to the standard of care," these alterations still would not save the law. First, separating the phrases with an "and" does not clarify the meaning of "contemporary scientific consensus," as discussed above. 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 reiterating the non-controversial proposition that doctors must practice medicine in accordance with the standard of care.

CONCLUSION

For the reasons set out above, the Court should grant summary judgment in Plaintiffs' favor. However, this Court should enjoin the law as to all physicians in the State of California, not only Plaintiffs, because this was a facial—as opposed to as-applied—challenge to the constitutionality of a statute. *See Comite De Jornaleros*, 475 F. Supp. 2d at 970 (enjoining City from enforcing challenged code in perpetuity in its entirety, not merely on behalf of the plaintiffs); *cf. Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018) (modifying district court's injunctive order to apply only to plaintiffs because the successful challenge was as-applied, not facial).

Respectfully submitted,

/s/ *Laura B. Powell*

Laura B. Powell (CA Bar No. 240853)
2120 Contra Costa Blvd #1046
Pleasant Hill, CA 94523
Telephone: (510) 457-1042
laura@laurabpowell.com
Local Counsel

/s/Gregory Dolin

Gregory Dolin, MD*
Senior Litigation Counsel

NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: (202) 869-5210
Facsimile: (202) 869-5238
greg.dolin@ncla.legal

**Admitted pro hac vice*

Attorneys for Plaintiffs

September 29, 2023