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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RAJAN GUPTA, a minor, by and through his next friend ANANDA GUPTA,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendant.

Case No. 3:21-cv-09045-EMC
Hon. Edward M. Chen, Courtroom 5

DATE: January 20, 2022
TIME: 1:30 pm

**PLAINTIFF ANANDA GUPTA'S REPLY IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUNCTION (Dkt. 44)**

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## INTRODUCTION

Defendant Bonta cannot deny that SB 742 criminalizes expressive activity—speech—which neither limits access to vaccines nor increases the risk of spreading COVID-19. Nor can Bonta contest that the chill on Plaintiff Gupta, and those like him, constitutes irreparable harm.

Instead, the Defendant argues in favor of an imaginary version of SB 742, using the word "patient" thirty times in his opposition even though the word does not appear once in the criminal code that the bill adds, Cal. Penal Code § 594.39. The law broadly applies to *anyone* approaching any pharmacy or supercenter grocery store in the state—it thus criminalizes speech directed toward many more people buying milk and shampoo than it does to "patients."

Defendant also claims that the exemption embodied by Cal. Penal Code § 594.39(d), is not an exemption at all. According to the Defendant, this subsection should be effectively ignored as unnecessary surplusage. In fact, a fair reading of the statute and its history confirms that the legislature intended to preserve the rights of labor protestors to approach people in order to "pass[] a leaflet…display[] a sign to, or engag[e] in oral protest," all of which are ordinary picketing behavior and now criminal within the vicinity of a pharmacy, hospital, or clinic—except when done for matters arising out of labor disputes.

Moreover, Defendant admits that one of SB 742's purposes is to protect individuals from "unwanted" speech. Opposition to Plaintiff's Motion for Preliminary Injunction ("Opp.," Dkt. 47) at 13. This purpose isn't content-neutral as Defendant claims, but actually confirms SB 742 to codify unconstitutional content-based discrimination. *McCullen v. Coakley*, 573 U.S. 464, 479-81 (2014). Defendant does not argue the law survives strict scrutiny. Opp. 6. Instead, the Defendant focuses exclusively on content-neutral intermediate scrutiny (Opp. 17), but that tack is also doomed because he admits California never tried less restrictive alternatives as *McCullen* requires. 573 U.S. at 495.

Magistrate Judge Cousins in this district and Judge Drozd of the Eastern District of California have each granted a temporary restraining order—transitory versions of the injunction Gupta seeks here. *See Aubin v. Bonta*, No. 21-cv-7938, Dkt. 28 (N.D. Cal. Dec. 23, 2021) (attached as Exhibit 1); *Right to Life of Cent. Cal. v. Bonta*, No. 1:21-cv-01512-DAD-SAB,

2021 U.S. Dist. LEXIS 209871 (E.D. Cal. Oct. 30, 2021) ("*RTLCC*"). No preliminary injunction has issued in either action, nor is it clear if or when such an order might issue. (Because these courts have issued only a temporary injunction, as compared to a permanent one, these orders do not moot an otherwise live controversy. *Allee v. Medrano*, 416 U.S. 802, 809-10 (1974). Gupta will further explain the lack of mootness in a short forthcoming filing, as the Court directed. Dkt. 48.) A preliminary injunction remains necessary here to stop SB 742's overbroad, content-based provisions from throttling free speech in the state until a permanent injunction can be entered.

## ARGUMENT

### I. SB 742 cannot withstand any level of scrutiny.

Defendant makes no argument that SB 742's prohibition of "harassment" could withstand strict scrutiny, and thereby admits it cannot. The bill ludicrously defines harassment as approaching a person for "passing a leaflet …, displaying a sign to, or engaging in oral protest, education, or counseling."

Instead, Defendant variously argues that the bill does not curtail speech at all, or that the carve-out for "labor dispute" speech does nothing, so that the statute is "content-neutral" and merits only intermediate scrutiny. Opp. 6-11. Neither of these arguments have any foundation. Just as its plain text suggests, SB 742 generally crimps speech, but uniquely allows certain labor protests to continue unmolested. Moreover, the bill flunks even intermediate scrutiny because Defendant admits the state has not even attempted to narrowly tailor its whimsically broad restraints on traditional free speech in public forums.

#### A. Contrary to Defendant, SB 742 restricts speech, not merely conduct.

Defendant claims that the law only prohibits an *activity*, allegedly not speech: "knowingly approaching, for a ***prohibited purpose***, within 30-feet of someone within 100 feet of the entrance or exit of a vaccination site without their consent." Opp. 12 (emphasis added). But Defendant's proposed speech/activity dichotomy collapses when one realizes that *speech itself* constitutes a "prohibited purpose" for an unlawful knowing approach. SB 742 prohibits the

"purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with, that other person in a public way or on a sidewalk area." Cal. Penal Code § 594.39(c)(1). Imagine if the government were to outlaw possession of paper for "forbidden purposes" such as printing leaflets. Such a law would infringe on free expression itself, not merely an *activity*, and the government cannot pretend that criminalizing an activity *specifically undertaken for speech* does not also restrain speech. The defendant is simply "wrong that the only thing actually at issue in this litigation is conduct." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). Both courts to have examined SB 742 concluded that it indeed restricts speech, just as the plain text of the statute suggests. *RTLCC*, 2021 U.S. Dist. LEXIS 209871, at *26-*27; *Aubin*, Ex. 1 at 6.

Criminalizing approaching people *does* limit speech. A 30-foot bubble zone makes normal conversation and leafletting virtually impossible, and even a 15-foot bubble zone prevents "communicating a message from a normal conversational distance." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997). The Supreme Court only permitted an 8-foot buffer because it "allows the speaker to communicate at a normal conversational distance." *Hill v. Colorado*, 530 U.S. 703, 726-27 (2000). *Schenck* invalidated "a floating buffer zone around people . . . partly on the ground that it prevented protestors from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* (cleaned up).

Approaching potential listeners is an essential requisite to some forms of speech like close conversation and hand billing, the precise types of speech Gupta engaged in. Those types of speech "have historically been more closely associated with the transmission of ideas than others. . . . [W]e have observed that one-on-one communication is the most effective, fundamental, and perhaps economical avenue of political discourse." *McCullen*, 573 U.S. at 488 (cleaned up). It is "no answer to say that petitioners can still be seen and heard by women within the buffer zones . . . . If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message." *Id.* at 489-90.

Defendant misreads precedent as endorsing restrictions against speech when speakers have the option of remaining stationary. Opp. 14-15. In fact, while the Supreme Court held stationary leafleting and counseling reduces the speech burden of not being able to approach, it did so in the context of much smaller 8-foot buffer in *Hill*. That distance permits a speaker on a city sidewalk far more leeway to maneuver into the best position from which to stand and offer quiet conversation or a leaflet, and indeed to obtain consent for an approach. These options are entirely criminalized by SB 742, "effectively stifl[ing] petitioners' message." 573 U.S. at 488-90. This is why when the Supreme Court confronted a blanket "no approach" rule in *Madsen v. Women's Health Ctr.*, it could not be sustained. 512 U.S. 753, 773-774 (1994). "[A] prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be" "burden[s] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 774, *contra* Opp. 12 (citing *Madsen* as supportive of finding SB 742 "narrowly tailored"). A 30-foot no approach zone is functionally equivalent to a blanket no-approach zone. To the extent that Defendant suggests that Gupta *can* walk around and approach potential listeners without doing so knowingly "[t]his strained interpretation is at best confusing and at worst frivolous." *RTLCC*, 2021 U.S. Dist. LEXIS 209871, at *37.

Defendant tacitly admits that SB 742 infringes speech, elsewhere arguing that it supposedly only curtails "expressive activity" that poses risks in view of the ongoing pandemic. Opp. 18-19. As discussed below in section I.D, the amount of "expressive activity" outlawed greatly exceeds any compelling government interest, and Defendant cannot argue that Gupta's polite, masked, outdoor handballing spreads disease or hinders access to vaccination sites.

### B. The labor exemption is not surplusage, and singles out labor-related content for favorable treatment.

Defendant argues that any sort of picketing—labor or otherwise—is permitted by SB 742, so that Cal. Penal Code § 594.39(d) is not an exception at all but merely "clarifies" that picketing would never have been a violation of the statute. On Defendant's reading, the words of this subsection serve no purpose except perhaps reiteration. Opp. 9.

Two courts have already addressed and rejected this argument. *Aubin*, Ex. 1 at 6; *RTLCC*, 2021 U.S. Dist. LEXIS 209871, at *22-*26.

Defendant's interpretation flies in the face of the canons of statutory construction and of the legislative history, as discussed in Gupta's opening brief. Mot. at 5-6. "[O]ne of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant." *RTLCC*, at *26 (quoting *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 817 (2018)). Defendant argues that the presumption against surplusage is not absolute. Opp. 9. True, but Defendant's own authorities show that the presumption *should* apply here. In *Lamie v. United States Tr.*, treating the words as non-surplus would lead to ambiguity in the bankruptcy statute, a complicated code that "may now contain surplusage, along with grammatical error … that may have been the result of trying to make the substantive change with the fewest possible textual alterations or of an error by the scrivener." 540 U.S. 526, 536, 541 (2004). None of these rationales exists here. To the contrary, ambiguity is caused by treating subsection (d) as surplus, as witnessed by Defendant's parsing of which criminalized activities might normally fall under the term "picketing." Opp. 8. In contrast, subsection (d) provides a simple answer when not discounted as surplus: picketing at least includes otherwise criminalized activities protected by Cal. Code. Civ. P. § 527.3(b)(1), including "giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved, in any labor dispute." This comports with the ordinary meaning of the term: *picketing* is nothing but a combination of carrying signs, oral protest, and hand billing, and SB 742 criminalizes approaching people for any of these purposes within 100 feet of a vaccination site (which will almost always also be a job site). *Cf. Boos v. Barry*, 485 U.S. 312, 333 (1988) ("'picketing' is most directly implicated in the display clause").

Additionally, unlike the Bankruptcy Code involved in *Lamie*, SB 742 fits on one page, so subsection (d) could *not* have been created by inadvertent scriveners' error. In fact, we know legislators *insisted* on the exemption. As detailed in Gupta's Complaint, which contains a detailed summary of the legislative history, commentators and legislators alike expressed

concern that previous version of SB 742 would hinder union job actions, and subsection (d) was added afterwards. Dkt. 1 ¶¶ 23-38. Contrary to the Defendant, subsection (d) added new substance, which is why the presumption against surplusage applies with special force. Mot. 6.

Defendant argues that use of the word "picketing" shows that not *all* labor activities are exempted, but this doesn't make SB 742 content neutral. Opp. 8. Defendant admits that several of the conduct prohibited by SB 742 falls under the umbrella of "picketing." *Id.* SB 742 thus discriminates based on conduct even if subsection (d) is not completely categorical. And anyway, the use of the word "picketing" militates in favor of interpreting the exemption broadly to encompass all purposes otherwise prohibited. "when a drafter has engaged in the retrograde practice of stringing out synonyms and near-synonyms (e.g., *transfer*, *assign*, *convey*, *alienate*, or *set over*), the bad habit is so easily detectible that the canon can be appropriately discounted: *Alienate* will not be held to mean something wholly distinct from *transfer*, *convey*, and *assign*, etc." *United States v. Bronstein*, 849 F.3d 1101, 1110 (2017) (quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012)) (cited at Opp. 9). Under SB 742, labor disputes—and labor disputes alone—enjoy all Constitutional right within the vicinity of a vaccination site that might be termed "picketing."

*Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019), does not support Bonta's categorical distinction between "picketing" and "approaching." Opp. 7. *Bruni* interpreted a statute regulating the *manner* by which persons could communicate outside of clinics, including through picketing. 941 F.3d at 86 ("The Ordinance prohibits four—and only four—activities within the zone: 'congregat[ing],' 'patrol[ling],' 'picket[ing],' and 'demonstrat[ing].'"). The Third Circuit held that the ordinance did *not* prohibit leafletting or "approaching someone individually to engage in a one-on-one conversation." *Id.* at 87. But this isn't because picketing might not involve approaching someone individually, nor because the dictionary defining of "picketing" compelled this result, but simply as a matter of statutory construction. Under the doctrine of constitutional avoidance, the Third Circuit found that the ordinance, which "sa[id] nothing about leafletting or peaceful one-on-one conversations," was "readily susceptible to a

narrowing construction." *Id.* at 85-86.[1] The issue here is not whether the Court can or should construe SB 742 as prohibiting highly-protected "sidewalk counseling" types of speech. SB 742 expressly does. It specifically prohibits the speech that *Bruni* found to be worthy of the highest constitutional protections, so the doctrine of constitutional avoidance cannot erase this dilemma.

As *RTLCC* correctly found, this case differs from *Bruni* because "SB 742 specifically prohibits the speech that the court in Bruni found to be worthy of the highest constitutional protections." 2021 U.S. Dist. LEXIS 209871, at *24. The statute expressly carves out the *content* of speech ("arising out of a labor dispute"), and not just a manner of speech ("picketing"). As the Third Circuit explained, "'demonstrating' and 'picketing,' . . . go to "the manner in which expressive activity occurs, not its content." 941 F.3d at 87 (citing *Madsen*, 512 U.S. at 759, 763-64; *Hill*, 530 U.S. at 721; *Schenck*, 519 U.S. at 383-85). Here SB 742 excepts not only the method of expression—picketing—but also the content of expression—labor disputes. This is akin to the cases Gupta cited in his Motion. Mot. 9 (*citing Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter."); *Carey v. Brown*, 447 U.S. 455, 466 (1980) (rejecting idea that "labor picketing is more deserving of First Amendment protection than are public protests over other issues")).

Bonta argues that the original draft of SB 742, which expressly banned "picketing" implies that the legislature recognized a distinction between "picketing" and the conduct prohibited by the enacted version of SB 742. Opp. 8. Defendant therefore urges the Court to give meaning to words in a *previous version* of the law in order to render the enacted words of

[1] This reading was also consistent with the idiosyncratic statutory history in that case. "As originally passed, the Ordinance also included an eight-foot floating personal bubble zone, extending 100-feet around clinics, in which people could not be approached without their consent for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id.* at 80. The contrast between this previously-enjoined provision and the "picketing" prohibition confirmed that the city did not intend the remaining part of the ordinance prohibiting picketing to include leafleting and counseling.

§ 594.39(d) meaningless surplus! This is backwards. Courts consider whether a law is content based or content neutral "on its face *before* turning to the law's justification or purpose," because a government's assertion of "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015). In any event, the legislative history sheds little light on the precise definition of "picketing." The first draft of SB 742 gave the word "picketing" the expansive and non-labor definition "protest activities engaged in by a person within 300 feet of a vaccination site." The first draft did not use the word "harass" at all. After the bill was passed in essentially this form by the Senate and presented to the Assembly in June, "picketing" was amended out of the bill and "harass" swapped in its place. Complaint ¶ 29.

It appears the legislature's focus was not on the term "picketing" itself, but instead the fact that the original version of SB 742 discriminated based on "picketing *targeted at a vaccination site*." The Senate Public Safety Committee flagged this Constitutional problem:

> This bill may be found to restrict speech on the basis of the content of the speech. This bill prohibits picketing "targeted at" a person giving, receiving, or providing vaccination services. However, it could be argued that it could be any information targeted at a person receiving vaccine, not just those who disagree with vaccinations.

Complaint Ex. 1 at 3.

The amendment replaced "picketing" and "targeting" with words that could more plausibly seem content-neutral, hence the catch-all definition for "harassment."

One could just as easily argue that the direct replacement of "picketing" with "harassment" implies the reverse of what Defendant says—that "harass" was meant to cover much the same ground as "picketing." After all, the original definition for "picketing" included "protest activities," and the enacted bill still covers "engaging in oral protest." At minimum, the legislative history does not support completely ignoring § 594.39(d).

Defendant's interpretation would render § 594.39(d) doubly surplus. First, if all picketing is allowed by SB 742 as Defendant contends, then there would be no need for the provision at all. Second, even if the Legislature wanted to clarify that "lawful picketing" is

allowed "there would be no need for the latter half of the provision singling out picketing 'arising out of a labor dispute.'" *RTLCC*, 2021 U.S. Dist. LEXIS 209871, at *26.

Gupta is likely to succeed on the merits in showing that the words of § 594.39(d) mean exactly what they say—that oral protest, displaying signs, and hand billing are generally forbidden, unless they are in service of a labor dispute.

### C. SB 742's avowed aim of protecting Californians from unwanted speech is also content-based.

Defendant contends that SB 742 was not enacted to squelch anti-vaccine speech, but instead to prevent "unwanted encounters" leading to "the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her." Opp. 11 (quoting *Hill*, 530 U.S. at 724). This is another form of impermissible content regulation.

A speech restriction "would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." *McCullen*, 573 U.S. at 481 (cleaned up). *McCullen* effectively overruled *Hill* on this issue. 573 U.S. at 505 (Scalia, J. concurring) ("[T]he Court itself has sub silentio (and perhaps inadvertently) overruled *Hill*. The unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks."). As Gupta observed in his motion, the Seventh and Third Circuit recognized that *Reed* and *McCullen* undermine *Hill*'s content-neutrality analysis, which Defendant relies on. *Compare* Opp. 11 with Mot. 7.

Furthermore, the legislative history of the bill shows that anti-vaccine speech was the primary target of legislation. "Such legislative concerns cut against a conclusion that a facially neutral statute is truly content-neutral." *Aubin*, Ex. 1 at 6. However, the Court need not decide this issue because the labor carve-out plainly discriminates based on content under *Hill* and every standard.

**D. Even under intermediate scrutiny, SB 742 cannot survive.**

Under the First Amendment, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 576 U.S. at 163 (quoting *Mosley,* 408 U.S. at 95). Content-based laws are "presumptively unconstitutional." *Reed*, 576 U.S. at 163. Defendant does not even attempt to argue that the speech-restrictive elements of SB 742 could withstand strict scrutiny, so Gupta will prevail if he can prove the unremarkable proposition that the words of SB 742 mean what they say.

But even if Defendant's atextual interpretation of SB 742 prevailed, by his own admission the statute cannot survive even intermediate scrutiny. Two courts have concluded that Defendant likely loses under intermediate scrutiny because SB 742 was not narrowly tailored. *Aubin*, Ex. 1 at 7-9; *RTLCC*, 2021 U.S. Dist. LEXIS 209871, at *30-*37.

Intermediate scrutiny assesses whether a content-neutral law "burden[s] substantially more speech than is necessary to further the government's" interests. *McCullen*, 573 U.S. at 486. "When the government makes it more difficult to engage in" one-on-one communication or leafletting, "it imposes an especially significant First Amendment burden," and the law must be narrowly tailored. *Id.* at 489. "The protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora." *Berger v. City of Seattle*, 569 F.3d 1029, 1035-36 (9th Cir. 2009). Public ways, sidewalks, and streets "have developed as venues for the exchange of ideas," and "[s]uch areas occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen*, 573 U.S. at 476.[2] A law is not narrowly tailored when the government has other alternatives which further its proffered interests without substantially burdening speech unrelated to those interests. *Id.* at 490-91. The government may not conveniently silence speech as "the path of least resistance" in addressing associated problems. *Id.* at 486. "[B]y demanding a close fit between ends and means, the

[2] Defendant suggests that SB 742 is not overbroad because it does not restrict speech along *all* streets (Opp. 17-18), but this is not the correct standard as cases like *Reed* and *McCullen* illustrate.

tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *Id.*

Defendant admits that California "has not tried other means of addressing the problem." Opp. 17. Instead, the Defendant argues he is relieved of that responsibility because SB 742 only squelches speech that "pose[s] risks to the government's purpose." *Id.*

This is manifestly untrue. Defendant does not allege even *pro forma* that Raj Gupta inhibits access to vaccines or spreads disease when he approaches pedestrians to distribute flyers in support of vaccination. The government must attempt less restrictive measures or at least explain why they would not work before enacting broad speech restrictions. *McCullen*, 573 U.S. 493-97 (cleaned up); *Bruni*, 824 F.3d at 357 ("The speech at issue is core political speech entitled to the maximum protection afforded by the First Amendment, and the City cannot burden it without first trying, or at least demonstrating that it has seriously considered, substantially less restrictive alternatives."). SB 742's bubble zone is especially broad considering how difficult it is to discern the perimeter of moving people in a public forum. This broad and shifting limit resembles the 30-foot zone in *Berger*: "As the end of a line shifts, or a picnic table is occupied, the Center's captive audience rule snaps on to bar speech within thirty feet of the line or the picnickers. This system of shifting 'speech-free' zones is the sort of capricious restraint, likely to chill far more speech than the Seattle Center would be justified in regulating, that *Schenck* struck down." *Berger*, 569 F.3d at 1056.

When a government is concerned about obstruction of the public ways and sidewalks, it can rely on laws that specifically restrict obstruction. *McCullen*, 573 U.S. at 493-94. Much of SB 742 effectively does this; Defendant offers no excuse for the "harassment" provision whatsoever. If the state is concerned about *bona fide* harassment, it can pass laws prohibiting stalking, physical intimidation and so forth. Perhaps odder still, Defendant's proposed workarounds for would-be speakers who want to engage patrons in one-on-one conversation—"standing nearby holding a sign or offering a handbill to patients in route to a vaccination site" (Opp. 13)—are at complete cross-purposes with the asserted interest in enabling unimpeded access to vaccination sites.

Moreover, as Gupta detailed in his Complaint and Motion (Mot. 12-13), California already has such laws in place. It proscribes "willfully and maliciously obstruct[ing] the free movement of any person on any street, sidewalk or other public place." Cal. Penal Code § 647c. Existing statutes also prohibit disorderly conduct (Cal. Penal Code § 647), assault (§ 240), inciting a riot (§ 404.6), unlawful assembly (§ 408), and disturbing the peace (§ 415).

California could—and already has—enacted "legislation similar to the federal Freedom of Access to Clinic Entrances Act" (FACE), "which subjects to both criminal and civil penalties anyone who 'by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been . . . obtaining or providing reproductive health services.'" *McCullen*, 573 U.S. at 491 (citing 18 U.S.C. § 248(a)(1)). California already has such an Act it could easily modify to include vaccination sites. Cal. Penal Code §§ 423 *et seq.* (California Freedom of Access to Clinic and Church Entrances Act). The Assembly Appropriations Committee flagged the statute as "similar," but for whatever reason did not narrowly tailor SB 742 similarly. Mot. 12.

These less restrictive alternatives prove SB 742 does not narrowly restrict speech. "The state could achieve the same purpose simply by enforcing existing laws against intimidation." *Aubin*, Ex. 1 at 8.

Defendant admittedly did not attempt any of these solutions before broadly prohibiting core speech in traditional public fora. For that reason alone, SB 742 cannot survive even intermediate scrutiny, and Gupta likely succeeds on the merits.

## II. The anti-speech "harassment" portion of SB 742 harms the public interest.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019).

Against the clear curtailment of constitutional rights, Defendant offers a grab-bag of incidents, most of which were already criminal prior to the passage of SB 742, and one of which is much less serious than it seems. While Defendant asserts that the small number of incidents

should not be dispositive because the harms are ongoing (Opp. 17), he utterly fails to show how the "harassment" prohibition of SB 742 would prevent or deter any of the incidents, meaning there are actually *zero* relevant examples.

Defendant leads with citation to the incident that occurred at Dodger Stadium January 30, 2021. Opp. 2. Gupta discussed this incident in his Complaint and Motion because it was repeatedly cited during the passage of SB 742. It turns out that public safety authorities confirmed that the antivaccination protestors were peaceful and did not block traffic. Complaint ¶ 47. The Fire Department closed the gates, as a precaution, and this short closure led to the cancellation of no appointments. *Id.* Even if protestors *had* blocked traffic, Defendant does not dispute that this activity could be regulated through a "properly drawn statute (many of which already exist)." Mot. 13-14.

Defendant cites an out-of-state incident where an antivaxxer drove her car into a vaccination site and a similar incident in Los Angeles. Opp. 2-3. Of course, this conduct is already illegal, constituting at least assault with a deadly weapon, and outlawing such behavior does not require criminalizing sign-carriers and leafletters. Defendant also recounts out-of-state incidents where an unknown liquid was thrown on vaccination workers, and where healthcare workers received threatening messages causing them to abandon their vaccination site. Myriad laws exist to deter this kind of conduct, and none of them infringe on the Gupta's free speech.

## III. If the Court invokes the severability clause, it should sever both "harassment" and labor picketing exemption

The restriction on Gupta's speech is not "minimal" as Defendant argues (Opp. 19), but the preliminary injunction Gupta seeks would only enjoin the suppression of speech. Gupta generally agrees with Defendant that the portions of the SB 742 that actually criminalize conduct, namely outlawing *obstruction* of vaccination sites need not be enjoined. Gupta seeks a preliminary injunction restricting the criminalization of *speech*, criminalization that poses extraordinary harm in chilling protected speech. *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

Defendant suggests in the alternative that a remedy should be limited only to the unconstitutional "harass" portion of SB 742. Opp. 20-21. One court concluded that the definition for "harass' in SB 742 cannot be reasonably severed and the law should therefore be enjoined entirely. *Aubin*, Ex. 1 at 10-12. But even if the statute can be rehabilitated by severing certain elements, the Court should enjoin application of both the definition for "harass" *and* subsection (d). Narrower relief leaves Gupta subject to unconstitutional content-based discrimination. In this context the First Amendment amounts to an "equal-treatment principle" and requires that such "First Amendment injury" be remedied by either extending or nullifying the benefit of the exemption. *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2354-55 (2020). It is no answer to say that subsection (d) is perfectly acceptable in the absence of the overbroad "harassment" definition, because it is still a viewpoint preference. Even if the remainder of SB 742 only encompasses *unprotected* speech, a "presumptive[]" constitutional violation exists when the government discriminates between subclasses of proscribable speech. *R.A.V. v. St. Paul*, 505 U.S. 377, 387-94 (1992).

By leaving in place subsection (d), Defendant invokes SB 742's severability clause in a manner that does not suffice to remedy the First Amendment violation. This may constitute a forfeiture by Bonta of a more curative severability argument. *Comite de Jornaleros de Rondondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 n.10 (9th Cir. 2011); *see also United States v. City of Arcata*, 629 F.3d 986, 992 (9th Cir. 2010) (declining to consider "non-jurisdictional arguments," including severability, that were waived) (citation omitted). Gupta is willing to overlook this, and would be satisfied with an injunction that severs out both subsection (d) and the "harassment" components of SB 742.

Finally, Defendant does not dispute that an injunction bond is unnecessary to secure the state's interests. Mot. 19. The injunction would not harm California, and would in fact save hundreds of thousands of dollars annually in attorney time, court, and corrections costs. *Id.*

## CONCLUSION

For these reasons, the Court should grant Gupta's motion for preliminary injunction.

Dated: January 6, 2022

Respectfully submitted,

*/s/ Theodore H. Frank*
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PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Reply in Support of Plaintiff's Motion for Preliminary Injunction using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 6th of January, 2022.

*/s/ Theodore H. Frank*
Theodore H. Frank