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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL COURIS and MICHAEL FITZGIBBONS,

Plaintiffs,

v.

KRISTINA D. LAWSON, WILLIAM J. PRASIFKA, and ROBERT BONTA, in their official capacities,

Defendants.

Case No.: 3:22-cv-01922-RSH-JLB
Date: February 2, 2023
Time: 1:30 p.m.
Courtroom: 3B Schwartz Courthouse

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Introduction

The government relies on the recently decided *McDonald v. Lawson*, but that decision is wrong, and wrong in several respects. No. 22-cv-01805, 2022 U.S. Dist. LEXIS 232798 (C.D. Cal. Dec. 28, 2022). The patient-doctor relationship requires open and frank communication so doctors can provide patients the best advice to ensure that a patient is fully informed. *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002). AB 2098 is not a statute that merely regulates conduct or treatments; the infringement on free speech is not incidental.

First, *McDonald* improperly conflates a doctor's communication of advice and information about COVID-19 to a patient with treatment and conduct. By doing so, *McDonald* effectively writes the word "advice" out of the statute. Under Ninth Circuit law*,* the advice and information that a doctor provides to a patient are entitled to the highest protection. *Conant*, 309 F.3d at 634-37; *Tingley v. Ferguson*, 47 F.4th 1055, 1072, 1075 (9th Cir. 2022) "Speech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) ("*NIFLA*"). Nor is it unprotected because it defies "the wide scholarly consensus concerning a particular matter." *United States v. Alvarez*, 567 U.S. 709, 752 (2012) (Alito, J., dissenting) (citing *New York Times Co. v. Sullivan*, 376 U.S. 264, 279 n.19 (1964) and John Stuart Mill, *On Liberty* 15 (R. McCallum ed. 1947)). Dr. Nuovo's inadmissible expert testimony (Doc. No. 12-1) to the contrary contradicts both California law and common sense. *See* Obj. to Nuovo Decl. (Doc. No. 14).

Second, because the statute's purpose was to suppress speech with which the state disagrees, rather than to regulate doctors' conduct, *McDonald* incorrectly concluded that AB 2098 only incidentally burden doctors' free speech rights. AB 2098 is not in the long-standing tradition of statutes and common law designed to regulate medical practice and protect patients. Instead, it operates *ex ante* to cast a pall over doctor-patient communications and specifically targets a subset of speech related to one subject matter, COVID-19.

Finally, *McDonald* erred when concluding that AB 2098 is not void for vagueness. The statute's reliance on terms such as "misinformation" and "scientific consensus" and an ever-evolving "standard of care" make it next to impossible for a doctor to know what is

permissible. This is especially true here, for a new viral disease like COVID-19, where any notion of medical or "scientific consensus" is at best elusive. Doc. No. 6-1 at 17-19.

AB 2098 is unconstitutional and the court should enjoin it.

Argument

I. AB 2098 regulates speech, rather than conduct.

A. AB 2098 is a content-based speech regulation.

To evade strict scrutiny, defendants and *McDonald* conflate medical treatment and conduct with the conveyance of information and advice by a doctor to a patient. This is wrong. *Tingley* and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), are inapposite; indeed, *Pickup* supports Plaintiffs here. *Tingly* and *Pickup* upheld statutes prohibiting conversion therapy treatment for minors. Both prohibitions fell on the conduct side of the conduct/speech divide because they regulated *treatments*, not merely advice or recommendations. In *Pickup*, "SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against" the banned treatment. 740 F.3d at 1231. Not so AB 2098. The statute survived in *Pickup* because "the mere dissemination of information" fell outside its prohibition. *Id.* at 1234. Again, not so AB 2098. *McDonald* committed reversible error in its *Pickup* reading.

AB 2098 does not prohibit a specific treatment, but rather prohibits advice or information about a broad variety of COVID-19 topics that the state disapproves of because it deviates from a fluctuating "scientific consensus." The inclusion of "or advice" in AB 2098's definition of "misinformation" is dispositive: it demonstrates that the legislature intended to regulate more than simply "treatment"; it intended to regulate the content of communications—pure non-incidental speech—between physicians and patients. *Conant* thus controls. 309 F.3d at 636. *McDonald v. Lawson*, No. 22-cv-01805, 2022 U.S. Dist. LEXIS 232798 (C.D. Cal. Dec. 28, 2022), errs by trying to split hairs between a doctor's "information underlying the [doctor's] advice rather than their particular opinion." *Id.* at *30. But that's not the legally relevant distinction. Instead, the line *Tingley* and *Conant* draw is between recommendation and treatment. One cannot reconcile *McDonald* with *Conant* and its First

1 Amendment protection for "information crucial to [patients'] well-being." 309 F.3d at 640
2 (Kozinski, J., concurring).
3 *McDonald* and the government rely on *Planned Parenthood v. Casey*, 505 U.S. 833, 882
4 (1992), but this is wrong. *Casey* was about requiring *additional* information rather than
5 subtracting it. Nothing in AB 2098 obliges doctors to provide any information that would
6 enhance patients' informed consent. In this sense, the invocation of informed consent here is
7 even weaker than the dissent's invocation of the concept in *NIFLA*. *Compare* 138 S. Ct. at
8 2888 (Breyer, J., dissenting). Here, ironically, the speech ban itself hinders informed consent
9 by impeding the flow of information from doctor to patient.
10 Unlike the prohibitions at issue in *Tingley* and *Pickup*, AB 2098 is not limited to a specific
11 treatment or care provided by a physician. The statute's reach is far broader because it covers
12 information and advice from physician to a patient "regarding the nature and risks of the virus,
13 its prevention and treatment; and the development, safety, and effectiveness of COVID-19
14 vaccines." Cal. Bus. & Prof. Code § 2270(a). Hence, AB 2098's regulation of speech is a
15 primary feature of the statute, rather than being incidental. The practical effect of AB 2098 is
16 that it will "prevent licensed [doctors] from discussing the pros and cons" of a course of
17 treatment because they will not know if the pros or cons are within or outside the "scientific
18 consensus." *Pickup*, 740 F.3d at 1229. AB 2098 only allows "discussions about treatment,
19 recommendations to obtain treatment, and expressions of opinions" with patients to the
20 extent that there is "scientific consensus" establishing a standard of care, which has been and
21 continues to be elusive. *Id.* at 1056; Doc. No. 6-1 at 17-19. The Board admits that it will be
22 "challenging" to prove a standard of care for which there is scientific consensus, (Doc.
23 No. 6-5, Exh. 22 at 8), and even Defendants acknowledge that a srecientific consensus may
24 not be discernible. Doc. No. 12 at 25, 26. The lack of definitive guidance built into AB 2098
25 makes it impossible for doctors to know what advice and information they are permitted to
26 discuss with a patient without violating the statute. The result is self-censorship, to the
27 detriment of patient care.
28

Plaintiffs agree with Defendants that trust is the cornerstone of the doctor-patient relationship. But AB 2098 works to undermine that trust because it prevents open discussions regarding related to a particular subject (COVID-19. *Compare Conant*, 309 F.3d at 636 (medicinal marijuana); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1313 (11th Cir. 2017) (guns). Defendants' brief repeatedly emphasizes that AB 2098 simply prohibits doctors from providing information or advice to a patient "in a manner that violates the standard of care." But that standard of care under the statute, compared to previous California law, is dependent upon a "contemporary scientific consensus" that is amorphous at best. Defendants assert that the lack of scientific consensus doesn't invalidate the statute, but instead makes it inapplicable. Odd: if the statute will cover nothing, then why fight an injunction of it? In reality, the shadow of AB 2098 enforcement hangs over a physician who, when advising a patient, expresses the slightest contrarian or unorthodox opinion or advice, even if in response to a patient inquiry. AB 2098 is thus analogous to the regulation in *Conant* that was presumptively invalid because it focused on the content of the doctor-patient communications. 309 F.3d at 637.

For instance, a doctor who in good faith counsels a patient to avoid the mRNA vaccines and instead choose the more traditional Novovax vaccine would arguably violate the statute. Likewise, a doctor who, in response to a question from a younger male patient who is otherwise healthy, expresses reservations about the safety of the mRNA vaccines, because they may be associated with a higher incidence of cardiac issues, could find themselves in the crosshairs of AB 2098. And a doctor opining to a 48-year-old patient that the more aggressive Israeli schedule expediting boosters for all ages is superior to the fluctuating age-restricted CDC schedule would be bucking the statute's concept of a "scientific consensus."

These examples of advice are neither incidental speech nor conduct in the form of a treatment. (Dr. Nuovo's claim (Doc. No. 12-1) that speech by itself is conduct that violates the standard of care when it does not completely track scientific consensus contradicts both California law and common sense. *See* Obj. to Nuovo Decl. (Doc. No. 14).)

AB 2098 targets speech and, as the Ninth Circuit emphasized, "professional speech may be entitled to the strongest protection our Constitution has to offer." *Conant*, 309 F.3d at 637.

1 *NIFLA* confirms *Conant*'s view. Defendants argue that AB 2098 relates to the "care" that a
2 doctor provides a patient, citing the statute's definition of dissemination as "the conveyance
3 of information …to a patient under the [doctor's] care in the form of treatment or advice."
4 Cal. Bus. & Prof. Code § 2270(b)(3). But advice will not always translate into treatment—
5 because under California law, the fully informed patient is entitled to choose her own
6 treatment. A young, healthy person may still decide to get a COVID-19 vaccine and may
7 decide to get the mRNA vaccine. Likewise, the patient may prefer not to get a booster that
8 the CDC doesn't recommend. Such interactions exemplify the advice and information
9 conveyed between doctor and patient that *Conant* holds the First Amendment protects.
10 AB 2098 is not limited to the occasion of harm. *Compare Alvarez*, 567 U.S. 709 (striking Stolen
11 Valor Act because of lack of requirement of cognizable harm). *McDonald* misunderstands
12 *Alvarez* and simply writes "advice" out of AB 2098 when it concludes that its speech restriction
13 is "incidental to a doctor's…proscribed [*sic*] treatment for COVID-19." 2022 U.S. Dist.
14 LEXIS 232798, at *32.

15 But *Tingley* draws the line elsewhere, noting that *Conant* "distinguished prohibiting
16 doctors from *treating* patients with marijuana—which the government could do—from
17 prohibiting doctors from simply *recommending* marijuana." 47 F.4th at 1072 (emphasis in
18 original) (citing 309 F.3d at 634-37). Under *NIFLA,* 138 S.Ct. at 2371-72, this professional
19 speech is subject to strict scrutiny, and then is presumptively invalid under *Conant.* 307 F.3d
20 at 637. The government makes no effort to claim that its speech ban satisfies strict scrutiny.

21 **B. AB 2098's purpose was to regulate speech, not conduct.**

22 AB 2098's genesis illustrates that the motivation underlying the statute was to suppress
23 the speech of doctors who expressed disfavored views. This is another reason that the statute's
24 regulation of speech is not incidental: speech regulation is AB 2098's *raison d'etre*.

25 Defendants acknowledge that Cal. Bus. & Prof. Code § 2234 already provides the Board
26 the appropriate tool to investigate and discipline doctors for unprofessional conduct, including
27 for the examples of disinformation cited by Defendants. Doc. No. 12 at 2-3. The Board also
28 conceded it already had the tools to investigate and punish physicians who engaged in harmful

conduct related to COVID-19. Doc. No. 6-1 at 14-15 (citing video of Quarterly Board Meeting). These less restrictive alternatives *already existed*. Failure to rely on them (*see* Doc. No. 6-1 at 15) leads to one inescapable conclusion: the only *marginal* difference AB 2098 makes is to chill licensed physicians's speech. One can only view AB 2098 as a content-based regulation of doctor speech, and as *NIFLA* and *Conant* hold, this violates the First Amendment.

The legislative history is thus unsurprisingly transparent that AB 2098 was not aimed at conduct, but rather at those "expressing views"—in other words, speech. The legislature noted opposition to the bill was primarily concerned that the Board "would overzealously prosecute doctors for *expressing views that are outside the mainstream* but not indisputably unreasonable based on the physician's research and training." Doc. No. 12-3, RJN Exh. B at 11. The legislature dismissed this concern by noting criticism from the legislature directed at the Board that it had not been aggressive enough in investigating and disciplining physicians for such speech. *Id.*

The legislative history's focus on the public comments of Dr. Simone Gold, an outspoken critic of public health officials and the government's response to the pandemic, is further evidence of the intent to regulate speech. The legislature complained that "there appears to be no record of any disciplinary action taken against" Dr. Gold, a California-licensed physician. Doc. No. 12-3, RJN Exh. B at 12. But the only evidence cited were public comments by her and not any advice or information she may have provided to patients about COVID-19. *Id.* According to the legislature, Dr. Gold's comments—her speech—"likely serve[] as an illustrative example of the type of behavior that the author of this bill seeks to unequivocally establish as constituting unprofessional conduct." *Id.* The legislature eventually realized that penalizing a physician's public speech was facially unconstitutional and amended AB 2098 so it applies only to information conveyed to patients "in the form of treatment or advice." *See AB-2098 Physicians and Surgeons: Unprofessional Conduct (2021-22)*, Cal. Leg. Info. (Bill Text, Apr. 20, 2022), Sec. 2(a) (Exh. 32). But that process indicates that the legislature's motive was to suppress disapproved speech and not to regulate physician conduct.

AB 2098, unlike malpractice liability, has no constitutional pedigree. When state actors attempt to use professional licensing to slant the public debate in favor of the government's preferred view on political, social, or scientific issues, courts rule such efforts unconstitutional. Florida tried to dissuade doctors' pro-gun-control views. *Wollschlaeger*. The DEA tried to chill pro-medicinal marijuana views. *Conant*. Most recently, Missouri tried to deter pharmacists from disputing the efficacy of ivermectin and HCL as treatments for COVID-19. *Stock v. Gray*, No. 22-cv-04104-DGK (W.D. Mo.) (motion for preliminary injunction pending). It's not just doctors. States targeted teachers with pro-LGBT views. *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1274 (10th Cir. 1984), *aff'd by equally divided court Bd. of Educ. v. Nat'l Gay Task Force*, 470 U.S. 903 (1985). They targeted attorneys litigating against racial segregation. *NAACP v. Button*, 371 U.S. 415 (1963). At the height of the Red Scare, there were those "among us always ready to affix a Communist label upon those whose ideas they violently oppose." *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 286-87 (1961). Political winds shift, but the First Amendment remains constant.

Even if AB 2098 only encompassed unprotected speech, the statute "presumptively" violates the First Amendment because it singles out just speech by doctors to patients regarding COVID-19. *See R.A.V. v. St. Paul*, 505 U.S. 377, 387-94 (1992). AB 2098's selective prohibition of communications between doctors and patients regarding COVID-19 is a transparent attempt to suppress speech with which the government disapproves. The state already has the means to discipline doctors for negligent or incompetent conduct, including when they render negligent or incompetent advice or treatment—such as the government's extreme hypothetical of a fictional doctor telling a patient not to use vaccines because of their microchips. *See* Cal. Bus. & Prof. Code § 2234. AB 2098 sweeps in all communications between a doctor and patient that might be construed as the "dissemination" of "misinformation" but only in the context of advice or treatment regarding COVID-19.

If protecting patients is really the underlying motivation for AB 2098, then why isn't Section 2234's negligence and incompetence standard sufficient? If preventing the "dissemination" of "misinformation" is so paramount to protecting patients, why does

AB 2098 target only COVID-19? The answer: the legislature intended AB 2098 to target speech specifically related to COVID-19, and not to protect patients from substandard conduct or "misinformation" or "disinformation" generally. This underinclusiveness demonstrates that the government is not pursuing the rationale it invokes, rather it is "disfavoring a particular … viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011). It is a content-based infringement on professional speech and thereby subject to strict scrutiny and presumptively invalid. *NIFLA,* 138 S.Ct. at 2374-75; *R.A.V.*, 505 U.S. at 394.

II. AB 2098 is unconstitutionally vague.

Defendants assert that AB 2098 is not vague because "scientific consensus" read in conjunction with the "standard of care" requirement adequately defines "misinformation." Doc. No 12 at 24. But the "standard of care" in the context of medical practice frequently is dependent upon conflicting expert opinions (Doc. No. 12-2, Prasifka Decl. ¶10) and, as the Board admitted, proving "misinformation" would be "challenging." This is even more the case when there has been anything but "scientific consensus" regarding COVID-19.

A statute "is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). There are two components of the vagueness doctrine: (1) the statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly;" and (2) the statute must "provide explicit standards for those who apply them." *Id.*; *accord Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019). AB 2098 fails both requirements.

The definition of "misinformation" references a standard of care that is not contrary to "scientific consensus." But the history of the COVID-19 pandemic demonstrates that there has been anything but "scientific consensus" regarding a litany of COVID-19 topics from the origins of the virus, its transmission, treatments, the vaccines, boosters, etc. The science related to COVID-19 has been constantly shifting and evolving, which is not surprising since it is a novel virus, with ever-multiplying variants with different features. To the extent that "scientific consensus" has a discernible core, it is a term of degree that "vests virtually complete discretion in the hands of the [enforcement official]." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

1 Although much has been learned about COVID-19, potential treatments, and the vaccines,
2 many COVID-19 topics are still very much open to debate and there is still much to be
3 researched and learned. This lack of definitive clarity demonstrates AB 2098's flaws. "[W]here
4 First Amendment freedoms are at stake, an even greater degree of specificity and clarity of
5 laws is required, and courts ask whether the language is sufficiently murky that speakers will
6 be compelled to steer too far clear of any forbidden areas." *Edge*, 929 F.3d at 664 (cleaned up).
7 AB 2098 also fails the second vagueness requirement because there is no explicit
8 standard to apply that would avoid "arbitrary and discriminatory enforcement." *Grayned*, 408
9 U.S. at 108. The Board, which is responsible for enforcement of the statute, admitted that the
10 definition of misinformation would be challenging to prove. Consequently, doctors likely will
11 be even more uncertain about what is permissible and preemptively chill their speech.
12 Defendants suggest that AB 2098 applies only when "scientific consensus exists." Doc.
13 No. 12 at 26. But because of AB 2098's chilling effect, doctors will likely refrain from having
14 unfettered discussions with patients about the options for treatment and the benefits and risks
15 associated with the vaccines. This may result in doctors failing to meet the required standard
16 of care, particularly in the context of informed consent. For instance, there have been recent
17 reports indicating that there is a higher incidence of cardiac issues for young, healthy males
18 who received mRNA vaccines. Because it runs counter to the prevailing public health currents
19 encouraging vaccinations, a doctor might refrain from disclosing this information when
20 consulting with a young, male patient (or a parent of such a minor patient). The resulting self-
21 censorship regarding COVID-19 will substantially erode the candor between physicians and
22 patients regarding the virus, treatments, and vaccines. *See Cal Tchers Ass'n v. State Bd. of Educ.*,
23 271 F.3d 1141, 1152 (9th Cir. 2001) ("The touchstone of a facial vagueness challenge is …
24 whether a substantial amount of legitimate speech will be chilled." (citing *Young v. Am. Mini*
25 *Theaters, Inc.*, 427 U.S. 50, 60 (1976)).
26 **III. Public interest supports granting preliminary relief.**
27 The remaining two factors to be considered—the public interest and whether other
28 interested parties would benefit or be harmed by an injunction—support granting relief.

AB 2098 infringes on the First Amendment rights of listener patients. Patients need to know available information "to perceive their own best interests." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578 (2011). That is *especially* so if patients disagree with unorthodox views of their doctor, for in that case their interest may be getting a second opinion or finding a new doctor. *See, e.g., Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748,765 (1976). AB 2098 casts an ominous shadow such that doctors will not feel at ease conveying advice and information freely about COVID-19 topics to their patients. In extreme examples, it may even result in doctors failing to fulfill informed-consent responsibilities. *See generally Florio v. Liu*, 60 Cal.App.5th 278, 292-94 (2021); Doc. No. 14. This harm to patients and the public ends the inquiry.

Conclusion

AB 2098 is an ill-tailored and hasty piece of legislation designed to chill protected professional speech. The statute is a dangerous intrusion on the doctor-patient relationship. The Court should grant Plaintiffs' motion to prevent the irreparable harm that will result if AB 2098 is allowed to stand.

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Respectfully submitted,

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