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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-MMA-JLB
Date: January 10, 2023
Time: 2:30 p.m.
Courtroom: 3C Schwartz Courthouse

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Introduction

Plaintiffs Michael Couris and Michael Fitzgibbons are practicing medical doctors licensed in the State of California who move to enjoin the enforcement of California Assembly Bill AB 2098, codified at Cal. Bus. & Prof. Code § 2270 ("the Statute") (Exh. 1). This law censors the private conversations between doctors and their patients in violation of the First and Fourteenth Amendment rights of Plaintiffs and their patients. "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*").

The patient-doctor relationship requires trust and openness such that doctors can provide patients the best advice and consultation to ensure that a patient has informed consent with respect to treatment options. *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002). This is particularly true when addressing a new viral disease such as COVID-19 where the notion of medical or scientific "consensus" is dangerously rigid and naïve. In such settings, robust discussion is essential to scientific inquiry and medical advancement. This is the last place that the government should intrude and attempt to impose a narrow narrative on what can and cannot be said about the virus, potential treatments, and vaccinations. This is especially true because since the onset of the pandemic there been no consensus, with the views of public health authorities transforming as more facts surface.

The California Assembly, Governor Newsom, and the Medical Board of California may all hold very strong opinions or beliefs about all matters related to COVID-19 and the COVID-19 vaccines. They may strenuously disagree with some messages or advice some doctors are providing to patients regarding the disease. Those opinions and disagreements do not matter, for "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[P]eople lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375.

This Statute infringing free-speech rights will take effect on January 1, 2023—unless this Court acts. Because the enforcement of AB 2098 chills free speech and candid discussions

between Plaintiffs and their patients, and because Plaintiffs have a strong probability of prevailing on the merits, this Court should preliminarily enjoin enforcement of AB 2098 pending resolution of this case on the merits.

I. Background

A. The COVID-19 pandemic and its response are controversial in the medical community.

In March 2020 the COVID-19 pandemic hit the United States. In response, federal, state, and local governments, as well as private entities, imposed or recommended various measures to mitigate the effect of the pandemic. These included orders to stay at home, social-distancing, requiring the wearing of masks, school closures, and closing of non-essential businesses. Federal public health authorities such as the National Institutes of Health ("NIH"), the Centers for Disease Control ("CDC"), the Food and Drug Administration ("FDA"), and local public health officials devoted resources to combat the pandemic. *See A Timeline of COVID-19 Developments in 2020*, AMER. J. OF MANAGED CARE (Jan. 1, 2021) ("AJMC 2020 COVID-19 Timeline") (Exh. 2).

The federal government-initiated Operation Warp Speed, an aggressive and accelerated push to develop vaccines for the virus that caused COVID-19. NIH, *What is Operation Warp Speed,* (July 1, 2020) (Exh. 3). Several major pharmaceutical and bio-technology companies, including Pfizer, Johnson & Johnson, and Moderna, participated in this unprecedented effort. In late 2020, Operation Warp Speed bore fruit when Pfizer, Moderna, and Johnson & Johnson announced that the trials for their vaccines had been successful. The FDA then approved vaccines on an emergency basis and public health officials and medical clinics began providing vaccines, first to at-risk populations and soon after, to the public. AJMC 2020 COVID-19 Timeline (Exh. 2).

Since its beginning, the pandemic has been marked by controversy. There has been debate and reassessment about the origins of the virus that causes COVID-19. *See* Joel Achenbach & Dan Diamond, *Senate GOP Report argues lab-leak theory is most likely origin of covid*, Wash. Post (Oct. 27, 2022) (Exh. 4). Similarly, there have been heated scientific and public-

policy debates about the merit of lockdowns, social-distancing, wearing of masks, and school closures. *See* Yevgeny Kuklychev, *Did a Johns Hopkins Study "Prove" Lockdowns Don't Work? What We Know So Far*, Newsweek (Feb. 7, 2022) (Exh. 5); Dylan Scott, *California mandated masks. Florida opened its restaurants. Did any of it matter?* Vox (June 2, 2021) (Exh. 6).

Controversy and often heated debate and disagreement continued after the roll-out of the vaccines in late 2020 and continues to this day. *See, e.g.*, Jenna Greene, *New data is out on COVID vaccine injury claims. What's to make of it?* Reuters (Oct. 12, 2022) (Exh. 7); Buzz Hollander, *Let's Stop Pretending About the Covid-19 Vaccines*, Real Clear Science (Aug. 23, 2021) (Exh. 8). The vaccines initially were controversial because their development had been fast-tracked and they used biomedical technology that had never been used in widely distributed vaccines. *See* Jeffrey Kluger, *Too Many People Still Mistrust the COVID-19 Vaccines. Here's Why*, Time.com (Jan. 5, 2021) (Exh. 9). Controversy has grown over the ability of the vaccines to reduce transmission and the risk-benefit of the vaccines for children and young adults.

The medical community has not been immune from this controversy and have often been at the center of the heated debate regarding COVID-19. In the pandemic's early days, many medical professionals struggled to find ways to effectively treat patients with or protect patients from COVID-19. It was a new disease and much about it was not known. *See* AJMC 2020 COVID-19 Timeline (Exh. 2). This remains true. Some physicians, including in California, who pursued a variety of treatment options. Two of the more controversial treatments were the use of hydroxychloroquine ("HCQ") and ivermectin. *See id.*; Jennifer Henderson, *Controversial doctor group touts ivermectin as long COVID treatment, What to know*, ABC News (Feb. 18, 2022) (Exh. 10). Some medical professionals were quite outspoken about what they believed were effective treatments for patients with COVID-19. Social media platforms blocked, banned, or removed content from medical professionals or that cited information about some treatments. *E.g.*, Sam Shead, *Facebook, Twitter and YouTube pull 'false' coronavirus video after it goes viral*, CNBC (July 28, 2020) (Exh. 11); Rachel Bovard, *Government dictating what social-media bans is tyrannical*, N.Y. Post (July 16, 2021) (Exh. 12); Ailan Evans, *EXCLUSIVE: Big*

Tech Censored Dozens of Doctors, Over 800 Accounts for COVID-19 'Misinformation,' Study Shows, Daily Caller (Feb. 8, 2022) (Exh. 13).

There have been additional allegations of social media censorship of critics of the vaccines. *See* Dylan Housman, *Internal Documents Reveal CDC Worked With Big Tech to Censor COVID-19 Speech*, Daily Caller (July 28, 2022) (Exh. 14). Members of the medical community and the general public have expressed skepticism about the vaccines, both initially and more recently. *See* Hollander, *supra* (Exh. 8). Others have outright rejected the vaccines and warned against their use, particularly for children. Michelle Smith, *How a Kennedy Built an Anti-Vaccine Juggernaut Amid COVID-19*, Associated Press (Dec. 15, 2021) (Exh. 15). Many more, both within the medical community and outside, have been vocal proponents of the safety and efficacy of the vaccines. *See, e.g.,* Gabor David Kelen & Lisa Maragakis, *COVID-19 Vaccines: Myth Versus Fact*, Johns Hopkins Medicine (Mar. 10, 2022) (Exh. 16). This is true even as it is now evident that the vaccines, while substantially reducing the severity of COVID, neither provide lasting protection from infection nor stop virus transmission. *See Fauci admits that COVID-19 vaccines do not protect "overly well" against infection*, Fox News (July 12, 2022) (Exh. 17).

B. Doctors Couris's and Fitzgibbons's experience with Covid causes them reasonable skepticism of medical consensus.

Plaintiffs Dr. Michael Couris and Dr. Michael Fitzgibbons are licensed physicians in California. Like most doctors, when the pandemic hit, they did their best to learn about the virus and COVID-19, navigate the sometimes conflicting messages coming from public health officials and medical community, and, most importantly, provide the best advice and medical care to their patients.

Dr. Fitzgibbons practices internal medicine and is an infectious disease specialist. Since the beginning of the pandemic, Dr. Fitzgibbons has not always agreed with the guidance from public health officials, or with the views of others in the medical and scientific community regarding a variety of issues related to COVID-19.

In the past two years, Dr. Fitzgibbons has treated approximately 1000 patients diagnosed with COVID-19 and is familiar with the methods of acquiring, diagnosing, treating

and avoiding COVID-19. Early in the pandemic, Dr. Fitzgibbons counseled patients about and prescribed HCQ and azithromycin because both drugs possess anti-inflammatory properties which he believed would be beneficial in the treatment of COVID-19. Further into the pandemic, Dr. Fitzgibbons prescribed ivermectin to patients both as a treatment and a prophylaxis, and in the instances where he did so, no patient complained about an adverse reaction.

When the COVID-19 vaccines became available, Dr. Fitzgibbons counseled patients to get vaccinated, but he is opposed to vaccinating children with the current vaccines because he believes that the risks associated with the vaccines outweigh the benefits. Dr. Fitzgibbons believes that for certain populations, especially children, the potential harms from the vaccines exceed the harms of COVID-19 and he has communicated this advice to patients and intends to continue to do so. Complaint ¶ 44, 48.

Dr. Couris is an ophthalmologist practicing in San Diego. He has treated patients who suffer from autoimmune diseases, several of whom use HCQ to manage their condition. There is a minor risk of eye damage from the chronic use of HCQ, so frequent eye exams are prudent for such patients. Dr. Couris has not had a single patient using HCQ have to discontinue its use because of cardiac factors, and he has recommended fewer than ten patients discontinue the use of HCQ. Complaint ¶ 54.

During the pandemic one of Dr. Couris's patients who suffered from an autoimmune disease and was having trouble getting an HCQ prescription filled, asked Dr. Couris to help her get a refill. Dr. Couris did so, but the pharmacy balked at filling the prescription until Dr. Couris spoke to the pharmacy directly. Although this was early in the pandemic, Dr. Couris was concerned that the episode might result in him being reported and investigated by the Board. Complaint ¶ 55.

Dr. Couris suffered a cardiac condition diagnosed as arrhythmia in January 2021 after receiving the second dose of the Pfizer COVID-19 vaccine. Prior to this, Dr. Couris had not suffered any cardiac condition and there was no history of heart disease in his family. Approximately three weeks later, Dr. Couris learned of a study in Israel that found that

myocarditis was a side-effect for men who received an mRNA vaccine. Dr. Couris believes that this type of information is relevant to patients who inquire about COVID-19 and the vaccines. Complaint ¶ 57.

Dr. Couris has been particularly mindful of COVID-19 issues during the pandemic, particularly regarding transmission. Ophthalmologists are at a higher risk because the proximity of their faces to a patient's face during an exam. Frequently, his patients ask him about COVID-19 and Dr. Couris does his best to provide candid counsel and advice regarding COVID-19. For patients who inquire, Dr. Couris typically advises patients age 60 or over to get vaccinated and get boosters at their discretion. He encourages those with one or more risk factors such as obesity to get vaccinated. Many of his patients ask about their children or grandchildren and his advice to them is that children should not get the mRNA vaccine. Dr. Couris recommends that patients who want the vaccine avoid the mRNA vaccines and get the more traditional vaccine produced by Novavax. Complaint ¶¶ 56, 59-60.

C. California passes AB 2098 to restrict the speech of doctors.

In July 2021, the Federation of State Medical Boards ("FSMB") issued a press release condemning physicians who spread misinformation and disinformation about COVID-19 vaccines and noting that such physicians risked disciplinary action by state medical boards, including suspension or revocation of their medical licenses. *FSMB: Spreading Covid-19 Vaccine Misinformation May Put Medical License at Risk,* Federation of State Medical Boards, News Releases (July 29, 2021) (Exh. 18).

The California Assembly responded by introducing AB 2098 in February of 2022 to counter the dissemination of "misinformation and disinformation related to Covid-19" by California licensed physicians and surgeons. *See AB-2098 Physicians and Surgeons: Unprofessional Conduct (2021-2022),* Cal. Legislative Information (Bill Text, June 21, 2022), Section 1(f) (Exh. 19). The Medical Board of California ("Board") similarly echoed its concern about misinformation and disinformation at a meeting in February 2022. Defendant Lawson, the Board President, cited the FSMB press release during the meeting, while the meeting minutes state:

> Ms. Lawson stated it is the duty of the board to protect the public from misinformation and disinformation by physicians, noting the increase in the dissemination of healthcare related misinformation and disinformation on social media platforms, in the media, and online, putting patient lives at risk in causing unnecessary strain on the healthcare system.
>
> Ms. Lawson elaborated [that] in July 2021, the Federation of State Medical Boards released a statement saying physicians spreading misinformation or disinformation risk disciplinary action by their state medical board.

Medical Board of California, Meeting Minutes for Feb. 10-11, 2022 at 6 (Exh. 20).

The Assembly amended AB 2098 in April to limit its reach to patient-doctor communications. *See AB-2098 Physicians and Surgeons: Unprofessional Conduct (2021-2022),* Cal. Legislative Information (Bill Analysis, April 18, 2022), Page 12, paragraph 3 (Exh. 21).

At its May 2022 meeting, several members of the Board expressed reservations about AB 2098 and the ability of the Board to enforce the statute if it passed, and some members indicated that the Board already had authority to investigate and discipline physicians for conduct that misled and/or was harmful to patients. Board member Dr. Dev GnanaDev noted that medicine "is not a stable thing" and that treatments that might be considered experimental can eventually become the "treatment of choice." Similarly, Board member Richard Thorp noted that many physicians advocating controversial COVID-19 treatment or expressing skepticism about new vaccines were acting in good faith and believed that they were acting in the best interest of patients. Dr. Thorp also noted that science and medicine is always evolving and that frequently medical pioneers engaged in practices that, at the time, might not have been considered firmly within the standard of care, but eventually came to define the standard of care. *See* Medical Board of California Quarterly Board Meeting May 19-20, 2022 (Day 2), https://www.mbc.ca.gov/About/Meetings/Minutes/31033/brd-Minutes-20220519.pdf, (link to video of meeting https://www.youtube.com/watch?v=dz-3h2IEcb4&t=7726s (2:08:48 to 3:03:00) (Dr. Dev GnanaDev's comments at 2:23:00 to 2:24:20; Dr. Thorp's comments at. 2:30:55 to 2:35:00)).

The meeting minutes also reflected the Board's concern that the "the definitions of misinformation/disinformation may prove challenging for the Board to prove." *See* Medical Board of California, Meeting Minutes for May 19-20, 2022 at 8 (Exh. 22).

On August 30, 2022 the California Assembly approved the final amended version of AB 2098 which the Senate had approved the previous day. Governor Newsome signed AB 2098 into law on September 30, 2022. Governor Newsom attempted to limit the reach of the Statute when he signed AB 2098 stating it would apply only in "egregious instances in which a licensee is acting with malicious intent or clearly deviating the standard of care." *See* Gov. Gavin Newsom, Signing Message (Sept. 30, 2022) (Exh. 23).

Section 1 of the Statute sets forth the legislature's findings, stating "[t]he spread of misinformation and disinformation about COVID-19 vaccines has weakened public confidence and placed lives at serious risk" and that "news outlets have reported that some of the most dangerous propagators of inaccurate information regarding COVID-19 vaccines are licensed health care professionals." It also repeats the FSMB warning from the July 2021 press release warning that physicians disseminating COVID-19 vaccine misinformation or disinformation put their medical licenses at risk. *See AB-2098 Physicians and Surgeons: Unprofessional Conduct (2021-2022),* Cal. Legislative Information (Bill Text, Oct. 3, 2022) (Exh. 1).

Section 2 of the Statute adds Section 2270 to the California Business and Professions Code and make it "unprofessional conduct" for any California physician or 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 COVD-19 vaccines." *Id.* "Misinformation" is "false information that is contradicted by contemporary scientific consensus contrary to the standard of care," while "disinformation" is "misinformation that the licensee deliberately disseminated with malicious intent or an intent to mislead." *Id.* And dissemination is "the conveyance of information from the licensee to a patient under the licensee's care in the form of treatment or advice." *Id.*

D. AB 2098 chills Drs. Fitzgerald's and Couris's advice to patients.

Some of the exchanges Dr. Fitzgerald has had with patients regarding HCQ, ivermectin, the vaccines, and other matters related to COVID-19 differed from guidance issued by various public health officials. Had AB 2098 been in effect during the first two years of the pandemic, it is likely that his advice would have been labeled "misinformation" by public health officials or others in the medical and scientific community. With the passage of AB 2098, Dr. Fitzgibbons is now extremely wary of what he can or cannot say to patients regarding COVID-19. Complaint ¶ 43, 48.

Similarly, Dr. Couris is concerned that some of the exchanges he has had with patients regarding COVID-19 could be construed as "misinformation" as defined in AB 2098 because what he has said may not align with the messages or guidance from public health officials or with the views of a majority of the medical and scientific community. Dr. Couris is now concerned about what information he can convey to patients regarding COVID-19 without jeopardizing his medical license. Complaint ¶ 61.

II. When the First Amendment is at issue, a court must grant a preliminary injunction when plaintiffs are likely to succeed on the merits.

Plaintiffs must satisfy the following four factors to obtain a preliminary injunction: (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm," (3) "the balance of equities tips in [their] favor," and (4) the required injunction "is in the public interest." *Am. Beverage Ass'n v. City of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (citing *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). When First Amendment freedoms are at risk, however, the focus is on a single factor—whether Plaintiffs are likely to succeed on the merits. This is so because even the brief loss of First Amendment freedoms causes "irreparable injury" and tilts the "the balance of hardships . . . sharply in [Plaintffs'] favor." *Id.* at 758. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.*; *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.").

Accordingly, because, as discussed below, Plaintiffs are likely to succeed on the merits, this Court should preliminarily enjoin enforcement of AB 2098.

III. Argument

A. AB 2098 impermissibly regulates content and viewpoint and cannot withstand strict scrutiny.

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

Laws that restrict speech based on content are presumptively unconstitutional and must overcome strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also IMDb.com v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020). A hallmark of content-based restrictions is whether enforcement authorities must "examine the content of the message that is being conveyed" to determine whether there has been a violation of the statute, rule or regulation in question. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

In this instance there can be no doubt that AB 2098 is a content-based restriction. The statute is directly aimed at what doctors say to their patients regarding COVID-19. *See Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) ("[B]ecause the ordinances depend on what is said, they are content-based restrictions that must receive strict scrutiny."). Authorities must "examine the content" of the doctors' messages to patients to determine if discipline is warranted.

AB 2098 squarely conflicts with the Ninth Circuit's holding in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), in which the Court invalidated a federal policy to revoke the medical licenses of doctors who recommended marijuana to a patient. The Court drew a distinction between a prohibition on treating patients with marijuana and simply recommending marijuana; the former, the Court held was a permissible regulation of doctor conduct, while the latter was based on viewpoint and content and thereby an unconstitutional infringement on free speech. *Id.* at 634-37.

True, *Pickup v. Brown* upheld a statute prohibiting conversion therapy treatment for minors, but that case is inapposite because the statute regulated conduct, rather than content, and any effect on free speech was incidental. 740 F.3d 1208, 1231 (9th Cir. 2014). Moreover,

Pickup used a rational basis standard that *NIFLA* abrogated. *Compare id.* at 1228, 1231 *with NIFLA*, 138 S. Ct. at 2371-72. After *NIFLA*, courts must apply strict scrutiny to restrictions on professional speech. 138 S. Ct. at 2371-72. "Speech is not unprotected merely because it uttered by 'professionals.'" *Id. NIFLA* singled out only "two circumstances" where professional speech may be afforded less than full protection. *Id.* at 2372. First, courts may apply "more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* Second, "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Id.*; *e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022) (distinguishing *NIFLA*).

AB 2098 fits in neither of *NIFLA*'s "two circumstances." The Statute directly regulates the content of a doctors' speech to a patient about COVID-19, treatments, and vaccines. The statute is not aimed at prohibiting or restricting what treatments a doctor can prescribe. Instead, it targets what information a doctor may disseminate to a patient about COVID-19, *i.e.*, content about the "nature and risks of the virus, its prevention, and treatment, and the development, safety, and effectiveness of Covid-19 vaccines." By its plain language it prohibits "treatment" or "advice"—recommendations that *Conant* and *Tingley* protect. Accordingly, the statute violates *Conant*. If Defendants argue that "the only thing actually at issue in this litigation is conduct," they are "wrong." *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)); *see also Wollschlaeger v. Governor*, 848 F.3d 1293, 1313 (11th Cir. 2017) (*en banc*) (striking down statute that generally prohibited doctors from asking about firearm ownership by patients or their families).

2. AB 2098 regulates viewpoint.

AB 2098 not only regulates content, but also viewpoint. The Statute aims to prohibit physicians from conveying certain medical viewpoints (ones "contradicted by contemporary scientific consensus") regarding COVID-19 to patients. The Statute's reference to the FSMB's July 2021 press release and the emphasis in Section 1 on vaccine "misinformation" and "disinformation" demonstrate that AB 2098 seeks to silence physicians who might be in the

least bit critical about the various COVID-19 consensuses as defined by the State. If a government entity chooses to regulate or restrict speech, it may not do so in a way that discriminates against certain viewpoints. *E.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (where rule "is viewpoint-based, it is unconstitutional"); *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("restrictions…based on viewpoint are prohibited"); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("viewpoint discrimination is forbidden"). "[V]iewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J, concurring).

AB 2098 seeks to punish or at least censor physicians who may deviate from the State's or the Board's preferred narrative regarding all COVID-19 topics, whether it be mask-wearing, lockdowns, school closures, vaccines, or potential treatments. Any physician who dissents from the government's preferred narrative on any one of the foregoing topics and conveys a contrary opinion or viewpoint to a patient is at risk of discipline from the Board. This is impermissible viewpoint discrimination because it regulates speech according to "the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see Conant*, 309 F.3d at 637. The Supreme Court cautions against such viewpoint discrimination: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

History abounds in examples of scientists and physicians who expressed contrarian or unorthodox viewpoints, often at great personal cost, only eventually to be vindicated. *See Galileo to Turing: The Historical Persecution of Scientists*, Wired (June 22, 2012) (Exh. 24); DAVID J APPLE MD, SIR HAROLD RIDLEY AND HIS FIGHT FOR SIGHT: HE CHANGED THE WORLD SO THAT WE MAY BETTER SEE IT (2006) (pioneering ophthalmologist faced fierce opposition from medical community as he developed what is now common cataract surgery). AB 2098 represents an ill-considered example of stifled scientific inquiry and censoring of contrarians. The Founders designed the First Amendment to prevent this type of government action. *See*

NIFLA, 138 S. Ct. at 2375 ("The test of truth is the power of an idea to get itself accepted in a competitive marketplace of ideas and the people lose when the government is the one deciding which ideas should prevail."). *NIFLA* highlighted not restraining the professional speech of medical professionals, "stress[ing] the danger of content-based regulations in the fields of medicine and public health" where "[d]octors help patients make deeply personal decisions and . . . candor is crucial." *NIFLA*, 138 S. Ct. at 2374 (cleaned up).

The freedom to express countercultural views, especially professional views, is the engine that drives our advancement toward a more culturally aware, scientifically advanced, tolerant, and open society. For example, less than a half-century ago, the prevailing opinion of the medical community (as reflected in the Diagnostic and Statistical Manual of Mental Disorders) considered homosexuality to be a disease. Before that, racial segregationist and anti-miscegenation views held sway in many states. Fortunately, the First Amendment prevented states from cementing these once-dominant views by suppressing private speech. *E.g. 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) (invalidating state statute forbidding teachers from "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity…"); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 854 (8th Cir. 1977), *cert. den'd sub nom. Ratchford v. Gay Lib.*, 434 U.S. 1080 (1978) (discrediting expert opinion of two psychiatrists and concluding that state university violated First Amendment by denying recognition to student organization wishing to provide a forum to discuss homosexuality); *NAACP v. Button*, 371 U.S. 415 (1963) (striking down Virginia's effort to resist desegregation by extending its barratry statute to outlaw NAACP litigation funding). Had governments been permitted to squelch dissenting speech, it is unclear that society would have made the pluralistic development that it has. *Cf. NIFLA*, 138 S. Ct. at 2374 (cataloging examples of repressive governments "manipulat[ing] the content of doctor-patient discourse" "throughout history"). "[F]or history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991).

3. AB 2098 cannot withstand strict scrutiny.

"Because First Amendment freedoms need breathing space to survive," a cornerstone of free speech jurisprudence is that "government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433. Because AB 2098 is viewpoint-based it is *per se* unconstitutional. *E.g.*, *Minn. Voters Alliance*, 138 S. Ct. at 1885. Content-based restrictions are "presumptively invalid" and can be upheld only if Defendants satisfy strict-scrutiny—proving a law "further[s] a compelling interest and is narrowly tailored." *Reed*, 576 U.S. at 171; *accord Conant*, 309 F.3d at 638; *see also Ashcroft v. ACLU*, 542 U.S. 656, 660-61 (2004) (defendants bear burden of proving both compelling state interest and narrow tailoring at all stages of litigation). This is "the most demanding test known to constitutional law" and only in the "rare case" is it satisfied. *City of Bourne v. Flores* 521 U.S. 507, 534 (1997); *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015).

Defendants cannot satisfy their burden because although Defendants might have a compelling interest in regulating the conduct of licensed physicians, the State lacks the right to restrict speech by limiting the candid exchange of information between a doctor and a patient. Doing so would not safeguard medical decisions. *NIFLA* recognized some narrow instances where the state may regulate the speech of medical professionals, most notably in the context of providing information allowing a patient to make decisions based on informed consent tied to a procedure or treatment. *NIFLA*, 138 S. Ct. at 2373. Here, a court cannot construe AB 2098's limitation on doctor speech as incidental to California's interest in regulating the conduct of doctors. AB 2098 is not aimed narrowly at what treatments doctors can use or prescribe for COVID-19. Instead, AB 2098 sweeps broadly, regulating everything a doctor may discuss with a patient about COVID-19. The prohibition goes beyond incidental speech about treatment recommendations or prescriptions.

And the statute is not narrowly tailored to promote any proffered compelling interest. While AB 2098 was working its way through the Assembly, the Board weighed in on the bill, and conveyed that it already had authority to investigate physicians for unprofessional or harmful conduct related to COVID-19. *See* Cal. Bus. & Prof. Code § 2234(b) & (e); Medical

Board of California Quarterly Board Meeting May 19-20, 2022 (Day 2) (link to video of meeting https://www.youtube.com/watch?v=dz-3h2IEcb4&t=7726s (2:08:48 to 3:03:00)). The Statute singles out only the speech of physicians and surgeons, thus leaving patients "open to an unlimited proliferation of" the same potentially offending speech provided by other medical professionals, such as nurses or physician assistants. *Victory Processing LLC v. Fox*, 937 F.3d 1218, 1229 (9th Cir. 2019) (statute not narrowly tailored when underinclusive).

Section 2234 of the Business and Professions Code authorizes the Board to act against licensees who engage in unprofessional **conduct** and provides non-exhaustive list of the type of conduct that could precipitate Board discipline, including incompetence, gross negligence, repeated negligence, and acts of dishonesty or corruption "substantially related to the qualifications, functions, or duties of a physician or surgeon." Cal. Bus. & Prof. Code § 2234(e). This would include gross negligence and any intentionally false and misleading speech a physician utters to a patient incidental to conduct of the physician treating a patient. Thus, Defendants cannot carry their burden to show that there were less restrictive alternatives or that those alternatives would have been ineffective. *See United States v. Playboy Ent. Grp. Inc.*, 529 U.S. 803, 817 (2000). The Board already had alternatives and at least some Board members believed that those alternatives were sufficient. The Board already has sufficient "speech-neutral remedies" at their disposal. *IMDb.com*, 962 F.3d at 1125-26; *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (finding tort laws to be a lesser restrictive alternative). Yet the Board supported this legislation anyway—revealing that the interest was chilling speech, rather than disciplining doctor wrongdoing. As additional alternatives, the State can use public relations campaigns and public health broadcast messages to counter messages of which it disapproves. *See Am. Beverage Ass'n*, 916 F.3d at 762 (Ikuta, J., concurring in the result) (noting that public information campaign is less burdensome).

A "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414; *accord Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("speech cannot be restricted simply because it is upsetting or arouses contempt"). The State

Assembly, Governor Newsom, and members of the Board may all believe quite strongly on how best to manage COVID-19 and they are entitled to their strong opinions, but they may not dictate or constrain what physicians discuss with their patients. *See Conant*, 309 F.3d at 637 (state cannot regulate doctor-patient speech to prevent individuals from making "bad decisions"). Consistent with the First Amendment, "the remedy for speech that is false is speech that is true—and not, as [California] would like, the suppression of that speech." *ALDF*, 878 F.3d at 1205 (cleaned up). Accordingly, Defendants cannot satisfy strict scrutiny. The Court should preliminarily enjoin enforcement of AB 2098.

B. AB 2098 is unconstitutionally vague and overbroad.

If Plaintiffs are correct that the Statute regulates viewpoint, that "end[s] the matter"; "it must be invalidated"—and a preliminary injunction granted—even without considering the Statute's "permissible applications." *Iancu*, 139 S. Ct. at 2302.

AB 2098 gives the Board *carte blanche* to determine what is fair or foul with respect to what physicians can say to their patients about COVID-19. This is an impermissible overreach. "States cannot choose the protection that speech received under the First Amendment [by regulating a profession] as that would give them a powerful tool to impose invidious discrimination of disfavored topics." *NIFLA*, 138 S. Ct. at 2375; *see also IMDb.com*, 962 F.3d at 1121 ("state legislatures do not have freewheeling authority to declare new categories of speech outside the scope of the First Amendment" (cleaned up)).

But even if one construes AB 2098 as a permissible regulation of conduct, rather than content, the Statute's imprecise language combined with its broad sweep of all matters related to COVID-19 render it impossible to know which doctor-patient exchanges are permitted or forbidden. A court must invalidate a statute as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation omitted). Even the Board recognized this problem with the Statute, expressing concern that "the definitions of misinformation/disinformation may prove challenging for the Board to prove." *See* Medical Board of California, Meeting Minutes for May 19-20, 2022 at 8.

The Statute purports to codify an official "scientific consensus" for a new virus-driven disease. This includes potential treatments or preventive measures for the disease, and for the new vaccines developed to counter the disease. This is overreaching by the government and contradicts fundamental scientific and medical inquiry, which requires that conventional views, especially those concerning new diseases, be challenged by opposing opinions.

It would be preposterous to believe a COVID-19 "scientific consensus" is immutable. There is a litany of examples of contradictory or revised COVID-19 public health pronouncements:

- Dr. Fauci on the dangers of COVID-19 and on mask wearing. Dr. Anthony Fauci, the most prominent public health official and an architect of the government's COVID-19 response, initially stated that the public had more to fear from the seasonal flu than from COVID-19, even suggesting in March 2020 that people need not fear taking cruise-ship vacations. Fauci also stated that the public did not need to wear masks, only to reverse himself and become a strong advocate for public masking. And there have since been several studies that have cast doubt on the efficacy of wearing ordinary masks. Brian Flood, *Contradictions from Fauci, CDC throughout COVID pandemic outlined in viral Twitter thread*, Fox News (July 29, 2021) (Exh. 25).

- Lockdowns. The lockdowns were initially supposed to last two weeks to flatten the curve, yet in many localities, they lasted much longer. More recently, there have been studies that strongly suggested that the lockdowns did little or nothing to reduce the spread of COVID-19. *See* Yevgeny Kuklychev, *supra* (Exh. 5).

- Treatments. On March 30, 2020, the FDA issued an emergency use authorization ("EUA") for "hydroxychloroquine sulfate and chloroquine phosphate products" to treat patients with COVID-19. The FDA rescinded the EUA on June 15, 2020 except for patients in clinical trials. *See* AJMC 2020 COVID-19 Timeline (Exh. 2).

- Testing protocol. On August 25, 2020, the CDC revised its testing guidance, saying that asymptomatic persons who have been exposed need not be tested, only to reverse that guidance after the agency acknowledged that the decision had bypassed scientific review process. *Id.* (Exh. 2).

- Method of spread. In September 2020, the CDC published guidance that Covid-19 spreads airborne, only to remove that guidance three days later. In October 2020, the CDC again revised its guidance on how COVID-19 spreads, acknowledging that the virus spreads through aerosolization and not just by close contact with an infected person or via droplets. *Id.* (Exh. 2).

- Mask wearing. In July 2021, the CDC reversed its masking guidance, advising that even vaccinated individuals should go back to wearing masks indoors. *See* Christian Datoc, *White House distances Biden from CDC's latest flip-flop on masks*, Wash. Examiner (July 27, 2021) (Exh. 26).

- Vaccine efficacy. In 2021, Dr. Fauci claimed that studies showed that the COVID-19 vaccines would reduce transmission of the virus and that the vaccines were effective at preventing symptomatic cases of COVID-19. Sara G. Miller, *"The looming question"; Fauci says studies suggest vaccines slow virus spread*, NBC News (Feb. 17, 2021) (Exh. 27); Dakin Andone & Travis Caldwell, *Covid-19 vaccines are effective at preventing severe disease, experts say, as rising cases threaten the unvaccinated*, CNN (July 17, 2021) (Exh. 28). But within a year, Dr. Fauci admitted that the vaccines do not prevent infection "overly well." *Fauci admits that COVID-19 vaccines do not protect "overly well" against infection*, Fox News (July 12, 2022) (Exh. 17).

- Booster shots. The consensus and government recommendations on booster shots have shifted repeatedly. *E.g.*, Anjalee Khemlani, *CDC guidance exacerbates confusion over COVID-19 boosters*, Yahoo (Sept. 24, 2021) (Exh. 29).

- The origins of the virus. It was once considered a dangerous conspiracy theory putatively disproven by science to assert that the virus was man-made in the Wuhan Institute of Virology or that the pandemic resulted from a lab leak. Now many consider the lab leak theory viable. *E.g.*, Achenback & Diamond, *supra* (Exh. 4).

- Intubation. Early in the pandemic doctors often very quickly resorted to using ventilators on severely ill patients. But some doctors began rethinking this strategy and either delayed or sought to avoid intubation, preferring alternate therapies that were less invasive and had fewer long-term effects. Jim Dwyer, *What Doctors on the Front Lines Wish They'd Known a Month Ago*, N.Y. Times (Apr. 15, 2020) (Exh. 30).

- School closures. In June 2020, the American Academy of Pediatrics recommended that schools reopen in the fall. After the Trump administration and CDC cited the AAP recommendation, teachers' unions successfully lobbied the AAP to change its "scientific consensus," and the AAP changed positions on July 20, 2020, just a few days after its initial statement. Aaron Sibarium, *The Highjacking of Pediatric Medicine*, Wash. Free Beacon (Dec. 7, 2022) (Exh. 31).

These are just a few examples. Questionable public health guidance that officials often revised as new data became available—or worse, in response to political pressure—litters the history of COVID-19. Yet in the face of this mountain of conflicting guidance and studies, the Assembly and Governor Newsom concluded there must be "scientific consensus" in there somewhere and that doctors who express reservations about that supposed consensus must face discipline. This is wrong. How can physicians know what is fair or foul when advising patients? This impossible predicament proves that AB 2098 is overly broad and vague.

"The void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253-54; *accord Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

There is a real risk that a physician will utter to a patient something that at the time is considered out of bounds from the current guidance on COVID-19, making her subject to a charge of unprofessional conduct under AB 2098. And it is irrelevant under AB 2098 if a physician made the statement in good faith to provide candid and helpful advice to a patient. The fact the statement might violate current, but perhaps inaccurate, public health guidance would place the doctor in jeopardy. The question is not whether discriminatory enforcement will necessarily occur, "but whether the [Statute] is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051; *see also United States v. Wunsch*, 84

F.3d 1110, 1119 (9th Cir. 1996) (in First Amendment context, key question is whether statute could impose "chilling effect on the exercise of First Amendment freedoms").

Governor Newsom's signing statement asserted that the state will only use AB 2098 in "egregious instances" where a physician acted with "malicious intent," but this does not save the Statute.[1] "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. Courts may not uphold an unconstitutional rule just because defendants "promise[] to use it responsibly." *Id.* Nor may a court "write nonbinding limits into a silent state statute" (*Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988)) or "rewrite a law to conform it to constitutional requirements." *Iancu*, 139 S. Ct. at 2301 (*quoting Stevens*, 559 U.S. at 481). They are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)). The Newsom signing statement deviates from the text of the Statute. There is no reasonable and readily apparent construction that can salvage the Statute.

C. Plaintiffs will sufferable irreparable harm

"When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary." 11A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. Apr. 2020 update). "[A]ny First Amendment infringement that occurs with each passing day is irreparable." *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (internal

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[1] Governor Newsom's support for AB 2098 is ironic: on August 5, 2022 he tweeted a video condemning political opponents for taking away the freedom of doctors and patients to speak openly and free from government interference. *See* Gavin Newsom (@GavinNewsom), Twitter (Aug. 5, 2022), https://twitter.com/GavinNewsom/status/1555550752726138881 ("Republican leaders are coming after doctors like it's the Salem witch trials.").

quotation omitted; citing cases)). The "chill on … free speech rights—even if it results from a threat of enforcement rather than actual enforcement—constitutes irreparable harm." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019).

Governor Newsom signed AB 2098 into law on September 30, 2022. Even if not immediately enforced until January 1, 2023, physicians such as Plaintiffs likely will begin to self-censor to avoid unwelcome Board attention. Thus the Court should enjoin enforcement of the Statute immediately to prevent further harm.

D. The balance of equities and public interest support granting preliminary relief.

The remaining two factors to be considered—the public interest and whether other interested parties would benefit or be harmed by an injunction—also support granting relief. Because AB 2098 deters not only Plaintiffs' speech, but that of all California licensed physicians and surgeons, "the balance of equities and the public interest thus tip sharply in favor of enjoining the [Statute]." *Klein*, 584 F.3d at 1208. Enforcement of the Statute might result in a physician being suspended or losing his or her license to practice medicine. Thus, "[t]here is a potential for extraordinary harm and serious chill upon protected speech." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

The Statute infringes on the First Amendment rights of the listeners—here, patients. First Amendment protection extends not just "to the communication," but also "to its source and to its recipients both." *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). The Statute's logical outcome is physicians self-censoring, perhaps to the detriment of their patients, many of whom will be seeking candid guidance. The practical effect of AB 2098 will be a single, government-approved—but empirically often incorrect—narrative regarding COVID-19 matters. This narrative may be at odds for what is best for a particular patient given her unique circumstances. Confining physicians to a government-approved message is not in the public interest, especially with respect to a novel and controversial disease such as COVID-19. "The Constitution embraces…a heated exchange of views, even (perhaps especially) when they concern sensitive topics . . . where the risk of

conflict and insult is high." *Rodriguez v. Maricopa County Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010). Truth is discovered "out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotation and alteration omitted).

As discussed above, Defendants already possess the tools necessary to investigate and discipline physicians who engage in harmful conduct. If Defendants (or any private party for that matter) are concerned about what they perceive to be misinformation regarding COVID-19 or the vaccines, the solution is accurate and truthful speech. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." *United States v. Alvarez*, 576 U.S. 709, 727 (2012); *see also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.").

Conclusion

AB 2098 is unconstitutional. The Court should issue a preliminary injunction prohibiting any enforcement action under AB 2098 pending entry of a final order in this case.

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Respectfully submitted,

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