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**IN THE SUPERIOR COURT FOR WASHINGTON STATE
ASOTIN COUNTY**

RICHARD J. EGGLESTON, M.D.

Plaintiff/Petitioner,

vs.

WASHINGTON MEDICAL COMMISSION,

Defendant/Respondent.

NO.

**COUNSEL’S DECLARATION IN
SUPPORT OF PLAINTIFF’S MOTION
FOR A PRELIMINARY INJUNCTION**

I, RICHARD JAFFE declare as follows:

1. I am an attorney admitted to the state bars in California, New York and Texas. My limited admission application to appear in this case is pending before the Court. I have personal knowledge of the adjudicative and legislative facts set out herein and in the complaint.

2. The purpose of this declaration is to put before the Court some uncontestable facts which need to be brought to the attention to the Court, or which support the granting of Plaintiff’s Preliminary Injunction Motion.

A. The Upcoming Administrative Hearing

3. Plaintiff’s administrative hearing is set for May 24 through May 26, 2023.

1 4. Plaintiff's had filed a motion to dismiss the case on First Amendment and Free Speech
2 Washington Constitutional grounds. At the prehearing conference, the Administrative
3 Law Judge indicated that she was denying the motion and would set out the grounds in
4 the forthcoming pre hearing order. As of the date of the filing of this case, the
5 prehearing order has not been yet been issued. However, based on the Attorney
6 General's argument in this and another similar case, it is likely that the ALJ will
7 conclude that she does not have the statutory power rule because she will interpret the
8 motion as making a constitutional challenge to a statute or rule, and that being
9 prohibited by WAC 246-11-480 (c).

10 5. If so. that means there is no administrative remedy available, which renders the
11 administrative hearing both inadequate and futile to protect Plaintiff's state
12 Constitutional Free Speech rights, which constitute exceptions to exhaustion under
13 RCW 34.05. 534, (3) (a) and (b).

14 **B. The Washington Federal Case**

15 6. Plaintiff is one of three physicians who filed a federal lawsuit against the members and
16 administrative staff of the Medical Commission to stop the Commission from
17 pursuing them for, inter alia, their public speech. (*Wilkinson et al v. Rogers et al.* Case
18 No. 1:23-cv-030335, Eastern District of Washington) That suit was a direct federal
19 and state law challenge to the Commission's September 2021 guidance document
20 which supported the Federation's July 21, 2021 press release which suggested that
21 medical boards should prosecute physicians for Covid misinformation.

22 7. The federal district judge denied the Plaintiffs' motion for a TRO on three grounds: 1.
23 *Younger* abstention (the federal prudential doctrine limiting federal courts from

1 intervening with an on-going state proceeding), 2. Lack of personal jurisdiction, and 3.
2 The guidance document is not subject to attack because it is only a non-binding policy
3 statement.

4 **8.** That the district judge denied the TRO is not a negative precedent to this motion
5 because of the limited grounds of the denial. The court declined to exercise pendant
6 jurisdiction over the stat law claims. Further, there was no direct constitutional
7 challenge of the Commission's general statutory ability to prosecute or sanction
8 physicians for their pure speech under its operating statutes and under the stated
9 grounds of moral turpitude, dishonesty or misrepresentation in light of the judge's
10 order, the Plaintiffs filed a First Amended Complaint which removed the state law
11 claims. The case continues under federal law challenging the Commission's guidance
12 policy statement. The instant case contains no such challenge to the Commission's
13 statement under either federal or state law.

14 **C. Other States' Implementation of the Federation's Press Release**

15 9. Washington is not the only state which has attempted to effectuate the Federation's
16 Covid misinformation press release. I think the experience in other states is relevant,
17 particularly what happened in California because the state legislature introduced a bill
18 in the 2022 legislative session seeking to make physician speech to patients and the
19 public board sanctionable via AB 2098.

20 10. Legislative bills are subjected to much greater scrutiny than policy/guidance statements
21 like what the Commission did for its Covid misinformation guidance. Bills pass
22 through committees in both houses and are subject to legislative review as well as
23 outside scrutiny.

- 1 11. Before the first hearing, the legislature was forced to limit the law to interactions
2 between physicians and patients, because of the widespread pushback resulting from
3 the unconstitutionality of sanctioning physicians for their pure speech. (The
4 Legislative Report containing the legal analysis is attached hereto as Exhibit A, pages
5 12 and 13). With that limitation of the bill (to communications between a physician
6 and a patient for treatment or advice), AB 2098 was signed into law in September 30,
7 2021, effective January 1, 2023 (Business and Professional Code, Section 2270).
- 8 12. However, the law is not currently in effect, at least as to physicians who are members
9 of a California physicians' organization which obtained a federal court preliminary
10 injunction against the law *in Hoang v. Bonta*, and its related case *Hoeg v. Newsom*.
11 Nos. 2:22-cv-01980 WBS AC, 2:22-cv-02147 WBS AC. (Jan. 25, 2023, ED Ca.), as
12 set out in detail on page 4 of the Complaint. I and Robert F. Kennedy Jr. are counsel of
13 record in the *Hoang* case.
- 14 13. The Complaint also sets out the California Medical Board's efforts to sanction two
15 physicians for their pure speech, but both investigations were closed without charges
16 being filed. (Complaint at page 5, para. 2.6.)
- 17 14. Similarly, the Maine Medical Board filed charges against a physician for Covid
18 misinformation, prescribing off-label drugs for Covid and recordkeeping. But prior to
19 the hearing, the board dropped the Covid misinformation charges. (*Id.* at para. 2.7)
- 20 15. I have been following and litigating the Covid misinformation cases in various states
21 for over a year, and the Eggleston case is the only current case I am aware of which is
22 based solely on the physician's public or pure speech.

1 16. In fact, the Legislative record in AB 2098 stated that as of mid-2022, there were at
2 least 14 states which had introduced legislation barring their state medical boards from
3 sanctioning physicians for conveying information and opinions contrary to the
4 mainstream Covid narrative. (See Exhibit A at page 8, highlighted).

5 17. I submit this declaration under penalties of perjury under the laws of the State of
6 Washington.

7 This declaration has been executed on May 8, 2023 in Westport, Ct.

8 

9
10 _____
11 Richard Jaffe

EXHIBIT “A”

Date of Hearing: April 19, 2022

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS

Marc Berman, Chair

AB 2098 (Low) – As Introduced February 14, 2022

SUBJECT: Physicians and surgeons: unprofessional conduct.

SUMMARY: Expressly provides that the dissemination of misinformation or disinformation related to COVID-19 by physicians and surgeons constitutes unprofessional conduct.

EXISTING LAW:

- 1) Enacts the Medical Practice Act, which provides for the licensure and regulation of physicians and surgeons. (Business and Professions Code (BPC) §§ 2000 *et seq.*)
- 2) Establishes the Medical Board of California (MBC), a regulatory board within the Department of Consumer Affairs (DCA) comprised of 15 appointed members. (BPC § 2001)
- 3) Enacts the Osteopathic Act, which provides for the licensure and regulation of osteopathic physicians and surgeons. (BPC §§ 2450 *et seq.*)
- 4) Establishes the Osteopathic Medical Board of California (OMBC), which regulates osteopathic physicians and surgeons who possess effectively the same practice privileges and prescription authority as those regulated by MBC but with a training emphasis on diagnosis and treatment of patients through an integrated, whole-person approach. (BPC § 2450)
- 5) Provides that protection of the public shall be the highest priority for both the MBC and the OMBC in exercising their respective licensing, regulatory, and disciplinary functions, and that whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (BPC § 2001.1; § 2450.1)
- 6) Entrusts the MBC with responsibility for, among other things, the enforcement of the disciplinary and criminal provisions of the Medical Practice Act; the administration and hearing of disciplinary actions; carrying out disciplinary actions appropriate to findings made by a panel or an administrative law judge; suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions; and reviewing the quality of medical practice carried out by physician and surgeon certificate holders under the jurisdiction of the board. (BPC § 2004)
- 7) Authorizes the MBC to appoint panels of at least four of its members for the purpose of fulfilling its disciplinary obligations and provides that the number of public members assigned to a panel shall not exceed the number of licensed physician and surgeon members. (BPC § 2008)
- 8) With approval from the Director of Consumer Affairs, authorizes the MBC to employ an executive director as well as investigators, legal counsel, medical consultants, and other assistance, but provides that the Attorney General is legal counsel for the MBC in any judicial and administrative proceedings. (BPC § 2020)

- 9) Allows the MBC to select and contract with necessary medical consultants who are licensed physicians to assist it in its programs. (BPC § 2024)
- 10) Empowers the MBC to take action against persons guilty of violating the Medical Practice Act. (BPC § 2220)
- 11) Requires the Director of Consumer Affairs to appoint an independent enforcement monitor no later than March 1, 2022 to monitor the MBC's enforcement efforts, with specific concentration on the handling and processing of complaints and timely application of sanctions or discipline imposed on licensees and persons in order to protect the public. (BPC § 2220.01)
- 12) Requires the MBC to prioritize its investigative and prosecutorial resources to ensure that physicians representing the greatest threat of harm are identified and disciplined expeditiously, with allegations of gross negligence, incompetence, or repeated negligent acts that involve death or serious bodily injury to one or more patients receiving the highest priority. (BPC § 2220.05)
- 13) Clarifies that the MBC is the only licensing board that is authorized to investigate or commence disciplinary actions relating to the physicians it licenses. (BPC § 2220.5)
- 14) Provides that a licensee whose matter has been heard by an administrative law judge, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the MBC, may be subject to various forms of disciplinary action. (BPC § 2227)
- 15) Provides that all proceedings against a licensee for unprofessional conduct, or against an applicant for licensure for unprofessional conduct or cause, shall be conducted in accordance with the Administrative Procedure Act. (BPC § 2230)
- 16) Requires the MBC to take action against any licensee who is charged with unprofessional conduct, which includes, but is not limited to, the following:
 - a) Violating or aiding in the violation of the Medical Practice Act.
 - b) Gross negligence.
 - c) Repeated negligent acts.
 - d) Incompetence.
 - e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician.
 - f) Any action or conduct that would have warranted the denial of a certificate.
 - g) The failure by a physician, in the absence of good cause, to attend and participate in an investigatory interview by the MBC.(BPC § 2234)

- 17) Provides that a physician shall not be subject to discipline solely on the basis that the treatment or advice they rendered to a patient is alternative or complementary medicine if that treatment or advice was provided after informed consent and a good-faith prior examination; was provided after the physician provided the patient with information concerning conventional treatment; and the alternative complementary medicine did not cause a delay in, or discourage traditional diagnosis of, a condition of the patient, or cause death or serious bodily injury to the patient. (BPC § 2234.1)
- 18) Provides that the conviction of any offense substantially related to the qualifications, functions, or duties of a physician constitutes unprofessional conduct. (BPC § 2236)
- 19) Provides that violating a state or federal law regulating dangerous drugs or controlled substances, constitutes unprofessional conduct. (BPC §§ 2237 – 2238)
- 20) Provides that self-prescribing of a controlled substance, or the use of a dangerous drug or alcoholic beverages to the extent that it is dangerous or injurious to the physician or any other person, or impairs the physician's ability to practice, constitutes unprofessional conduct. (BPC § 2239)
- 21) Provides that prescribing, dispensing, or furnishing dangerous drugs without an appropriate prior examination and a medical indication constitutes unprofessional conduct. (BPC § 2242)
- 22) Provides that the willful failure to comply with requirements relating to informed consent for sterilization procedures constitutes unprofessional conduct. (BPC § 2250)
- 23) Provides that the prescribing, dispensing, administering, or furnishing of liquid silicone for the purpose of injecting such substance into a human breast or mammary constitutes unprofessional conduct. (BPC § 2251)
- 24) Provides that the violation of an injunction or cease and desist order relating to the treatment of cancer constitutes unprofessional conduct. (BPC § 2252)
- 25) Provides that failure to comply with the Reproductive Privacy Act governing abortion care constitutes unprofessional conduct. (BPC § 2253)
- 26) Provides that the violation of laws relating to research on aborted products of human conception constitutes unprofessional conduct. (BPC § 2254)
- 27) Provides that the violation of laws relating to the unlawful referral of patients to extended care facilities constitutes unprofessional conduct. (BPC § 2255)
- 28) Provides that any intentional violation of laws relating to the rights of involuntarily confined inpatients constitutes unprofessional conduct. (BPC § 2256)
- 29) Provides that the violation of laws relating to informed consent for the treatment of breast cancer constitutes unprofessional conduct. (BPC § 2257)
- 30) Provides that the violation of laws relating to the use of laetrile or amygdalin with respect to cancer therapy constitutes unprofessional conduct. (BPC § 2258)

- 31) Provides that failing to give a patient a written summary prior to silicone implants being used in cosmetic, plastic, reconstructive, or similar surgery constitutes unprofessional conduct. (BPC § 2259)
- 32) Provides that failing to give a patient a written summary prior to collagen injections being used in cosmetic, plastic, reconstructive, or similar surgery constitutes unprofessional conduct. (BPC § 2259.5)
- 33) Provides that any violation of extraction and postoperative care standards constitutes unprofessional conduct. (BPC § 2259.7)
- 34) Provides that the removal of sperm or ova from a patient without written consent constitutes unprofessional conduct. (BPC § 2260)
- 35) Provides that the violation of laws relating to human cloning constitutes unprofessional conduct. (BPC § 2260.5)
- 36) Provides that knowingly making or signing any certificate related to the practice of medicine which falsely represents the existence or nonexistence of a state of facts constitutes unprofessional conduct. (BPC § 2261)
- 37) Provides that altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct. (BPC § 2262)
- 38) Provides that numerous other inappropriate activities or violations of the law constitute unprofessional conduct. (BPC §§ 2263 – 2318)
- 39) Requires that licensees be given notification of proposed actions to be taken against the licensee by the MBC and be given the opportunity to provide a statement to the deputy attorney general assigned to the case. (BPC § 2330)

THIS BILL:

- 1) Provides that the dissemination or promotion of misinformation or disinformation related to COVID-19 by a physician and surgeon constitutes unprofessional conduct.
- 2) Includes false or misleading information regarding the nature and risks of the COVID-19 virus, its prevention and treatment, and the development, safety, and effectiveness of COVID-19 vaccines as types of misinformation or disinformation that could be disseminated.
- 3) Requires the MBC or OMBC to consider the following factors prior to bringing a disciplinary action against a licensee for disseminating misinformation or disinformation:
 - a) Whether the licensee deviated from the applicable standard of care.
 - b) Whether the licensee intended to mislead or acted with malicious intent.
 - c) Whether the misinformation or disinformation was demonstrated to have resulted in an individual declining opportunities for COVID-19 prevention or treatment that was not justified by the individual's medical history or condition.

- d) Whether the misinformation or disinformation was contradicted by contemporary scientific consensus to an extent where its dissemination constitutes gross negligence by the licensee.
- 4) Defines “physician and surgeon” as a person licensed by either the MBC or the OMBC.
- 5) Provides that violators of the bill’s provisions are not guilty of a misdemeanor.
- 6) Makes various findings and declarations in support of the bill.

FISCAL EFFECT: Unknown; this bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by the **California Medical Association**. According to the author:

“AB 2098 is crucial to addressing the amplification of misinformation and disinformation related to the COVID-19 pandemic. Licensed physicians, doctors, and surgeons possess a high degree of public trust and therefore must be held accountable for the information they spread. Providing patients with accurate, science-based information on the pandemic and COVID-19 vaccinations is imperative to protecting public health. By passing this legislation, California will show its unwavering support for a scientifically informed populous to protect ourselves from COVID-19.”

Background.

COVID-19 Pandemic and Vaccines. To date, over 984,000 people have died of COVID-19 in the United States, including approximately 90,000 Californians.¹ On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency as a result of the impacts of the COVID-19 public health crisis, and on March 19, 2020, the Governor formally issued a statewide “stay at home order,” directing Californians to only leave the house to provide or obtain specified essential services. Subsequent guidance from the State Public Health Officer expressly exempted from that order various professionals regulated by the Department of Consumer Affairs (DCA), including physicians and surgeons providing essential care.

On March 30, 2020, Governor Newsom announced an initiative to “expand California’s health care workforce and recruit health care professionals to address the COVID-19 surge” and signed Executive Order N-39-20. This executive order established a waiver request process under the DCA and included other provisions authorizing the waiver of licensing, certification, and credentialing requirements for health care providers. Through this waiver process, the DCA issued a series of waivers of law to authorize various healing arts professionals to order and administer COVID-19 vaccines. These waivers aligned with similar authority granted federally under the Public Readiness and Emergency Preparedness (PREP) Act for Medical Countermeasures Against COVID-19.

¹ Data current as of April 11, 2022; the number of Californians who have died from causes related to COVID-19 has risen 20 percent since this bill was introduced with its current findings and declarations.

Vaccines are regulated and overseen by multiple federal entities responsible for ensuring their safety and efficacy. The federal Food and Drug Administration (FDA) is initially responsible for approving new drugs, determining both that they are safe to administer and that their recommended use is clinically supported. During states of emergency, the FDA may expedite their review through the Emergency Use Authorization (EUA) process to accelerate the availability of new immunizations or treatments. Currently, three vaccines have been approved through the EUA process for COVID-19. These vaccines have additionally been reviewed and found safe by national experts participating in a Western States Scientific Safety Review Workgroup. Data has continued to show that the risks of infection, hospitalization, and death for vaccinated individuals are dramatically lower than for those who have not been vaccinated.²

Misinformation and Disinformation. This bill is intended to target three types of false or misleading information relating to the COVID-19 pandemic. First, the language refers to nonfactual information regarding “the nature and risks of the virus”—for example, misleadingly comparing COVID-19 to less serious conditions or inaccurately characterizing the deadliness of the disease. Second, the bill seeks to address false statements regarding its “prevention and treatment”—this would presumably include the promotion of treatments and therapies that have no proven effectiveness against the virus. The third category is for misinformation or disinformation regarding “the development, safety, and effectiveness of COVID-19 vaccines.”

Public skepticism and misunderstanding of diseases, treatments, and immunizations is not unique to COVID-19. The earliest known group formed to oppose vaccination programs, the National Anti-Vaccination League, was established in the United Kingdom in 1866 following a series of violent protests against mandatory smallpox immunizations in the Vaccination Act of 1853.³ In 1918, conspiracy theories were circulated that the Spanish Flu pandemic was a deliberate act of biological warfare, spread through aspirin manufactured by German company Bayer.⁴

What has been historically unprecedented about the dissemination of misinformation and disinformation throughout the COVID-19 pandemic is the omnipresence of media coverage and the prevalence of social media. False information can easily be spread to millions within days or even hours of it being created. It can become challenging for a population already feeling overloaded with complex information to differentiate between thoroughly researched, accurate reporting and information that is oversimplified, unproven, or patently false.⁵

A substantial factor in the spread of false information is a phenomenon known as “confirmation bias.” When individuals hold a preexisting belief or suspicion, they will often unconsciously seek out information to validate that predisposition and filter out contradictory evidence.⁶ The persistence of modern media exposure and the internet has exacerbated this effect, as information seeming to support virtually any viewpoint or understanding can now easily be found through the use of search engines and social media. Many websites further exacerbate the issue of confirmation bias by algorithmically delivering consistent information to users who have demonstrated a pattern of belief or ideology.

² Dyer, Owen. “COVID-19: Unvaccinated face 11 times risk of death from delta variant, CDC data show.” *BMJ (Clinical research ed.)* vol. 374 (2021).

³ Wolfe, Robert M. “Anti-vaccinationists past and present.” *BMJ (Clinical research ed.)* vol. 325 (2002).

⁴ Johnson, Norman A. “The 1918 flu pandemic and its aftermath.” *Evo Edu Outreach* 11, 5 (2018).

⁵ Nelson, Taylor. “The Danger of Misinformation in the COVID-19 Crisis.” *Missouri medicine* vol. 117, 6 (2020).

⁶ Nickerson, Raymond S. “Confirmation bias: A ubiquitous phenomenon in many guises.” *Review of General Psychology*, 2 (1998).

The role of physicians and other health professionals in legitimizing false information during the COVID-19 pandemic has presented serious implications for public safety. For example, the federal Centers for Disease Control and Prevention (CDC) has for decades been recognized as the United States government's primary agency for protecting Americans through expert research and advice related to the control and prevention of communicable disease. The CDC has consistently warned Americans about the threat of COVID-19 and strongly encouraged vaccination. However, throughout the pandemic, many individuals who are predisposed toward skepticism of the government and incredulity toward vaccines have sought to validate those views, despite unambiguous guidance to the contrary from leading health experts.

As a result, health practitioners whose views on COVID-19 and immunization against it are within the extreme minority for their profession are armed with a disproportionately loud voice in the public discourse. Antigovernment cynics and vaccine skeptics cohere to the opinions of those few physicians who will reinforce their beliefs as they seek to appeal to authority in service of their confirmation bias.⁷ The effect of this is that a relatively small group of public health contrarians who are licensed as physicians will be afforded the same, if not more, credibility as long-trusted public institutions like the CDC, the FDA, and the American Medical Association, even if those physicians do not specialize in epidemiology or infectious disease prevention.

The incongruity of this reasoning is frequently rationalized in part through conspiracy theories about the medical establishment. This is not novel. When allopathic medicine first achieved dominance during the Progressive Era, there were many who vilified the medical system as financially motivated, accusing “modern medicine men” of oppressing natural therapies in order to profit from a monopoly on health care practice.⁸ Other related conspiracy theories frequently involve the United States government, which has been accused of everything from inventing or exaggerating the pandemic to suppressing natural remedies, or even using COVID-19 vaccines as a clandestine method for implanting microchips into Americans.⁹

Role of State Medical Boards. Physicians and surgeons in California are regulated by one of two entities: the Medical Board of California (MBC) or the Osteopathic Medical Board of California (OMBC). The MBC licenses and regulates about 153,000 physicians while the OMBC licenses and regulates slightly over 12,000. Despite receiving different forms of medical education and being overseen by separate boards, the essential scope of practice for these two categories of licensees are virtually identical.

In July of 2021, the Federation of State Medical Boards (FSMB) issued a statement positioned as being “in response to a dramatic increase in the dissemination of COVID-19 vaccine misinformation and disinformation by physicians and other health care professionals on social media platforms, online and in the media.” The FSMB warned that physicians who engage in the spread of false information related to COVID-19 were jeopardizing their licenses to practice medicine. While physicians are subject to discipline only by boards located in states where they hold a license, the FSMB's statement was viewed as a serious warning to doctors that they risked disciplinary action if they engaged in spreading inaccurate information.

⁷ Topf, Joel M., and Williams, Paul N. “COVID-19, social media, and the role of the public physician.” *Blood Purification* 50.4-5 (2021).

⁸ Burrow, JG. *Organized Medicine in the Progressive Era: The Move Toward Monopoly*. Baltimore, MD: Johns Hopkins University Press (1977).

⁹ Rubin, Rita. “When Physicians Spread Unscientific Information About COVID-19.” *JAMA* 327 (2002).

Following the FSMB's statement, some state medical boards appeared poised to take action against licensees found to be spreading misinformation or disinformation. Tennessee's Board of Medical Examiners adopted the FSMB's statement as their own. However, in response, the state's Republican legislature threatened to disband the board if it sought to take any such action against a physician. Legislation in at least fourteen states has been introduced to prevent medical boards from holding physicians who spread false information accountable in accordance with the FSMB's guidance.¹⁰

In contrast to legislative action taken in those states, this bill would seek to confirm that in California, physicians who disseminate COVID-19 misinformation or disinformation are indeed subject to formal discipline. The bill would expressly establish that such dissemination would constitute "unprofessional conduct"—a term used prolifically in the Medical Practice Act as a general description of numerous forms of conduct for which disciplinary action may be taken. The MBC or OMBC would be required to consider multiple factors prior to filing an accusation, but would ultimately be authorized to take enforcement action against physicians who have used their licenses to jeopardize public health and safety through the spread of false information.

It is certainly meaningful that this bill would establish as a matter of California law that physicians are subject to discipline for spreading false information. However, it is more than likely that the MBC and OMBC are both already fully capable of bringing an accusation against a physician for this type of misconduct. For example, the Medical Practice Act includes "gross negligence" and "repeated negligent acts" within the meaning of unprofessional conduct, representing situations where the physician deviated from the standard of care in the opinion of the MBC and its expert medical reviewers.

If, for example, a physician were to advise patients to inject disinfectant as a way of treating COVID-19—as former President Trump once did, resulting in a sharp rise in reported incidents of misusing bleach and other cleaning products¹¹—disseminating that "misinformation" would almost certainly be considered negligent care subject to discipline. Whether a case of spreading misinformation is sufficient to bring an action for gross negligence would be evaluated using the MBC's expert reviewer guidelines, which provide that "the determining factor is the *degree* of departure from the applicable standard of care." Similarly, it is arguable that spreading "disinformation" as commonly defined would constitute an "act of dishonesty or corruption"—also statutorily included within the Medical Practice Act's meaning of unprofessional conduct.

Those in opposition to this bill have expressed concern that the MBC would overzealously prosecute doctors for expressing views that are outside the mainstream but not indisputably unreasonable based on the physician's research and training. This apprehension cannot easily be reconciled with persistent criticisms levied against the MBC by the Legislature and patient safety advocates, who have repeatedly reproved the board for its underwhelming enforcement activities. Major news editorials have pointed out that the MBC only takes formal disciplinary action in about three percent of cases, and that more than 80 percent of complaints are dismissed without investigation. As the Legislature persists in its admonishment of the MBC for failing to take aggressive action against physicians who commit unprofessional conduct, it would appear dubious that the board would excessively utilize the authority expressly provided by this bill.

¹⁰ <https://www.audacy.com/wccoradio/news/national/laws-are-stopping-medical-boards-from-punishing-doctors>

¹¹ Gharpure, Radhika. "Knowledge and Practices Regarding Safe Household Cleaning and Disinfection for COVID-19 Prevention." *Morbidity and Mortality Weekly Report*, 69 (2020).

It stands to reason that Californians who have demonstrated suspicion toward both the medical establishment and their government would be slow to trust the MBC, with a majority of its members consisting of physicians appointed by the Governor. However, the degree of enmity recently exhibited by physicians and others opposed to COVID-19 prevention policies could be viewed as disturbing. In December of 2021, it was reported that representatives of an anti-vaccination organization called America’s Frontline Doctors had stalked and intimidated Kristina Lawson, President of the MBC.¹² This harassment was escalated in April of 2022 when that same organization “released a 21-minute video that depicts Lawson in Nazi regalia, a whip in her hand and swastika on her shoulder, and shows a clip of the garage confrontation validating Lawson’s description.”¹³

America’s Frontline Doctors was founded by Dr. Simone Gold, who holds an active license in California as a physician. Dr. Gold and her organization have vociferously promoted hydroxychloroquine as a COVID-19 treatment, despite evidence increasingly showing it to be ineffective and potentially unsafe.¹⁴ Dr. Gold has engaged in multiple campaigns to stoke public distrust in COVID-19 vaccines, characterizing them as “experimental” despite numerous safety and efficacy trials successfully confirming their safety and efficacy.¹⁵ Dr. Gold spoke at a rally held in conjunction with the attempted insurrection on the United States Capitol on January 6, 2021; she was arrested and subsequently pleaded guilty to a misdemeanor relating to that event.

Despite what would appear to be repeated conduct perpetrated by Dr. Gold involving the dissemination of false information regarding COVID-19, Dr. Gold’s license remains active with the MBC and there appears to be no record of any disciplinary action taken against her.¹⁶ Given the air of legitimacy she sustains from her status as a licensed physician, Dr. Gold likely serves as an illustrative example of the type of behavior that the author of this bill seeks to unequivocally establish as constituting unprofessional conduct for physicians in California. Regardless of whether similar authority is already available to the MBC through other enforceable provisions in the Medical Practice Act, it is understandable that the author desires to make this authority explicit and confirm that doctors licensed in California who disseminate misinformation or disinformation should be held fully accountable.

Current Related Legislation. AB 1636 (Weber) would prohibit the MBC from granting or reinstating physician certificates to individuals who commit sexual misconduct and require the MBC to revoke the licenses of physicians to commit such misconduct. *This bill is pending in this committee.*

AB 1767 (Boerner Horvath) would remove licensed midwives from the jurisdiction of the MBC and establish a new board to license and regulate that profession. *This bill is pending in this committee.*

AB 2060 (Quirk) would change the membership composition of the MBC so that a majority of the board consists of public members. *This bill is pending in this committee.*

¹² <https://www.latimes.com/business/story/2021-12-10/covid-anti-vax-confrontations>

¹³ <https://www.latimes.com/business/story/2022-04-06/covid-anti-vaxxers-campaign-against-public-health-advocates-gets-more-extreme>

¹⁴ Singh, Bhagteshwar. “Chloroquine or hydroxychloroquine for prevention and treatment of COVID-19.” *The Cochrane database of systematic reviews* vol. 2, 2 (2021).

¹⁵ <https://www.medpagetoday.com/infectiousdisease/covid19/90536>

¹⁶ <https://search.dca.ca.gov/details/8002/G/70224/595d067c562f072a5e7b25c913b285cf>

Prior Related Legislation. SB 806 (Roth, Chapter 649, Statutes of 2021) extended the sunset date for the MBC until January 1, 2023 and made numerous reforms to the Medical Practice Act.

AB 1909 (Gonzalez) would have provided that performing an examination on a patient for the purpose of determining whether the patient is a virgin constitutes unprofessional conduct. *This bill was not presented for a vote in this committee.*

AB 1278 (Nazarian) would have provided that failing to post an Open Payments database notice constitutes unprofessional conduct. *This bill was held on the Assembly Appropriations Committee's suspense file.*

SB 1448 (Hill, Chapter 570, Statutes of 2018) requires physicians and surgeons, osteopathic physicians and surgeons, podiatrists, acupuncturists, chiropractors and naturopathic doctors to notify patients of their probationary status beginning July 1, 2019.

ARGUMENTS IN SUPPORT:

The **California Medical Association (CMA)** is sponsoring this bill. According to the CMA: “The COVID-19 pandemic has unfortunately led to increasing amounts of misinformation and disinformation related to the disease including how the virus is transmitted, promoting untested treatments and cures, and calling into question public health efforts such as masking and vaccinations. Many health professionals, including physicians, have been the culprits of this misinformation and disinformation effort.” The CMA goes on to argue that “while the MBC may have the ability to discipline licensees for unprofessional conduct under Business and Professions Code section 2234, AB 2098 makes clear that the MBC has the statutory authority to take such actions against physicians that spread COVID-19 misinformation or disinformation.”

The **American Academy of Pediatrics, California** is in support of this bill, writing: “Licensed physicians possess a high degree of public trust and therefore have a powerful platform in society. When they choose to spread inaccurate information, physicians contradict their responsibilities and further erode public trust in the medical profession. By passing this bill, California will demonstrate its unwavering support for a scientifically informed populous to protect ourselves from COVID-19.”

ARGUMENTS IN OPPOSITION:

A Voice for Choice Advocacy opposes this bill, writing: “While we agree that physicians and surgeons should be disciplined for maliciously sharing misinformation and disinformation, there are already measures in place for the California Medical Board to discipline for such offenses. Furthermore, AB 2098 is overly broad and would be impossible to implement because there is no definition and no established ‘standard of care’ or ‘contemporary scientific consensus’ for treating SARS-COV-2/COVID-19.”

Californians for Good Governance opposes this bill “based on concerns about its unconstitutional restrictions on free speech.” The organization argues that “while the state may be able to claim that providing the public with accurate information regarding Covid-19 is a compelling interest, it cannot possibly argue that the blunt weapon that AB 2098 represents is narrowly tailored to that interest.” The organization further states that “in a country such as ours, which was established on the foundation of civil liberties such as free speech, the truth is something hashed out in the marketplace of ideas, rather than dictated by the government.”

POLICY ISSUE(S) FOR CONSIDERATION:

Lack of Definitions. The intent of this bill is made clear in the subdivision providing that “it shall constitute unprofessional conduct for a physician and surgeon to disseminate or promote misinformation or disinformation related to COVID-19.” However, the terms “misinformation,” “disinformation,” and “disseminate” are not defined. Provisions outlining what factors the MBC or OMBC must consider prior to bringing a disciplinary action do suggest how false information should be deemed enforceable under the bill, with some of the language taken directly from definitions provided by the CDC on its public guidance regarding misinformation and disinformation.¹⁷ To ensure greater clarity with regards to how this bill should be interpreted and implemented by the MBC and the OMBC within their existing enforcement architecture, the author should consider amendments restructuring the bill to provide for clearer definitions.

Constitutionality. Many of the opposition arguments regarding this bill have revolved around the concept of “free speech” and whether a state law penalizing physicians for conveying information determined to be false is lawful under the United States Constitution. It is certainly true that the First Amendment prohibits laws “abridging the freedom of speech.” However, the Supreme Court of the United States has repeatedly confirmed that this constitutional right is not absolute.

A key factor in determining whether a statute like the one proposed in this bill violates the First Amendment is whether the law would in fact regulate professional *speech* as opposed professional *conduct*. The United States Court of Appeals for the Ninth Circuit discussed this distinction extensively in its decision upholding the constitutionality of California’s ban on licensed health professionals providing therapies intended to change a patient’s sexual orientation or identity.¹⁸ That decision noted that “doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself.”

To illustrate the critical difference between the regulation of professional speech versus professional conduct, the Ninth Circuit suggested that the issue be viewed “along a continuum.” First, the Ninth Circuit stated that “where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine.”

The Ninth Circuit then suggested that “at the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished.” As an example, the decision cited *Planned Parenthood v. Casey*, in which the Supreme Court upheld a requirement that doctors disclose truthful, nonmisleading information to patients about certain risks of abortion. In this case, the Supreme Court ruled that “the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”¹⁹

¹⁷ <https://www.cdc.gov/vaccines/covid-19/health-departments/addressing-vaccine-misinformation.html>

¹⁸ *Pickup v. Brown*, 728 F.3d 1042 (2015).

¹⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992).

The Ninth Circuit ultimately ruled that California’s ban on gay conversion therapy fell at the far end of the continuum, in that it consisted of “the regulation of professional conduct, where the state’s power is great, even though such regulation may have an incidental effect on speech.” The ruling explained that while much of the practice of medicine requires speech to effectuate treatment and therapy in the form of prescriptions, recommendations, and counseling, this is incidental to the regulation of professional conduct, which is the core purpose of all state and federal license requirements. The Supreme Court declined to grant review of the Ninth Circuit’s decision, and the California law remains in effect.

A recent decision issued by the Supreme Court in *National Institute of Family and Life Advocates v. Becerra*—which declared that a California law requiring crisis pregnancy centers to make disclosures about pregnancy options was unconstitutional—has frequently been cited as a key precedent for determining whether state laws implicating professional speech are impermissible under the First Amendment.²⁰ In that decision, the Supreme Court declined to recognize the Ninth Circuit’s treatment of “professional speech” as a separate category afforded less protection than other forms of speech. However, the Supreme Court did affirm that “states may regulate professional conduct, even though that conduct incidentally involves speech.”

Whether this bill would be considered constitutionally valid would in large part depend on how it is interpreted and enforced. If the MBC or the OMBC were to take action against a physician for statements made to the general public about COVID-19 through social media or at a public protest, a court may find that this speech falls at the end of the spectrum where the First Amendment’s protections are strongest. However, if a physician were to be subjected to formal discipline for communications made to a patient under their care in the form of treatment or advice, this would quite likely be considered professional conduct that may be more heavily regulated through the state’s police power.

AMENDMENTS:

- 1) To clarify the meaning of terms used in the bill to align with the boards’ existing authority to regulate professional conduct, insert the following provisions to the definitions contained in subdivision (c):

(3) “Misinformation” means false information that is contradicted by contemporary scientific consensus to an extent where its dissemination constitutes gross negligence by the licensee.

(4) “Disinformation” means misinformation that the licensee deliberately disseminated with malicious intent or an intent to mislead.

(5) “Disseminate” means the communication of information from the licensee to a patient under the licensee’s care in the form of treatment or advice.

- 2) To reflect that much of the language currently provided as factors for a board to consider has been relocated to the bill’s definitions, strike the current subdivision (b) and insert the following:

²⁰ *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ____ (2018).

(b) Prior to bringing a disciplinary action against a licensee under this section, the board shall consider both whether the licensee departed from the applicable standard of care and whether the misinformation or disinformation resulted in harm to patient health.

- 3) To add a severability clause to protect the enforceability of the bill following any adverse ruling on the validity of a certain provision or application, insert a new Section 3 as follows:

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

- 4) To update statistics in the bill's findings and declarations, amend Section 1 to replace "5,000,000" with "6,000,000 and "75,000" with "90,000."

REGISTERED SUPPORT:

California Medical Association (*Sponsor*)
 American Academy of Pediatrics, California
 American College of Obstetricians and Gynecologists District IX
 California Chapter of the American College of Emergency Physicians
 California Podiatric Medical Association
 California Rheumatology Alliance
 California Society of Anesthesiologists
 Children's Specialty Care Coalition
 Families for Opening Carlsbad Schools
 Numerous individuals

REGISTERED OPPOSITION:

A Voice for Choice Advocacy
 California Health Coalition Advocacy
 Californians for Good Governance
 Catholic Families 4 Freedom CA
 Central Coast Health Coalition
 Children's Health Defense California Chapter
 Concerned Women for America
 Depression and Bipolar Support Alliance California
 Educate. Advocate.
 Frederick Douglass Foundation of California
 Homewatch Caregivers of Huntington Beach
 Nuremberg 2.0 LTD.
 Pacific Justice Institute
 Physicians for Informed Consent
 Protection of the Educational Rights for Kids
 Restore Childhood
 Siskiyou Conservative Republicans
 Stand Up Sacramento County
 Numerous individuals