

1 Robert H. Tyler, Esq. CA Bar No. 179572
2 btyler@faith-freedom.com
3 Mariah Gondeiro, Esq. CA Bar No. 323683
4 mgondeiro@faith-freedom.com
5 ADVOCATES FOR FAITH & FREEDOM
6 25026 Las Brisas Road
7 Murrieta, California 92562
8 Telephone: (951) 600-2733
9 Facsimile: (951) 600-4996

10 Daniel R. Suhr (*Pro Hac Vice to be filed*)
11 dsuhr@libertyjusticecenter.org
12 Reilly Stephens (*Pro Hac Vice to be filed*)
13 rstephens@libertyjusticecenter.org
14 Liberty Justice Center
15 440 N. Wells Street, Suite 200
16 Chicago, Illinois 60604
17 Phone: 312-637-2280
18 *Attorneys for Plaintiffs*

19 **UNITED STATES DISTRICT COURT**
20 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

21 MARK McDONALD AND JEFF BARKE,

22 Plaintiffs,

23 v.

24 KRISTINA D. LAWSON, *in her official*
25 *capacity as President of the Medical Board*
26 *of California*; RANDY W. HAWKINS, *in his*
27 *official capacity as Vice President of the*
28 *Medical Board of California*; LAURIE ROSE
LUBIANO, *in her official capacity as*
Secretary of the Medical Board of
California; MICHELLE ANNE BHOLAT,
DAVID E. RYU, RYAN BROOKS, JAMES M.
HEALZER, ASIF MAHMOOD, NICOLE A.
JEONG, RICHARD E. THORP, VELING TSAI,
and ESERICK WATKINS, *in their official*

Case No. _____

**COMPLAINT SEEKING
DECLARATORY AND INJUNCTIVE
RELIEF FOR VIOLATION OF FIRST
AMENDMENT RIGHTS**

1 *capacities as members of the Medical Board*
2 *of California; and ROBERT BONTA, in his*
3 *official capacity at Attorney General of*
4 *California,*

5
6 Defendants.

7 INTRODUCTION

8 1. Plaintiffs Mark McDonald, M.D. and Jeff Barke, M.D., physicians licensed in
9 the State of California, bring this challenge to the recently enacted Assembly Bill (AB)
10 2098, which chills the protected speech of medical professionals on the basis of viewpoint.

11 2. AB 2098 declares that it will be deemed “unprofessional conduct” for doctors
12 to advise their patients of any view that deviates from the official position of the State
13 regarding COVID-19. It directs the Medical Board of California (“the Board”) to punish
14 any doctor who “disseminates” “misinformation,” defined as anything that is not consistent
15 with what the Board deems to be the official scientific consensus. This imposition of official
16 government-approved orthodoxy cannot survive First Amendment scrutiny and is at odds
17 with the scientific method itself.

18 3. Disagreement is integral to the progress of medical science, a value that cannot
19 be served by using the power of the state to punish those who dissent from the official line.
20 This is particularly objectionable in the context of a new disease like COVID-19, about
21 which consensus opinions and official guidance have regularly adjusted as new information
22 is learned.

23 4. At the beginning of the pandemic, public health authorities insisted that the
24 public not wear masks, arguing they would provide little benefit and should be reserved for
25 front-line medical professionals—that was soon replaced with broadly mandated mask
26 wearing for much of the population. Schools were closed in the face of the fear that the
27 disease would spread among children too young to adhere to quarantine procedures—but it
28

1 turned out that the young were at the least risk, and that such closures may well have been
2 harmful to their development.

3 5. Reasonable minds disagreed then, and continue to disagree now, about any
4 number of such topics, but the search for truth cannot be furthered by a government edict
5 imposing orthodoxy from above, punishing those who disagree with the loss of their
6 profession and their livelihood. Plaintiffs therefore ask that this court enjoin enforcement
7 of AB 2098 and leave these important matters to the marketplace of ideas.

8 **PARTIES**

9 6. Plaintiff Mark McDonald, M.D., is a resident of the State of California and a
10 physician who is licensed to practice in the state.

11 7. Plaintiff Jeff Barke, M.D., is also a resident of the State of California and a
12 physician licensed to practice in the state.

13 8. Defendants Kristina D. Lawson, Randy W. Hawkins, Laurie Rose Lubiano,
14 Michelle Anne Bholat, David E. Ryu, Ryan Brooks, James M. Healzer, Asif Mahmood,
15 Nicole A. Jeong, Richard E. Thorp, Veling Tsai, and Eserick Watkins are the President,
16 Vice President, Secretary, and Members of the Medical Board of California, the state
17 licensing authority that regulates the practice of medicine in the state, sued in their official
18 capacities. The mailing address for the Board is 2005 Evergreen Street, Suite 1200
19 Sacramento, California 95815 in Sacramento County.

20 9. Defendant Attorney General Robert Bonta (the “Attorney General”) is sued in
21 his official capacity as the representative of the State of California charged with
22 enforcement of state laws. His address for service of process is 1300 “I” Street, Sacramento,
23 California 95814 in Sacramento County.

24 **JURISDICTION AND VENUE**

25 10. This case raises claims arising under the First and Fourteenth Amendments of
26 the U.S. Constitution, 42 U.S.C. § 1983, and 28 U.S.C. § 2201(a). The Court has subject-
27 matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

1 11. Venue is proper because Plaintiffs live and practice in, and a substantial
2 portion of the events giving rise to the claims occurred in, the Central District of California.
3 28 U.S.C. § 1391(b)(2).

4 **FACTS**

5 **AB 2098**

6 12. On August 30, 2022, the California State Assembly approved the final version
7 of AB 2098¹ (“the Act”), which the State Senate had passed the previous day. Governor
8 Newsom signed the bill into law on September 30, 2022.

9 13. AB 2098 adds a new Section 2270 to the State’s Business and Professions
10 Code, entitled “Physicians and surgeons: unprofessional conduct.”

11 14. Section 1 of the Act, outlining the legislature’s findings, asserts *inter alia* that
12 “[t]he spread of misinformation and disinformation about COVID-19 vaccines has
13 weakened public confidence and placed lives at serious risk” and that “[m]ajor news outlets
14 have reported that some of the most dangerous propagators of inaccurate information
15 regarding the COVID-19 vaccines are licensed health care professionals.”

16 15. Section 1 likewise incorporates a recent statement by the Federation of State
17 Medical Boards “warning that physicians who engage in the dissemination of COVID-19
18 vaccine misinformation or disinformation risk losing their medical license, and that
19 physicians have a duty to provide their patients with accurate, science-based information.”

20 16. Section 2 of the Act is the substantive provision, which makes it
21 “unprofessional conduct” for any California physician to make any statement to his or her
22 patients that the Board considers “misinformation” about COVID-19:

23 2270. (a) It shall constitute unprofessional conduct for a physician
24 and surgeon to disseminate misinformation or disinformation
25 related to COVID-19, including false or misleading information
26 regarding the nature and risks of the virus, its prevention and
27 treatment; and the development, safety, and effectiveness of
28 COVID-19 vaccines.

¹ Available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2098.

1 (b) For purposes of this section, the following definitions shall
2 apply:

3 (1) “Board” means the Medical Board of California or
4 the Osteopathic Medical Board of California, as applicable.

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

8 (3) “Disseminate” means the conveyance of information
9 from the licensee to a patient under the licensee’s care in
10 the form of treatment or advice.

11 (4) “Misinformation” means false information that is
12 contradicted by contemporary scientific consensus
13 contrary to the standard of care.

14 (5) “Physician and surgeon” means a person licensed by
15 the Medical Board of California or the Osteopathic
16 Medical Board of California under Chapter 5 (commencing
17 with Section 2000).

18 (c) Section 2314 shall not apply to this section.²

19 17. Section 3 of the Act specifies that each of its provisions are severable.

20 18. The Act therefore declares it “unprofessional conduct” for a doctor to
21 “disseminate”—that is, speak—“misinformation,” as judged by the State of California, to
22 his or her patients regarding COVID-19.

23 19. AB 2098 intrudes into the privacy of the doctor-patient relationship, replacing
24 the medical judgment of the government for that of the licensed professional, and chilling
25 the speech of those who dissent from the official view.

26 20. AB 2098’s codification of an official “scientific consensus” is at odds with the
27 progress of science itself, which requires that conventional views be challenged by new
28 theories, and that dissenters air their views for comment and criticism.

29 21. It is also at odds with the responsible practice of medicine, which requires that
30 doctors employ individualized professional judgment as to the best course of treatment for
31 each individual patient, rather than following official guidance to the letter in all cases.

² Cal. Bus. & Prof. Code § 2314 makes violations of this chapter of the code a misdemeanor offense. Section 2(c) of the Act prevents AB 2098 from creating criminal liability.

1 22. AB 2098 attempts to redefine the established understanding of standards of
2 care, which require particularized assessment of medical decision-making in the individual
3 context at issue, rather than the imposition of approved opinions that must be agreed with
4 in all circumstances.

5 23. The goal of AB 2098 is to chill speech—in particular the speech of doctors
6 who make a different assessment of the available evidence than the State of California.

7 24. Recognizing the profound defects with the Act, in signing the bill on
8 September 30, 2022, Governor Newsom attached a statement in which he articulated a
9 narrowing construction he claimed would render the bill constitutional:

10 I am signing this bill because it is narrowly tailored to apply only
11 to those egregious instances in which a licensee is acting with
12 malicious intent or clearly deviating from the required standard
of care while interacting directly with a patient under their care.

13 To be clear, this bill does not apply to any speech outside of
14 discussions directly related to COVID-19 treatment within a
15 direct physician patient relationship. I am concerned about the
16 chilling effect other potential laws may have on physicians and
17 surgeons who need to be able to effectively talk to their patients
about the risks and benefits of treatments for a disease that
appeared in just the last few years. However, I am confident that
discussing emerging ideas or treatments including the subsequent
risks and benefits does not constitute misinformation or
disinformation under this bill’s criteria.

18 25. Plaintiffs share Governor Newsom’s “concern[] about the chilling effect”
19 “laws may have on physicians and surgeons,” but the Governor’s attempt to rewrite AB
20 2098 cannot overcome what the law in fact says by its terms.

21 26. The Governor is not the enforcement authority responsible for determining
22 how AB 2098 should be applied—enforcement powers reside in the Board and Attorney
23 General Bonta, and therefore the Governor’s desired narrowing construction is simply
24 wishful thinking.

25 27. And it would not matter if the Governor had any such authority, because an
26 unconstitutional speech restriction cannot be saved by the announcement that it will be
27 enforced in a narrow manner. *United States v. Wunsch*, 84 F.3d 1110, 1118 (9th Cir. 1996)
28 (“California has failed to show that this new policy represents an authoritative and binding

1 construction of [the statute] rather than a mere enforcement strategy, which would not be
2 binding on the courts.”).

3 28. Despite the Governor’s assurances, AB 2098 does not “apply only to those
4 egregious instances in which a licensee is acting with malicious intent or clearly deviating
5 from the required standard of care.”

6 29. Malicious intent is not a required element in the Act—rather, it appears only
7 in the definition of “disinformation,” which is not the only speech the law covers.

8 30. Nor does the Act require “clear[] deviat[ion] from the required standard of
9 care.” Instead, the act defines “Misinformation” as “false information that is contradicted
10 by contemporary scientific consensus contrary to the standard of care,” with no limitation
11 on the clarity of the deviation or how well established the standard of care need be.

12 31. To the contrary, the Governor’s attempt to provide a narrowing construction
13 all but concedes the Act, as written, is not narrowly tailored to any government interest
14 sufficient to survive First Amendment scrutiny.

15 **Dr. McDonald**

16 32. Dr. Mark McDonald, M.D., is a physician licensed by the Medical Board of
17 California who is board-certified in both adult and child and adolescent psychiatry.

18 33. Dr. McDonald received an undergraduate degree from the University of
19 California, Berkeley before beginning medical training at the Medical College of
20 Wisconsin. After graduating from medical school in 2007, he completed his general
21 psychiatry residency training at the University of Cincinnati, and child and adolescent
22 psychiatry fellowship training at Harbor-UCLA Medical Center. He currently maintains a
23 private psychiatry practice in the Los Angeles area, where most of his patients are children
24 suffering from various mental health problems.

25 34. Dr. McDonald has never been disciplined by any medical regulatory authority,
26 had his medical license suspended, or had a complaint against him sustained for
27 unprofessional conduct.

1 35. Over the course of the pandemic, Dr. McDonald became increasingly
2 concerned about the public-health response to COVID-19, and the way in which he feared
3 that official public-health guidance held the potential to cause harm.

4 36. These concerns caused Dr. McDonald to become outspoken, as both a citizen
5 and a medical professional, about the flaws he sees in the public-health response to the
6 COVID-19 pandemic.

7 37. In particular, his expertise in adolescent mental health prompted concern about
8 the potential harm to children that school closures and mandatory mask-wearing policies
9 could have on young people. He objected that isolating children, and requiring them to wear
10 masks, was not justified by the available scientific evidence, particularly since it is widely
11 agreed that otherwise healthy children were at very low risk of either contracting or
12 spreading COVID-19.

13 38. Dr. McDonald likewise objected to the broader use of mandatory masking for
14 the adult population, pointing to a lack of evidence that otherwise-healthy adults would
15 benefit from such face coverings.

16 39. Dr. McDonald has also supported the use of medications such as ivermectin
17 and hydroxychloroquine as options to treat COVID-19, pre-existing drugs long approved
18 as safe and effective by the Food and Drug Administration. While the use of such
19 medications to treat COVID-19 is controversial, a number of studies have found positive
20 results using them to treat the disease.

21 40. Dr. McDonald also raised concerns about the new vaccines developed to
22 combat COVID-19, pointing to a lack of evidence that these brand-new drugs had been
23 proven sufficiently safe and effective to be recommended, and in many cases mandated, for
24 essentially the entire American public.

25 41. In particular, Dr. McDonald objected to administering these new vaccines to
26 children, despite limited evidence that they would be safe and effective for this population,
27 arguing that since children were already at low risk of the disease, there was little benefit
28 as compared with the known and unknown potential harms from vaccination.

1 42. While these topics remain subjects of controversy, a number of Dr.
2 McDonald’s concerns have proved prescient—for instance, there is now considerable
3 evidence that quarantine policies proved detrimental to both the education and mental health
4 of children. *See, e.g.,* Sarah Mervosh, *The Pandemic Erased Two Decades of Progress in*
5 *Math and Reading*, N.Y. Times, Sep. 1, 2022;³ Claire Cain Miller & Bianca Pallaro, *362*
6 *School Counselors on the Pandemic’s Effect on Children: ‘Anxiety Is Filling Our Kids,’*
7 N.Y. Times, May 29, 2022.⁴

8 43. Dr. McDonald has advocated publicly and privately about these and other
9 objections to federal and state COVID-19 policies, including on social media, in various
10 media interviews, and in his own published writing.

11 44. Dr. McDonald’s advocacy on these issues has made him a subject of
12 controversy.

13 45. It has also attracted the attention of the Medical Board of California. In
14 December 2021, Dr. McDonald received a letter from the Board informing him of a
15 complaint filed against him by “your patient, N/A.” According to the Board, the anonymous
16 complainant alleged “[McDonald’s] posts on Twitter/Facebook about masks were flagged
17 for spreading misinformation about Covid and using derogatory terms for disabled people.
18 Alleges [McDonald] spreading misinformation about Covid.”

19 46. Dr. McDonald responded by letter that he had never treated a patient named
20 “N/A,” and denied that he had offered medical opinions to the public that included
21 inaccurate information.

22 47. Under traditional Board practice, the fact that the complaint was not made by
23 a named patient of Dr. McDonald would have ended the matter, as the purpose of such
24 complaints is to protect patients personally subjected to unprofessional conduct. However,
25 the Board did not close the matter, instead responding in January 2022 with a request for
26

27
28 ³ <https://www.nytimes.com/2022/09/01/us/national-test-scores-math-reading-pandemic.html>.

⁴ <https://www.nytimes.com/interactive/2022/05/29/upshot/pandemic-school-counselors.html>.

1 “[a] response to the allegation that you [McDonald] are promoting the use of Ivermectin to
2 cure COVID on Twitter.”

3 48. Dr. McDonald responded to this inquiry by letter, stating that it was his
4 practice to advocate for medical treatments that have the strongest empirical evidence to
5 support their efficacy and safety. His response then linked to a database of studies that
6 supported the use of various medications to treat COVID-19, including ivermectin, vitamin
7 D, zinc, hydroxychloroquine, and aspirin.

8 49. Rather than closing the matter, the Board appears to be proceeding with an
9 investigation based on the anonymous complaint, with an investigator emailing Dr.
10 McDonald on August 30 requesting an interview, which is expected to take place in the
11 coming months.

12 50. The Board’s unprecedented pursuit of Dr. McDonald based on an anonymous
13 complaint about his social media activity demonstrates the intent of the Board to use the
14 power granted to them by the State of California to punish doctors like Dr. McDonald for
15 their speech.

16 51. As a medical professional, Dr. McDonald feels it is his professional duty to
17 continue to provide his patients with medically sound advice in his counseling sessions, but
18 if subject to AB 2098 he will be forced to choose between providing his best medical
19 judgment and censoring that judgment to comply with the law, because of his well-founded
20 fear that the Board will use this new authority to threaten his medical license.

21 **Dr. Barke**

22 52. Dr. Jeff Barke, M.D., is a physician licensed by the Medical Board of
23 California who is board-certified in family practice.

24 53. Dr. Barke received an undergraduate degree from the University of Southern
25 California before beginning medical training at the University of California, Irvine. After
26 graduating from medical school in 1990, he completed his residency in family practice, also
27 at UC Irvine. He currently maintains a private concierge medical practice in the Newport
28 Beach area.

1 54. Dr. Barke has never been disciplined by any medical regulatory authority, had
2 his medical license suspended, or had a complaint against him sustained for unprofessional
3 conduct.

4 55. Like Dr. McDonald, over the course of the pandemic, Dr. Barke became
5 increasingly concerned about the public-health response to COVID-19, and the way in
6 which he feared that official public-health guidance held the potential to cause harm.

7 56. These concerns caused Dr. Barke to become outspoken, as both a citizen and
8 a medical professional, about the flaws he sees in the public-health response to the COVID-
9 19 pandemic.

10 57. Dr. Barke objected that isolating children, and requiring them to wear masks,
11 was not justified by the available scientific evidence, particularly since it is widely agreed
12 that otherwise healthy children were at very low risk of either contracting or spreading
13 COVID-19.

14 58. Dr. Barke likewise objected to the broader use of mandatory masking for the
15 adult population, pointing to a lack of evidence that otherwise-healthy adults would benefit
16 from such face coverings.

17 59. Dr. Barke has also supported the use of medications such as ivermectin and
18 hydroxychloroquine as options to treat COVID-19, pre-existing drugs long approved as safe
19 and effective by the Food and Drug Administration. While the use of such medications to
20 treat COVID-19 is controversial, a number of studies have found positive results using them
21 to treat the disease.

22 60. Dr. Barke also raised concerns about the new vaccines developed to combat
23 COVID-19, pointing to a lack of evidence that these brand-new drugs had been proven
24 sufficiently safe and effective to be recommended, and in many cases mandated, for
25 essentially the entire American public.

26 61. In particular, Dr. Barke objected to administering these new vaccines to
27 children, despite limited evidence that they would be safe and effective for this population,
28

1 arguing that since children were already at low risk of the disease, there was little benefit
2 as compared with the known and unknown potential harms from vaccination.

3 62. Again, while these topics remain subjects of controversy, a number of Dr.
4 Barke's concerns have proved prescient—for instance, there is now considerable evidence
5 that quarantine policies proved detrimental to both the education and mental health of
6 children. *See, supra*, ¶ 42.

7 63. Dr. Barke has advocated publicly and privately about these and other
8 objections to federal and state COVID-19 policies, including on social media, in various
9 media interviews, and in his own published writing.

10 64. Dr. Barke's advocacy on these issues has made him a subject of controversy.

11 65. As a medical professional, Dr. Barke feels it is his professional duty to
12 continue to provide his patients with medically sound advice to his patients, but if subject
13 to AB 2098 he will be forced to choose between providing his best medical judgment and
14 censoring that judgment to comply with the law, because of his well-founded fear that the
15 Board will use this new authority to threaten his medical license.

16 **COUNT I**

17 **(AB 2098 Constitutes Content And Viewpoint Discrimination**
18 **In Violation of the First Amendment)**

19 66. The allegations contained in all preceding paragraphs are incorporated herein
20 by reference.

21 67. The rights to free speech and freedom of association in the First Amendment
22 have been incorporated to and made enforceable against the states through the Fourteenth
23 Amendment guarantee of Due Process. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gitlow*
24 *v. New York*, 268 U.S. 652 (1925).

25 68. 42 U.S.C. § 1983 provides a cause of action against any person who, under
26 color of law of any state, subjects any person within the jurisdiction of the United States to
27 a deprivation of any rights, privileges, or immunities secured by the Constitution.

1 69. 28 U.S.C. § 2201(a) allows a court of the United States, as a remedy, to declare
2 the rights and other legal relations of interested parties.

3 70. AB 2098 imposes a government mandate to espouse only those ideas that the
4 State of California deems acceptable. This “on its face burdens disfavored speech by
5 disfavored speakers.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011).

6 71. No other professionals, even other medical professionals such as nurses, are
7 covered. No speech about other diseases, no matter how serious, is covered. And speakers
8 who parrot the contemporary “consensus” may continue speaking; only those who may
9 dissent are silenced. There can be no question that “official suppression of ideas is afoot.”
10 *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992).

11 72. “If there is any fixed star in our constitutional constellation, it is that no
12 official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion,
13 or other matters of opinion or force citizens to confess by word or act their faith therein.”
14 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

15 73. “If there is a bedrock principle underlying the First Amendment, it is that the
16 government may not prohibit the expression of an idea simply because society finds the
17 idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

18 74. AB 2098 is not a traditional regulation of the conduct of medical professionals.
19 Although the Act tries to disguise itself as a conduct regulation by defining “dissemination”
20 to mean “the conveyance of information” “to a patient” “in the form of treatment or advice,”
21 information is not a “treatment” for COVID-19.

22 75. Rather, the law directly and specifically burdens speech, and discriminates
23 against that speech based on both content and viewpoint.

24 76. The fact that some doctors’ views are at odds with the official views of
25 government health authorities does not undermine the right of doctors to express them;
26 instead “minority views are treated with the same respect as are majority views.” *Bd. of*
27 *Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

1 77. The fact that doctors belong to a regulated profession does not undermine their
2 right to speak their views. As the Supreme Court recently held, “[s]peech is not unprotected
3 merely because it is uttered by ‘professionals.’” *Nat’l Inst. of Fam. & Life Advocs. v.*
4 *Becerra*, 138 S. Ct. 2361, 2371–72 (2018). “To the contrary, professional speech may be
5 entitled to ‘the strongest protection our Constitution has to offer.’” *Conant v. Walters*, 309
6 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634
7 (1995)).

8 78. AB 2098 therefore constitutes content and viewpoint discrimination in
9 violation of the First Amendment.

10 **COUNT II**

11 **(AB 2098 Is Unconstitutionally Void For Vagueness** 12 **Under The Fourteenth Amendment)**

13 79. The allegations contained in all preceding paragraphs are incorporated herein
14 by reference.

15 80. A law is unconstitutionally vague if it does not give “a person of ordinary
16 intelligence fair notice of what is prohibited” or if it is “so standardless that it authorizes or
17 encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285,
18 304 (2008).

19 81. Though civil laws are sometimes permitted a greater “degree of vagueness,” if
20 “the law interferes with the right of free speech or of association”—as here—“a more
21 stringent vagueness test should apply.” *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests.,*
22 *Inc.*, 455 U.S. 489, 498–99 (1982).

23 82. “[W]here First Amendment freedoms are at stake, a “great[] degree of
24 specificity and clarity of laws is required.” *Edge v. City of Everett*, 929 F.3d 657, 664 (9th
25 Cir. 2020).

26 83. AB 2098 does not define its terms with any specificity and therefore does not
27 give regulated physicians like Plaintiffs adequate notice of what will run afoul of the law.
28

1 84. The statute defines “misinformation” ambiguously as “false information that
2 is contradicted by contemporary scientific consensus contrary to the standard of care.” This
3 definition is ambiguous even on the most basic level of grammar, as literally it applies to
4 information that is contradicted by a consensus that is itself contrary to the standard of care.

5 85. Even beyond the linguistic challenges, the statute leaves to the caprice of the
6 Board what it will or will not decide is misinformation: it does not provide notice of when
7 information is sufficiently mainstream to be considered a scientific consensus, how that
8 consensus is to be established, how that supposed consensus will be disseminated such that
9 every licensed doctor in the state will be on notice of it, or how far one may deviate from
10 that consensus without being subject to the censorship of the Board.

11 86. AB 2098 therefore imposes an unconstitutionally vague restriction on the
12 speech of doctors like Plaintiffs and should be enjoined on that basis.

13 **PRAYER FOR RELIEF**

14 Plaintiffs respectfully requests that this Court:

- 15 1. Declare that AB 2098 unconstitutionally discriminates against speech on the
16 basis of viewpoint;
- 17 2. Declare that AB 2098 is unconstitutionally vague;
- 18 3. Enjoin Defendants from enforcing AB 2098 against Plaintiffs and physicians
19 like them who wish to communicate their best medical judgment to their patients without
20 interference from Defendants;
- 21 4. Award Plaintiffs their costs and attorneys’ fees under 42 U.S.C. § 1988; and
- 22 5. Award Plaintiffs any further relief to which they may be entitled and such other
23 relief as this Court may deem just and proper.
- 24
25
26
27
28

1 Dated: October 4, 2022

2 Respectfully submitted,

3
4 /s/ Daniel R. Suhr

Daniel R. Suhr (*Pro Hac Vice to be filed*)

dsuhr@libertyjusticecenter.org

5 Reilly Stephens (*Pro Hac Vice to be filed*)

6 rstephens@libertyjusticecenter.org

7 Liberty Justice Center

8 440 N. Wells Street, Suite 200

Chicago, Illinois 60604

9 Phone: 312-637-2280

10 Robert H. Tyler, Esq. CA Bar No. 179572

11 btyler@faith-freedom.com

12 Mariah Gondeiro, Esq. CA Bar No. 323683

13 mgondeiro@faith-freedom.com

14 ADVOCATES FOR FAITH & FREEDOM

25026 Las Brisas Road

15 Murrieta, California 92562

16 Telephone: (951) 600-2733

Facsimile: (951) 600-4996

17 *Attorneys for Plaintiffs*