

Hannah Kieschnick (SBN 319011)
hkieschnick@aclunc.org
Chessie Thacher (SBN 296767)
cthacher@aclunc.org
Shilpi Agarwal (SBN 270749)
sagarwal@aclunc.org
Angélica Salceda (SBN 296152)
asalceda@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Attorneys for Amici Curiae

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL COURIS and MICHAEL FITZGIBBONS,

Plaintiffs,

v.

KRISTINA LAWSON, in her official capacity as
President of the Medical Board of California;
WILLIAM J. PRASIFKA, in his official capacity as
Executive Director of the Medical Board of California;
and ROB BONTA, in his official capacity as Attorney
General of California,

Defendants.

Peter Eliasberg (SBN 189110)
peliasberg@aclusocal.org
Melissa Goodman (SBN 289464)
mgoodman@aclusocal.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN
CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-9500
Facsimile: (213) 915-0219

Case No. 3:22-cv-01922-RSH-JLB

**[PROPOSED] BRIEF OF AMICI
CURIAE AMERICAN CIVIL
LIBERTIES UNION OF
NORTHERN CALIFORNIA AND
AMERICAN CIVIL LIBERTIES
UNION OF SOUTHERN
CALIFORNIA IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Judge: Hon. Robert S. Huie
Date: February 2, 2023
Time: 1:30 P.M.
Courtroom: 3B

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INTRODUCTION

“An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients.” *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002). Before prescribing medicine, performing a medical procedure, or administering some other form of treatment, a physician discusses their patient’s symptoms, risk factors, values, and goals; explains treatment options; and shares their opinion on the advantages and disadvantages to different courses of action. Healthcare decisions are, as the Supreme Court has described, “deeply personal.” *Nat’l Inst. of Family & Life Advocates v. Becerra* (“*NIFLA*”), 138 S. Ct. 2361, 2374 (2018) (citation omitted). Accordingly, candor between doctor and patient is “crucial.” *Id.* (citation omitted).

Assembly Bill (“AB”) 2098¹ threatens that candor. While California is rightly focused on the role of licensed medical professionals during the COVID-19 pandemic, AB 2098 goes too far. According to the State, the law is needed because an “extreme minority” of physicians have used their positions of trust—and popularity on social and legacy media—to propagate what the State deems “false or misleading information” about COVID-19.² But rather than employ the existing tools at its disposal, the State has taken a blunt instrument to the entire profession. AB 2098 declares it “unprofessional conduct” for a physician to “disseminate misinformation or disinformation related to COVID-19,” with “disseminate” defined broadly as the “conveyance of information from the licensee to a patient under the licensee’s care in the form of treatment or advice.” AB 2098, § 2(a), § 2(b)(3).³

The State claims that AB 2098 is a mere professional regulation—out of reach of the First Amendment and subject to rational basis review—because it targets only medical “care” that is well within the government’s purview to regulate. Not so. Under the Ninth Circuit’s well-established

¹ 2022 Cal. Stat., ch. 938 (AB 2098) (to be codified at Cal. Bus. & Prof. Code § 2270).

² Defs.’ Req. for Judicial Notice (“RJN”), Ex. B, ECF 12-3, Assembly Comm. on Bus. & Prof. Report at 6–7 (Apr. 19, 2022) (hereinafter “Apr. 19, 2022 Assembly Rep.”).

³ Amici focus on the First Amendment analysis, but share Plaintiffs’ concerns that AB 2098’s definitions of “misinformation” and “disinformation” are impermissibly vague. *See* Plaintiffs’ Mem. ISO Mot. for Prelim. Inj. (“MPI”), ECF 6-1, at 16–20. Amici likewise agree that giving the State the power to separate “truth” from “fiction,” and then to censor speech on that basis, risks irreparable First Amendment harm including, among other things, stifling important public debate, prioritizing state-approved messages, and silencing already marginalized voices. *See id.* at 13, 16, 19.

1 framework for evaluating regulations of healthcare professionals, AB 2098 sweeps in exactly the kind of
2 protected speech physicians rely on in their doctor-patient relationships. And while the State resists
3 aspects of the Ninth Circuit’s framework, this Court need not. Under a straightforward application of
4 this framework and the speech-conduct continuum most recently articulated in *Tingley v. Ferguson*, 47
5 F.4th 1055 (9th Cir. 2022), AB 2098 is a content-based regulation encompassing speech protected by the
6 First Amendment. Strict scrutiny therefore applies.

7 Fortunately, as even the State acknowledges, it does not need AB 2098 to keep patients safe. *See*
8 Defs.’ Opp. to Mot. for Prelim. Inj. (“Opp.”), ECF 12, at 5. A less restrictive alternative exists: the
9 California Business and Professions Code already regulates unprofessional conduct by physicians to the
10 full extent allowed by the First Amendment. Under section 2234 of that code, physicians can be—and
11 historically have been—disciplined for committing medical fraud, prescribing medically inappropriate
12 treatment, and failing to provide patients with material information to make informed choices, like the
13 availability of conventional treatment options. Inexplicably, the California Medical Board has failed to
14 take advantage of its authority under section 2234 to investigate and punish unprofessional conduct
15 related to COVID-19. Requiring California to prove such conduct before imposing a sanction neither
16 ties officials’ hands nor harms patients. Indeed, the State does not explain why existing law has fallen so
17 short as to justify a sweeping censorship law, or why the burden to prove unprofessional conduct under
18 AB 2098 would be any less onerous than under the current section 2234.

19 This brief proceeds as follows. After explaining the Ninth Circuit’s framework for distinguishing
20 between speech and conduct in the healthcare context, Amici address the State’s analysis, which
21 muddles that framework. Amici conclude by expanding for the Court the central reason why AB 2098
22 fails strict scrutiny, alluded to in Plaintiffs’ briefing, *see* MPI at 15: existing law is able to address
23 California’s stated concerns. Because AB 2098 violates the First Amendment, Amici respectfully urge
24 the Court to grant Plaintiffs’ motion for a preliminary injunction and enjoin AB 2098 in full. If the Court
25 is not inclined to enjoin the law in full, Amici urge this Court to narrowly construe AB 2098 so that it
26 reaches no more conduct than that already deemed “unprofessional” under existing law by, for example,
27 holding that the phrase “or advice” violates the First Amendment and enjoining the State from enforcing
28 that portion of AB 2098.

ARGUMENT

I. Under the Ninth Circuit’s Well-Established Framework for Evaluating Healthcare Regulations, AB 2098 Regulates Protected Speech, and the First Amendment Applies.

While the government must play a role in licensing and regulating physicians, the First Amendment strictly limits restrictions on doctor-patient communications. *See NIFLA*, 138 S. Ct. at 2373–75. The Ninth Circuit uses a “continuum approach” to evaluate whether the government is interfering with the speech of healthcare providers or instead merely regulating the conduct of the profession. *See Tingley*, 47 F.4th at 1072. If the former, the First Amendment and strict scrutiny apply. *Id.* at 1072–73; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.”). If the latter, the First Amendment does not apply, and the regulation need only be reasonable. *See Tingley*, 47 F.4th at 1077–78. This approach safeguards the free speech rights of physicians to exchange information and opinions, and the government’s ability to regulate medical treatment for patient safety.

The constitutionality of AB 2098 turns on where along the continuum the law falls. On one end, a physician’s “public dialogue”—including advocacy for a “position that the medical establishment considers outside the mainstream”—“receives the greatest First Amendment protection.” *Id.* at 1072–73 (citing *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014), *overruled on other grounds by NIFLA*, 138 S. Ct. 2361 (2018)). At the other end of the continuum, consistent with the government’s general police powers, a physician’s “professional conduct”—such as performing a particular type of procedure—does not receive First Amendment protection. *Id.* at 1073 (citing *Pickup*, 740 F.3d at 1229). The Ninth Circuit includes in this category any treatment provided through words, like the talk therapy at issue in *Tingley* designed to alter a patient’s sexual orientation or gender identity: “States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel.” *Id.* at 1064; *see also, e.g., Nat’l Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir. 2000) (rejecting argument that psychoanalysis, as “talking cure,” was pure speech

1 because “key component of psychoanalysis” is “treatment of emotional suffering and depression”
2 (internal citation, quotation marks omitted).

3 The Ninth Circuit also includes in the professional-conduct category regulations on the practice
4 of medicine that only “incidentally involve[] speech,” such as prohibitions on malpractice and laws that
5 require informed consent. *Tingley*, 47 F.4th at 1074 (quoting *NIFLA*, 138 S. Ct. at 2373); *see also, e.g.,*
6 *NIFLA*, 138 S. Ct. at 2373 (explaining that informed-consent law, which required doctors to provide
7 information to patients before treatment, regulated “speech only ‘as part of the *practice* of medicine,
8 subject to reasonable licensing and regulation by the State[.]’”) (quoting *Planned Parenthood of Se. Pa.*
9 *v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women’s Health*
10 *Org.*, 142 S. Ct. 2228 (2022)). And in the middle of the speech-conduct continuum, certain speech
11 receives less First Amendment protection, including “commercial speech or compelled disclosures”
12 about the terms of services. *Tingley*, 47 F.4th at 1074 (citing *NIFLA*, 138 S. Ct. at 2372–73).

13 Some courts, including the Ninth Circuit, previously recognized a distinct category of
14 “professional speech”—that is, speech “within the confines of a professional relationship”—that also
15 fell in the middle of the continuum and so received “diminished” constitutional protection. *See Pickup*,
16 740 F.3d at 1228. The Supreme Court, however, expressly rejected such a rule in *NIFLA*. *See* 138 S. Ct.
17 at 2371–72, 2374–75. Thus, consistent with *NIFLA*, the First Amendment protects physicians’ medical
18 advice and recommendations—including about treatments the government is otherwise permitted to
19 regulate—because physicians and patients “must be able to speak frankly and openly.” *See Conant*, 309
20 F.3d at 636–37 (federal regulation allowing government to revoke DEA prescription authority based
21 solely on physician’s recommendation that medical marijuana could help patient violated First
22 Amendment). In a case quoted approvingly in *NIFLA*, *see* 138 S. Ct. at 2374, the Eleventh Circuit
23 likewise recognized that “doctor-patient communications *about* medical treatment” are distinct from the
24 treatment itself, and thus “receive substantial First Amendment protection[.]” *Wollschlaeger v. Gov.*,
25 *Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) (quoting *Pickup*, 740 F.3d at 1227).

26 As written, AB 2098 undoubtedly reaches speech protected by the First Amendment. It expressly
27 limits the ability of physicians to speak about certain topics to their patients and thereby restricts their
28 ability to communicate. The law defines the prohibited dissemination as a licensed professional’s

1 “conveyance of *information* from the licensee to a patient under the licensee’s care in the form of
2 treatment *or advice*.” AB 2098, § 2(b)(3) (emphases added). *Conant* plainly forecloses the State from
3 censoring physicians’ discussion, medical advice, and recommendations related to COVID-19 unless the
4 content-based regulation can meet strict scrutiny.⁴

5 **II. This Court Should Resist the State’s Effort to Collapse the Distinction Between Speech and**
6 **Conduct.**

7 As the foregoing shows, AB 2098 presents a straightforward application of the Ninth Circuit’s
8 speech-conduct continuum. The law restricts, at the very least, physicians’ advice, and such advice is
9 protected speech. Notwithstanding this evident infirmity, the State resists aspects of the well-established
10 framework for evaluating regulations on healthcare professionals’ speech. The Ninth Circuit’s carefully
11 calibrated framework is both doctrinally sound and safeguards against state interference with doctor-
12 patient discourse, *see NIFLA*, 138 S. Ct. at 2374, while allowing the state to prevent unprofessional
13 conduct, like practicing without a license or providing harmful treatments. There is no need for the
14 Court to stray from that framework to decide this case. *See id.* at 2373 (“While drawing the line between
15 speech and conduct can be difficult, this Court’s precedents have long drawn it, and the line is long
16 familiar to the bar.”) (internal citations, quotation marks omitted).

17 The State points to the phrase “under the [practitioner’s] *care*,” to insist that, like the conversion-
18 therapy bans in *Tingley* and *Pickup*, AB 2098 is a regulation on professional conduct that incidentally
19 impacts speech. *See* Opp. at 9–10. Under the State’s rubric, *all* physician-provided “patient care” must
20 be construed as the “practice of medicine” and is thus professional conduct immune from First
21 Amendment protection. *Id.* at 10–11. But the State does not cabin “care” to the treatment physicians
22 provide. Rather, consistent with the explicit scope of the statute itself, in the State’s telling, “patient
23 care” encompasses “the *advice* and treatment physicians provide—and the information conveyed in such

24 ⁴ Early versions of AB 2098 focused on an “extreme minority” of healthcare practitioners’
25 contribution to “the public discourse” on COVID-19, rather than on general doctor-patient
26 communications. *See* Apr. 19, 2022 Assembly Rep. at 7, 9 (describing as an “illustrative example” of
27 the need for legislation a well-known physician speaking at a public rally and otherwise engaging “in
28 multiple campaigns to stoke public distrust in COVID-19 vaccines”). Disciplining physicians for sharing
their opinions in the public square obviously violates the First Amendment, and the Legislature was
right to narrow the reach of AB 2098. But as Amici explain herein, and as Plaintiffs also argue, the
Legislature did not narrow the law enough, and AB 2098 continues to penalize protected speech. *See*
supra at 8–10; Pls.’ Reply ISO MPI, ECF 15, at 6.

1 advice and treatment.” *Id.* at 17. (emphasis added). This sweeping position eviscerates the carefully
2 wrought distinction drawn in cases like *Conant* and *NIFLA* between speech and conduct, thereby
3 threatening to swallow whole the free speech rights of physicians.

4 The Ninth Circuit has declined to construe all clinical interactions between a physician and their
5 patient as falling into a catch-all category of “care” subject to regulation. Instead, to strike the balance
6 between protecting physicians’ free speech rights and patient safety, the court has expressly
7 distinguished treatment from the discussions, advice, recommendations, and other information sharing a
8 physician may engage in leading *up to* the treatment itself. So in *Conant*, the First Amendment applied
9 to a physician’s “discussion of the medical use of marijuana,” including the “pros and cons” of such use,
10 and the “recommendation” that, even if the physician could not prescribe it, “medical marijuana would
11 likely help a specific patient.” 309 F.3d at 634, 637. In *Pickup*, too, the First Amendment protected
12 providers’ “discussions about treatment, recommendations to obtain treatment, and expressions of
13 opinions” about treatment even if the First Amendment did not protect the treatment itself. 740 F.3d at
14 1229. The same in *Tingley*. *See* 47 F.4th at 1073, 1077–78. In other words, the Ninth Circuit did not step
15 back and analyze the totality of interactions between physicians and patients as overarching “care”;
16 rather, it looked more specifically at the function of the communication itself.

17 Moreover, the practical effect of the State’s proposed rule—that *Conant*, *Pickup*, and *Tingley*
18 imply that provider speech is protected *only* when consistent with the standard of care, *see* Opp. at 9,
19 10–11, 13—turns the rubric upside down. The State’s rule fails because it would resurrect something
20 like the “professional speech” doctrine, which subjected speech “within the confines of a professional
21 relationship” to lesser First Amendment protection. *See Pickup*, 740 F.3d at 1228. As explained, the
22 Supreme Court in *NIFLA* expressly declined to conclude that professionals such as doctors have
23 diminished First Amendment rights simply by virtue of their state-issued licenses. *See* 138 S. Ct. at
24 2371–72, 2374–75; *see also Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring)
25 (“[T]he state may prohibit the pursuit of medicine as an occupation without its license but I do not think
26 it could make it a crime publicly or *privately* to speak urging persons to follow or reject any school of
27 medical thought.”) (emphasis added). In addition, the State’s rule conflicts with the very case law on
28 which it is based. While the State argues that the speech at issue in *Conant* was protected because it was

1 consistent with the standard of care, *see* Opp. at 13, look again to the conversion-therapy bans at issue in
2 *Pickup* and *Tingley*. The Ninth Circuit found it critical to the First Amendment analyses there that
3 physicians could still talk about, express support for, and even recommend a treatment that both the
4 “medical community” and the States of California and Washington had deemed contrary to the
5 “applicable standard of care and governing consensus at the time.” *See Tingley*, 47 F.4th at 1081.⁵

6 To be sure, the *NIFLA* Court recognized that the First Amendment does not stand in the way of
7 “[l]ongstanding torts for professional malpractice” that harm patients. *See* 138 S. Ct. at 2373 (citing
8 *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Supreme Court was quick to caution, however, that
9 the government “may not, under the guise of prohibiting professional misconduct, ignore constitutional
10 rights.” *Id.* (quoting *NAACP*, 371 U.S. at 439). Healthcare providers who endanger or harm their
11 patients can be held accountable, but “[b]road prophylactic rules in the area of free expression are
12 suspect.” *See NAACP*, 371 U.S. at 438 (listing cases).

13 **III. Even if AB 2098 Regulates Some Conduct, the Court Should Apply First Amendment** 14 **Scrutiny Because AB 2098 Is Overbroad and Chills Protected Speech.**

15 Prophylactic, content-based rules like AB 2098 are suspect in part because their “very existence”
16 threatens to chill speech. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).
17 And because the threat of chilled speech is untenable, courts have struck down overbroad laws that may
18 have some constitutional applications, but which also reach a substantial amount of protected speech. *Id.*
19 at 130, 133–34; *see also Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.* (“*Madigan*”), 538 U.S.
20 600, 619–20 (2003) (distinguishing between constitutional regulations “aimed at fraud” and
21 unconstitutional regulations “aimed at something else in the hope that it would sweep fraud in during the

22 ⁵ If the State takes an unduly broad view of professional conduct, the district court in *McDonald*
23 *v. Lawson* took an unduly narrow view of professional advice in denying the plaintiffs’ motion for
24 preliminary injunction in a similar challenge to AB 2098. For the reasons provided both in this brief and
25 a substantially similar one submitted in *McDonald*, Amici disagree with the conclusion that AB 2098
26 regulates professional conduct with an incidental burden on speech. In reaching that conclusion, the
27 *McDonald* court interpreted AB 2098 to allow—as the law must under *Conant*—physicians to
28 “express[] a particular medical opinion.” *McDonald v. Lawson*, No. 22-cv-01805, Order Denying Mot.
for Prelim. Inj. (“*McDonald Order*”), ECF 78 at 19 (C.D. Cal. Dec. 28, 2022). Inexplicably, however,
the court interpreted AB 2098 to prohibit physicians from sharing the information “underlying” those
protected opinions. *See id.* at 19. In other words, a physician could share her opinion or ultimate advice,
but not tell her patient why. As with the State’s proposed rule, this cramped interpretation cannot be
reconciled with *Conant* and the broad First Amendment rights that physicians retain.

process”) (citation omitted). So even if the Court determines that AB 2098 touches on some professional conduct that is properly regulated by the State, AB 2098 should still be subject to First Amendment scrutiny because the law threatens to chill a significant amount of protected speech. AB 2098 presents no mere incidental impact on speech.

“A law is overbroad if it ‘does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech[.]’ *Klein v. San Diego Cnty.*, 463 F.3d 1029, 1038 (9th Cir. 2006) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Courts apply the overbreadth doctrine when there is a “realistic danger” that the law will “significantly compromise” the free speech rights of others or where it is “susceptible of regular application to protected expression.” *United States v. Hansen*, 25 F.4th 1103, 1109–10 (9th Cir. 2022) (internal citations, quotation marks omitted).

These risks are present here. Given the ambiguities in the reach of AB 2098 highlighted by Plaintiffs, *see* MPI at 16, 19–20; Reply at 3–4, 8–9, physicians will be loath to speak their minds and share their opinions with patients about a rapidly evolving disease with many unknowns. At any point, the State could determine that a physician has violated AB 2098 for sharing an unconventional opinion that the State deems below the standard of care, and take away their medical license. The State’s brief does not assuage such concerns and leaves the scope of the law ambiguous. For example, the State insists that AB 2098 allows physicians to discuss “the pros and cons of any potential treatment” and offer “specific advice.” But those physicians must also, somehow, hew to the shifting goalposts of a medical consensus and standard of care in the State’s purview to set. Moreover, according to the *McDonald* court, *see supra* 12 n.5, to meet these goalposts, physicians must now distinguish between (1) their protected recommendations and opinions (like that a patient should not be vaccinated), which can be shared, and (2) the unprotected information supporting those recommendations (like studies a physician has reviewed that contradict the current medical consensus that vaccines are safe and effective), which cannot be shared. *Id.* (citing *McDonald* Order at 19).

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1 **IV. AB 2098 Is Unconstitutional Because the State Can Achieve its Goal of Protecting Patients**
2 **Using Less Restrictive Alternatives, like Laws that Already Regulate Physician Conduct.**

3 Properly construed as a restriction on protected speech, AB 2098 fails strict scrutiny because it is
4 not narrowly tailored to the State’s asserted interests. The legislative record reflects the State’s driving
5 concerns in passing AB 2098. First and foremost, the Legislature focused on addressing physicians’
6 public dialogue regarding COVID-19, which ironically is beyond AB 2098’s final scope because the
7 State cannot regulate such speech. *See supra* 10 n.4. And second, the Legislature focused on curtailing
8 physicians who “promot[e] [] treatments and therapies that have no proven effectiveness against the
9 virus” and prescribe what the State asserts are “ineffective and potentially unsafe” treatments, like
10 ivermectin, hydroxychloroquine, and injecting disinfectants. *See, e.g.*, Apr. 19, 2022 Assembly Rep. at
11 6, 8–9; RJN, Ex. D, ECF 12-3, Sen. Comm. on Bus., Prof. & Econ. Dev. Report at 4–5, 8 (June 27,
2022).

12 AB 2098 is not necessary to address these concerns, however. The State has at its disposal
13 existing narrowly tailored laws that govern unprofessional conduct to the full extent tolerated by the
14 First Amendment. Under California Business and Professions Code section 2234, the Medical Board of
15 California (“MBC”) “shall take action against any licensee who is charged with unprofessional
16 conduct,” which includes, among other things, “gross negligence,” “repeated negligent acts,”
17 “incompetence,” and acts involving “dishonesty.” Cal. Bus. & Prof. Code §§ 2234, (b)–(e). And
18 California courts have long interpreted the types of conduct the Legislature was concerned about—such
19 as failing to provide patients with sufficient information to make informed health choices, committing
20 medical fraud, and providing patients with medically inappropriate treatment—as falling under section
21 2234. Indeed, when considering AB 2098, the Legislature acknowledged that the MBC was “*already*
22 *fully capable* of bringing an accusation against a physician for this type of misconduct.” Apr. 19, 2022
23 Assembly Rep. at 8 (emphasis added); *see also* Opp. at 5 (citing same). While the State acknowledges
24 this “larger system of medical regulation,” Opp. at 21, it fails to explain or offer evidence demonstrating
25 why that system has proven “ineffective to achieve its goals.” *See Victory Processing, LLC v. Fox*, 937
26 F.3d 1218, 1228 (9th Cir. 2019) (quoting *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816
27 (2000)); *see also Playboy Ent. Group*, 529 U.S. at 816 (“When a plausible, less restrictive alternative is
28

1 offered to a content-based speech restriction, it is the Government’s obligation to prove that the
2 alternative will be ineffective to achieve its goals.”).

3 Starting with informed consent. A physician who fails to obtain informed consent or to provide
4 their patient with “adequate information to enable an intelligent choice” about their health can be
5 disciplined under section 2234. *See Cobbs v. Grant*, 8 Cal. 3d 229, 245 (1972); *see also Davis v.*
6 *Physician Assistant Bd.*, 66 Cal. App. 5th 227, 276–79 (2021) (affirming finding of unprofessional
7 conduct under section 2234(c) when physician assistant failed to disclose information material to
8 patients’ healthcare decisions). When recommending or administering treatment, physicians must
9 provide “whatever information is material to the [patient’s] decision” to undergo such treatment, which
10 can include the “available choices” for treatment options and “the dangers inherently and potentially
11 involved in each.” *Cobbs*, 8 Cal. 3d at 243, 245.

12 In addition to general informed-consent requirements, physicians are specifically required to
13 obtain informed consent and to describe “conventional treatment” before recommending or providing
14 unconventional or “alternative or complementary medicine.” *See* Cal. Bus. & Prof. Code § 2234.1(a)(1).
15 This provision alone can accomplish most, if not all, of what the Legislature set out to do with AB 2098.
16 And importantly, disciplining physicians for failure to provide adequate material information does not
17 violate the First Amendment because requirements for informed consent are treated as regulations on
18 professional conduct that only incidentally impact speech. *See NIFLA*, 138 S. Ct. at 2373. Thus, even if
19 the First Amendment protects physicians’ advice about unconventional at-home COVID-19 treatments,
20 for example, the State can still discipline those physicians if they fail to provide patients with all
21 material information necessary to make an informed decision about choosing to undergo such
22 treatments.

23 Moving to medical fraud. A physician who peddles harmful treatments below the standard of
24 care to their patients commits fraud and thus engages in unprofessional conduct based on a dishonest
25 act. *See* Cal. Bus. & Prof. Code § 2234(e); *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 635–36 (1981)
26 (patient stated cause of action for fraud against physician who falsely told patient she would experience
27 “absolutely no side effects” from unsafe treatment that physician had previously been arrested for
28 providing, ultimately leading to patient needing double mastectomy); *see also, e.g., Fuller v. Bd. of Med.*

1 *Exam 'rs*, 14 Cal. App. 2d 734, 739–40, 743 (1936), *abrogated on other grounds by Hughes v. Bd. of*
2 *Architectural Exam 'rs*, 17 Cal. 4th 763 (1998) (affirming revocation of medical license of physician
3 who falsely advertised to patients that he could cure their hernias without surgery).

4 Disciplining physicians for medical fraud does not violate the First Amendment because “the
5 First Amendment does not shield fraud.” *Madigan*, 538 U.S. at 612; *see also United States v. Alvarez*,
6 567 U.S. 709, 723 (2012) (plurality op.) (“Where false claims are made to effect a fraud or secure
7 moneys or other valuable considerations . . . , it is well established that the Government may restrict
8 speech without affronting the First Amendment.”). Instead of prophylactically censoring vast swaths of
9 protected speech, California could—and should—have relied on the existing prohibitions against
10 medical fraud to respond to any harm that flows from physicians who mislead patients about COVID-
11 19. Indeed, the federal government has done so, successfully prosecuting licensed healthcare providers
12 in California who defrauded patients by marketing and selling, for example, so-called “COVID-19
13 treatment packs,” or “homeoprophylaxis immunization pellets” that were promised to provide “lifelong
14 immunity” to COVID-19 as well as fake COVID-19 vaccination record cards.⁶

15 Continuing with gross negligence and incompetence. Even if they do not intentionally lead their
16 patients astray, a physician who engages in a course of treatment that is medically inappropriate or
17 otherwise not indicated can be found to be grossly negligent and incompetent, and thus liable for
18 unprofessional conduct. *See* Cal. Bus. & Prof. Code §§ 2234(b), (d). For example, in *Yellen v. Board of*
19 *Medical Quality Assurance*, 174 Cal. App. 3d 1040 (1985), the California Court of Appeal affirmed the
20 revocation of the medical license of a physician who had a “practice of injecting and prescribing
21 medications which were medically inappropriate and dangerous,” even though the physician saw
22 “nothing wrong with the injections and type of prescription given” to a minor patient who ultimately
23 died. *Id.* at 1048, 1059. The physician also failed to instruct his minor patient’s guardian about
24 appropriate care while ordering these “contraindicated” or “useless” medications. *Id.* at 1058. Thus,

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27 ⁶ *See* Johnny Diaz, *A San Diego doctor receives a prison sentence for selling a ‘100 percent’*
28 *cure for COVID-19*, N.Y. Times (May 30, 2022), <https://tinyurl.com/52pkj5hn>; Andres Picon, *Napa*
doctor convicted of selling fake COVID vaccination cards, remedies, S.F. CHRONICLE (Apr. 6, 2022),
<https://tinyurl.com/ck8rvj46>.

1 California already can discipline physicians for prescribing medically inappropriate or dangerous
2 medications to treat COVID-19.

3 “If the First Amendment means anything, it means that regulating speech must be a last—not
4 first—resort. Yet here it seems to have been the first strategy the Government thought to try.” *Conant*,
5 309 F.3d at 637 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)). As in *Conant*, the
6 legislative record in this case reflects that the regulatory body charged with enforcing section 2234 has
7 not taken advantage of what should have been the State’s first resort. For instance, the Legislature
8 criticized the MBC’s “underwhelming enforcement activities” and failure “to take aggressive action
9 against physicians who commit unprofessional conduct.” *See* Apr. 19, 2022 Assembly Rep. at 8. And
10 the Executive Director of the MBC admits that, “[t]o date, no physician or surgeon has been disciplined
11 by the Board related to the dissemination of COVID-19 misinformation or dissemination.” Decl. of W.
12 Pasifka ISO Opp. to Mot. Prelim. Inj., ECF 12-2, ¶ 13. The State now suggests but one type of physician
13 conduct that can be regulated consistent with the First Amendment that is arguably not covered by
14 section 2234: “a single instance” of negligence or “substandard care.” Opp. at 21. But the legislative
15 record points to no actual incidents where section 2234 fell short or otherwise justifies enacting a new,
16 overbroad law that sweeps in protected speech only to get at single acts of negligence. Nor does the
17 legislative record explain why AB 2098 will lead to more enforcement given the boards’ apparent
18 unwillingness or lack of capacity to enforce existing law.

19 CONCLUSION

20 For the foregoing reasons, Amici respectfully urge the Court to grant Plaintiffs’ motion and
21 preliminarily enjoin the State from enforcing AB 2098. In the alternative, Amici urge this Court to
22 narrowly construe AB 2098 to reach no more conduct than that already regulated as “unprofessional”
23 under existing law by, for example, holding that the phrase “or advice” violates the First Amendment
24 and enjoining the State from enforcing that portion of AB 2098.

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Respectfully submitted,

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3 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

4 /s/ Hannah Kieschnick

5 Hannah Kieschnick (SBN 319011)

6 Chessie Thacher (SBN 296767)

7 Shilpi Agarwal (SBN 296152)

Angélica Salceda (SBN 296152)

8 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN CALIFORNIA

9
10 Peter Eliasberg (SBN 189110)

Melissa Goodman (SBN 289464)

11 *Attorneys for Amici Curiae*
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