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9 And Physicians for Informed Consent

10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF CALIFORNIA

12 DOUGLAS MACKENZIE, MD and  
13 PHYSICIANS FOR INFORMED CONSENT,  
14 a not-for profit physicians' organization

15 Plaintiffs,

16 v.

17 WILLIAM J. PRASIFKA,  
18 In his official capacity as EXECUTIVE  
19 DIRECTOR, MEDICAL BOARD OF  
20 CALIFORNIA, and JOHN AND JANE DOES  
21 1-10 being unknown state and other  
22 individuals who violated Plaintiff's clearly  
23 established First Amendment rights

24 Defendants.

**No.: 2:22-CV-01203-JAM-KJN**

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
INJUNCTION; MEMORANDUM IN  
SUPPORT THEREOF**

**Date:** September 27, 2022

**Time:** 1:30 p.m.

**Judge:** Judge John A. Mendez

**Location:** Courtroom 6

25 TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

26  
27 **PLEASE TAKE NOTICE THAT** on September 27, 2022, at 1:30 p.m. or as soon  
28 thereafter as the matter may be heard, at the United States District Court for the Eastern

1 District of California, in courtroom number 6, 14<sup>th</sup> floor, 501 I Street, Sacramento California,  
2 the Plaintiffs will move for an order granting preliminary injunctive relief.

3 Pursuant to Federal Rules of Civil Procedure 65, Plaintiffs seek a preliminary injunction  
4 to enjoin William Prasifka, Executive Director of the Medical Board of California (“MBC” or  
5 the “Board”) from commencing or continuing any investigation of a California licensed  
6 physician arising out protected free speech relating to Covid-19.

7 This motion is based on Plaintiffs’ Notice of Motion and Motion, the Declarations of  
8 Plaintiff Douglas Mackenzie, and Counsel for Plaintiff Physicians for Informed Consent in  
9 support of the motion, a companion Motion for Judicial Notice, and all papers and records on  
10 file with the clerk or which may be submitted prior to the time of the hearing, and any further  
11 evidence which may be offered.

12 Dated August 9, 2022

13 Respectfully submitted,

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17  


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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Motion for Preliminary Injunction seeks to stop the Medical Board of California,  
4 (the “Board”) from continuing or commencing any investigation against any California  
5 licensed physician based on the physician’s protected content and viewpoint speech about the  
6 Covid pandemic.

7 **II. STATEMENT OF MATERIAL FACTS**

8 **A. The Plaintiffs and other Board Investigations About Covid Misinformation**

9 As set forth in the First Amended Verified Complaint (“FAVC”), the Board commenced  
10 an investigation of Plaintiff Mackenzie by letter dated December 15, 2021, which requested  
11 that he respond to the complaint that he spread Covid misinformation at a Zoom school board  
12 meeting. FAVC page 7 para. 28 to page 8 para. 30. Plaintiff Mackenzie’s attorney responded to  
13 the request on January 10, 2022. The response did not attempt to explain or scientifically  
14 support Plaintiff’s speech. Rather, the response asserted Plaintiff’s First Amendment right to  
15 speak out in public. *Id.* at para. 31. The investigation was apparently pending until on or about  
16 July 14, 2022, six days after this lawsuit was commenced, at which point, the Board notified  
17 Plaintiff that the investigation had been closed. *Id.* at page 9 para. 32- 34. (Copies of these  
18 three letters are attached to Plaintiff Mackenzie’s Declaration.)

19 Plaintiff PIC is a physicians’ organization which, *inter alia*, represents physicians who  
20 support voluntary (as opposed to mandatory) vaccination and has different views of informed  
21 consent about vaccines than many mainstream practitioners. It has member physicians who  
22 speak out against the government’s response to Covid and hence are live targets of the Board’s  
23 ongoing and imminent investigations for alleged Covid misinformation. *Id.* at page 5 para. 20,  
24 to page 6 para. 23. (A Declaration from PIC’s General Counsel is being submitted with this  
25 Motion).

26 Plaintiffs are aware of at least two other Board investigations based in whole or in part  
27 on complaints of public Covid misinformation. *Id.* at page 9 paras, 36-37.

28



1           **B.     The Federation’s Call to Action**

2           On or about July 29, 2021, the Federation of State Medical Board issued a press release  
3 stating that its member state boards should investigate and sanction physicians for spreading  
4 Covid misinformation. *Id.* at page 10 para. 40 <sup>1</sup>

5           **C.     The Board Announces a New Covid Misinformation Policy Retroactively**  
6                   **Applied to Plaintiff and others**

7           The minutes of the Board’s February 10-11, 2022 meeting indicate that Board President  
8 Kristina Lawson, JD announced that the Board would implement the Federation’s call-to-  
9 action and would investigate and discipline physicians for public dissemination of Covid  
10 misinformation. *Id.* at page 11 para. 43. <sup>2</sup>

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11  
12 <sup>1</sup> “Physicians who generate and spread COVID-19 vaccine misinformation or disinformation  
13 are risking disciplinary action by state medical boards, including the suspension or revocation  
14 of their medical license. Due to the specialized knowledge and training, licensed physicians  
15 possess a high degree of public trust and therefore have a powerful platform in society,  
16 whether they recognize it or not. They also have an ethical and professional responsibility to  
17 practice medicine in the best interests of their patients and must share information that is  
18 factually, scientifically grounded and consensus driven for the betterment of public health.  
19 Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens  
20 to further erode public trust in the medical profession and thus puts all patients at risk.”

21 *FSMB: Spreading Covid-19 Vaccine Misinformation May Put Medical License At Risk*,  
22 Federation of State Medical Boards, News Releases (Jul. 29, 2021),  
23 [https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-  
24 misinformation-may-put-medical-license-at-risk/](https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/), offered into evidence as judicially noticeable  
25 via Plaintiffs’ Motion for Judicial Notice, (“MJN”), Appendix 1 attached to Counsel’s  
26 Declaration.

27 <sup>2</sup> “Ms. Lawson stated it is the duty of the board to protect the public from misinformation and  
28 disinformation by physicians, noting the increase in the dissemination of healthcare related  
misinformation and disinformation on social media platforms, in the media, and online, putting  
patient lives at risk in causing unnecessary strain on the healthcare system.  
Ms. Lawson elaborated in July 2021, the Federation of State Medical Boards released a  
statement saying physicians spreading misinformation or disinformation risk disciplinary  
action by their state medical board.”

FAVC page 11 para. 43, reproduced and offered into evidence as judicially noticeable via the  
accompanying Motion for Judicial Notice, Appendix 2 to Counsel’s declaration.

1           **D.     The Legislature Answers the Federation’s Call-to-Action, and then Changes**  
2           **its Mind**

3           In February 2022, the California Assembly introduced AB 2098 which would make the  
4           pubic dissemination of Covid Misinformation a board sanctionable offense. Thereafter, and as  
5           a result of concerns about the lack of constitutionality, the Bill was amended to limit the  
6           conduct to interactions between physicians and patients for the purpose of treatment or advice.  
7           *Id.* at page 13 paras. 51-54. (Reproduced at MJN Appendix 3)

8           **E.     Judicial Notice of Basic Covid Facts**

9           The Court can take judicial notice that the world is still dealing with the Covid  
10          pandemic and neither this country nor the world has eliminated the pandemic via vaccines,  
11          which is the fist and main point Plaintiff made to the school board in his comments one year  
12          ago. MJN request number 5.

13          The Court can also take judicial notice of the fact that the Covid vaccines do not prevent  
14          infection or transmission of the disease, which is another point made by Plaintiff Mackenzie to  
15          the school board. MJN request 5.

16          **III.    LEGAL REQUIREMENTS FOR A PRELIMINARY INJUNCTION**

17          The standard four-part test for a plaintiff to obtain a preliminary injunction is: 1.  
18          Likelihood of success on the merits, 2. Irreparable injury in the absence of relief, 3. The  
19          balance of equities tips in plaintiff’s favor, and 4. Showing the public interest favors granting  
20          the injunction. *Winter v. Natural Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008); *Flexible*  
21          *Lifeline Sys. Inc. v Precision Lift, Inc.* 654 F.3d 989, 994 (9<sup>th</sup> Cir. 2001).

22          However, when the plaintiff asserts a constitutional claim, and especially one involving  
23          a fundamental right as is the case here, the three latter elements are either presumed or carry  
24          less importance in determining the need for preliminary injunctive relief. Thus, in terms of the  
25          irreparable injury requirement, the Supreme Court has held that "[t]he loss of First Amendment  
26          freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for  
27          purposes of the issuance of a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.  
28          Ct. 2673, 49 L.Ed.2d 547 (1976); ...." Establishing probable success on the merits of a First

1 Amendment claim itself demonstrates irreparable harm. *S.O.C. v. County of Clark*, 152 F.3d.  
2 1136, 1148 (9th Cir. 1998).

3 Similarly, regarding the balancing of the interests of the parties, in *Baby Tam & Co. v.*  
4 *City of Las Vegas*, 154 F.3d 1097, 1102 (9<sup>th</sup> Cir. 1998),<sup>3</sup> this Circuit reversed the lower court’s  
5 denial of a preliminary injunction, because it concluded that the plaintiff had established that  
6 the challenged ordinance violated the First Amendment. It ordered the district court to enter a  
7 *permanent* injunction. without a trial and without considering the balance of equities between  
8 the parties.

9 *Baby Tam* is consistent with the Supreme Court’s reluctance to balance the equities  
10 when the government is attempting to suppress content-based speech. *See United States v.*  
11 *Alvarez*, 567 U.S. 709, 717 (2012) (“In light of the substantial and expansive threats to free  
12 expression posed by content-based restrictions, this court has rejected as ‘startling and  
13 dangerous’ a ‘free floating test for First Amendment coverage ... [based on] an ad hoc  
14 balancing of relative social costs and benefits.’ *United States v. Steven*, 559 U.S. 460, 470  
15 (2010).”

16 As to the public’s interest, it has been generally held that there is no public “interest in  
17 the enforcement of an unconstitutional law.” *ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3<sup>rd</sup>  
18 Cir. 2003). Further, “By protecting those who wish to enter the marketplace of ideas from  
19 government attack, the First Amendment protects the public’s interest in receiving  
20 information.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986).

21 In short, if Plaintiffs clearly establishes a First Amendment violation, this federal court  
22 should grant the preliminary injunction stopping the continuing Constitutional violation. It  
23 would be odd indeed if the Court would conclude that investigating Plaintiff and other  
24 physicians for speaking in public violates their First Amendment rights of free speech (and the  
25 concomitant right of the public to hear this information), and or violates their Due Process  
26

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27  
28 <sup>3</sup> Abrogated on other grounds by *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1002  
(9th Cir. 2004).

1 rights, but nonetheless decided not to enjoin the continuing violations. The Court should stop  
2 the Board, right here, and right now.

#### 3 **IV. ARGUMENT**

##### 4 **A. Plaintiffs have an overwhelming likelihood of success on the merits on their** 5 **Constitutional Claims**

##### 6 **1. The First Amendment Free Speech Claim**

7 Because Plaintiffs fully tabled First Amended Verified Complaint sets out and  
8 discusses most of the relevant case law, there seems little need to repeat that herein. Instead,  
9 the legal arguments will be summarized and amplified as necessary.

##### 10 **a. Basic Principles**

11 The First Amendment applies to States via the Fourteenth Amendment and at its core  
12 provides that with some limited exceptions, the government has no power to restrict the subject  
13 matter or content of speech (FAVC page 16, paras. 63-65).

##### 14 **b. Investigating Physicians for “Covid misinformation” is** 15 **Targeting Protected Content-based Speech and therefore** 16 **Presumptively Unconstitutional**

17 In this case, the Board is investigating Plaintiff and all similarly situated physicians  
18 based on the content of their speech, *i.e.* speech relating to the "topic discussed or the idea or  
19 message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A reliable way to  
20 determine whether the government's restriction of free speech is content-based is to ask  
21 whether the enforcement authorities must "examine the content of the message that is  
22 conveyed to know whether the law has been violated." *Otto v. City of Boca Raton*, 981 F.3d  
23 854, 862 (11<sup>th</sup> Cir. 2020) *citing* *Mc Cullen v. Coakley*, 573 U.S. 464, 479 (2014).

24 Government restrictions of content-based speech are "presumptively invalid." *R.A.V. v.*  
25 *City of St. Paul*, 505 U.S. 377, 382 (1992). The seminal and most recent and Supreme Court  
26 case on the general illegality of content-based government restrictions is *United States v.*  
27 *Alvarez*, 567 U.S. 709, wherein the Supreme Court struck down the Stolen Valor act, which  
28 made it a crime to lie about receiving the Congressional medal of honor. The Supreme Court

1 held that the act was an improper content-based restriction barred by the First Amendment free  
2 speech clause, even though the speech criminalized by the act involved a lie.

3 It is indisputable that the Federation’s July 29, 2021 call-to-action and Board  
4 President’s Lawson’s implementation thereof (via her February 10-12, 2022 Board  
5 memorialized comments) targets highly protected content-based pure speech of the Plaintiff  
6 and any other California licensed physician who speaks out against the Government’s response  
7 to Covid. As such, this censorship of physician viewpoints is presumptively unconstitutional.

8 **c. Investigating Physicians for “Covid misinformation” is**  
9 **Protected Viewpoint-based Speech which is Fully Protected**  
10 **Speech and Practically Speaking Per Se Unconstitutional**

11 Of all the types of content-based speech, viewpoint-based government restrictions to  
12 free speech is an especially "... egregious form of content discrimination." *Otto v City of*  
13 *Boca Raton*, 981 F.3d at 864, *citing Rosenberger v. Visitors of Univ. of Virginia*, 515 U.S.  
14 819, 829, (1995). In fact, in *Otto*, the Eleventh Circuit stated that:

15 Indeed, there is an argument that such regulations are  
16 unconstitutional *per se*; The Supreme Court has said that ‘the First  
17 Amendment *forbids* the government to regulate speech in ways that  
18 favor some viewpoints or ideas at the expense of others.’ *Members*  
19 *of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804  
20 (1984) (parallel citations omitted). In that case, it applied  
21 heightened scrutiny only after finding that the challenged law was  
22 viewpoint neutral. (citations omitted.) As Rosenberger said,  
23 ‘government must abstain from regulating speech when the specific  
24 motivating ideology or the opinion or perspective of the speaker is  
25 the rationale for the restriction. (citation omitted.) And we have not  
26 shied away from the same point: ‘The prohibition against  
27 viewpoint discrimination is ‘firmly embedded in first amendment  
28 analysis’ *Searcey v. Harris*, 888 F.2d 1314, 1325 (11<sup>th</sup> Cir. 1989).  
Those holdings do not leave a lot of breathing room for viewpoint-  
based speech restrictions.

26 *Id.*

27 The take-away from *Otto* is that while the Supreme Court has not quite explicitly  
28 adopted a *per se* rule against viewpoint-based government restrictions to free speech, there is

1 almost no “breathing room” for such government interference. And let us remember that *Otto*  
2 involved communications between health care practitioners and their patients. So, whatever  
3 breathing room there might be for the government to restrict professional speech to patients is  
4 likely nonexistent when the practitioner is speaking to the public, as set forth in this case.

5 **d. Ninth Circuit Authority Strongly Supports Issuing a**  
6 **Preliminary Injunction<sup>4</sup>**

7 In *Pickup v. Brown*, 740 F.3d at 1227, the court cited two authorities (a Colorado  
8 Appellate Decision and a law review article) that stated that health care boards cannot  
9 discipline practitioners for expressing their opinions in public. FAVC at page 16 para. 68 to  
10 page 17, para. 69.

11 The *Pickup* court also cited Justice Byron White who cited Justice Jackson, both of  
12 whom expressed the same notion, that the government cannot sanction professionals for  
13 speaking out in public about matters of public concern. (*Id.* at page 17 para. 71 to page 18).

14 In *Conant v. Walters*, 309 F.2d. 629 (9<sup>th</sup> Cir. 2002) two separate district court judges  
15 entered injunctions against the DEA for investigating physicians for recommending medical  
16 marijuana to their patients which was held to be a First Amendment violation, and the  
17 permanent injunction was upheld by this circuit.

18 It is important to point out that *Conant* was not a challenge by a physician under DEA  
19 investigation for recommending medical marijuana (or challenging the DEA’s request to  
20 respond to a complaint). It was a challenge filed by patient and physician groups based on a  
21 DEA written policy sent to state medical boards and physicians’ organizations that the DEA  
22 would investigate physicians who would “risk revocation of their DEA prescription authority”  
23 if they recommended the schedule 1 drug to patients. *Conant v. Walters, supra*, 309 F.2d. at  
24 633 (9<sup>th</sup> Cir. 2002).

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26  
27  
28 <sup>4</sup> FAVC page 16 para. 68 to page 18 para. 71 and page 18 para. 75 to page 19 para. 77 contains  
an extensive discussion of the *Pickup* and *Conant* cases.

1 The analogy here is that *Conant* strongly suggests that Board President Lawson’s  
2 statement in the Board minutes is an actionable infringement of California physicians’ First  
3 Amendment rights, and that the fact that the Board has closed its investigation is not a defense  
4 to this lawsuit.

5 Finally, there is an *a fortiori* argument to be made from both *Pickup* and *Conant*. Both  
6 involved communications between physicians and patients, which is far closer to professional  
7 conduct which incidentally involves speech, which may be less protected than public speech  
8 which cannot be suppressed or sanctioned except for rare exceptions based on “historical and  
9 traditional” categories of speech not accorded constitutional protections like fighting words,  
10 obscenity, commercial speech and such. *See United States v. Alvarez*, 567 U.S. at 717.

11 e. ***NIFLA v. Becerra* Strongly Supports Granting a Preliminary**  
12 **Injunction**

13 *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) is the  
14 most recent Supreme Court authority on speech by professionals and it offers important  
15 guidance which support the granting of a preliminary injunction for several reasons. *NIFLA*  
16 dealt with government compelled speech in the form of a law requiring anti-abortion  
17 pregnancy centers to provide patients with information about abortions. The California district  
18 court denied the plaintiff’s First Amendment motion for preliminary injunction, and the Ninth  
19 Circuit affirmed. The Supreme Court reversed and ordered the Ninth to order the district  
20 court to grant the preliminary injunction.

21 To get there, first, the Supreme Court rejected the notion circulating in the lower  
22 courts (including the Ninth Circuit) that professional speech was a distinct form of speech  
23 over which the government had greater regulatory control than other types of pure speech.

24 Second, the majority opinion manifested a deep skepticism about the government’s  
25 attempt to control speech by physicians, even when the speech is directed to patients. This  
26 deep mistrust caused the Supreme Court to cite some extremely harsh analogies to the most  
27 extreme authoritarian regimes that had also attempted to control what physicians told  
28 patients.

1 To make that point, the majority opinion quoted a concurring opinion by an Eleventh  
2 Circuit judge who noted that "Throughout history, governments have `manipulat[ed] the  
3 content of doctor-patient discourse' to increase state power and suppress minorities."  
4 The *NIFLA* opinion then continued quoting the concurring judge's examples of Chinese, Soviet  
5 and Nazi doctors who "systematically violated the separation between state ideology and  
6 medical discourse. German physicians were taught that they owed a higher duty to the 'health  
7 of the Volk' than to the health of the individual patient." *NIFLA*, 138 S. Ct. at 2374 (2018),  
8 quoting *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (11th Cir. 2017)  
9 (Pryor, J. concurring opinion).

10 If the *NIFLA* majority thought such harsh historical comparisons were appropriate for  
11 physician communications with patients, one can only image what they would say about  
12 attempted government suppression of physicians who speak out in public.

13 **f. The Level of Scrutiny is Irrelevant Because the Board's Action**  
14 **Are Illegal Under State and Federal Law, apart from the Fact**  
15 **they Violate Physicians' Free Speech rights**

16 Content and viewpoint-based restrictions to free speech being a fundamental right are  
17 usually mandate strict scrutiny meaning proof of a compelling state need and the least  
18 restricting means possible. *Otto v. City of Boca Raton*, 981 F.3d 854. However, arguably, no  
19 such analysis is required in this case because the Board's investigations of physicians for  
20 their public speech does not satisfy any level of scrutiny for the simple reason that its actions  
21 are otherwise illegal under federal and state law for three reasons: (1). The Board is  
22 attempting enforce an illegal and unenforceable underground regulation, (2). Its investigation  
23 of Plaintiff Mackenzie and all other physicians prior to the Board's announcement of the  
24 underground regulation would violate the ex post facto provision of Article 10 of the  
25 Constitution and (3). The only theoretical statutory authority for these Board investigations  
26 is unconstitutionally vague and overbroad.



1                   i.       **If allowed to continue, Board President Lawson’s**  
2                                   **Statement of Intent to Pursue Physicians for Public**  
3                                   **Covid Misinformation would be an Illegal Underground**  
4                                   **Regulation**

5                                   **(A)    Board President Lawson’s Statement:**

6                   Board President’s Lawson’s statement recorded in the Board’s minutes (page 2,  
7                   footnote 2 *supra*) is an official Board statement of general applicability announcing a new  
8                   board enforcement policy which presumably implements or interprets some preexisting  
9                   statutory authority allowing it to “protect the public” from misinformation/disinformation “on  
10                   social media platforms, in the media and online” such that the Board can and will discipline  
11                   physicians for publicly propagating misinformation and/or disinformation.

12                                   **(B)    California law on Underground Regulations**

13                   The California Administrative Procedure Act (“APA”) provides that “[n]o state agency  
14                   shall issue, utilize, enforce, or attempt to enforce ... a regulation" without complying with the  
15                   APA's notice and comment provisions. (Gov. Code, § 11340.5, subd. (a).)

16                   Under the APA,

17                                   "[a] ‘regulation’" is defined as "every rule, regulation, order, or  
18                                   standard of general application or the amendment, supplement, or  
19                                   revision of any rule, regulation, order, or standard adopted by any  
20                                   state agency to implement, interpret, or make specific the law  
21                                   enforced or administered by it, or to govern its procedure." (Gov.  
22                                   Code, § 11342.600.) This is a very broad definition, providing two  
23                                   principal identifying characteristics for regulations. (See *Tidewater*  
24                                   *Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, 59  
25                                   Cal.Rptr.2d 186, 927 P.2d 296 (*Tidewater*.) "First, the agency  
26                                   must intend its rule to apply generally, rather than in a specific  
27                                   case. The rule need not, however, apply universally; a rule applies  
28                                   generally so long as it declares how a certain class of cases will be  
                                 decided. [Citation.] Second, the rule must ‘implement, interpret, or  
                                 make specific the law enforced or administered by [the agency], or  
                                 ... govern [the agency's] procedure.’ " (*Ibid.*)

27                   *Malaga Cty. Water Dist. v. Cent. Valley Reg’l Water Quality Control Bd.* 58 Cal.App.5th 418,  
28                   434 (2020).

1 As set forth by the California Appellate court in *Excelsior College v. Cal. Bd. of*  
2 *Nursing*, 136 Cal.App.4th 1218 (2006):

3 "An underground regulation is a regulation that a court may  
4 determine to be invalid because it was not adopted in substantial  
5 compliance with the Administrative Procedure Act (Gov. Code,  
6 § 11340 et seq.) . . . ." (*Modesto City Schools v. Education Audits*  
7 *Appeal Panel* (2004) 123 Cal.App.4th 1365 1381, 20 Cal.Rptr.3d  
8 831.) We will conclude a regulation is an underground regulation if  
9 (1) the agency intended it to apply generally rather than in a  
10 specific case and (2) the agency adopted it to implement, interpret,  
11 or make specific the law enforced by the agency. (*Ibid.*)”

12 *Id.* at 1233.

13 Since the Board cannot show compliance with the APA in issuing this new enforcement  
14 policy adopting the Federation’s press release, the policy is an illegal and unenforceable  
15 underground regulation. *See Morning Star v. State Bd. of Equalization*, 38 Cal.4th 324 (2006)  
16 (underground regulation is invalid and unenforceable); *Clovis Unified Sch. Dist. v. Chiang*, 188  
17 Cal.App.4th 794 (2010) (same).

## 18 **2. Due Process Vagueness**

19 It is black letter constitutional law that where a statute "threatens to inhibit the exercise  
20 of constitutionally protected rights," the Constitution requires an especially high level of  
21 clarity. *Village of Hoffman Estates*, 455 U.S. 489, 499, 102 S. Ct. 1186, 1193 (1982). And a  
22 law which "nominally imposes \*\*\* civil penalties," if those are "prohibitory and stigmatizing,"  
23 courts still undertake a close review for vagueness. *Id.*” *Hopkins v. Jegley*, 510 F.Supp.3d 638,  
24 734 (E.D. Ark. 2021).

25 The Board’s apparent attempt to use Bus. & Prof. Code Section 2234(e) as the basis for  
26 its Covid misinformation investigations triggers the strictest review for vagueness, because it  
27 both inhibits the exercise of constitutionally protected right to free speech and because findings  
28

1 of professional misconduct constitute stigmatizing penalties.<sup>5</sup> Plaintiffs submit this purported  
2 basis of the investigation of Plaintiffs and other physicians is unconstitutionally vague and  
3 threatens to inhibit the exercise of Plaintiffs and all California physicians First Amendment  
4 rights of free speech to the public.

5 This court itself has had experience with a case with multiple similarities to this one. In  
6 *Potts v. Cty. of Trinity*, No. 2:12-CV-01793 JAM-CMK, 2012 U.S. Dist. LEXIS 119920 (E.D.  
7 Cal. Aug. 22, 2012), this Court granted a preliminary injunction to a sheriff's deputy who was  
8 censured for writing letters to the editor critical of policing policies. A copy of the preliminary  
9 injunction order and the transcript of the hearing of the motion is attached to Counsel's  
10 declaration in the MJN as Appendix 4. The policy statement held to be unconstitutionally  
11 vague in *Potts*, is a quantum level less vague than Business and Professions Code section  
12 2234(e), or the Federation's call to action.

13 Accordingly, the Board's possible use of Section 2234(e) as a basis for sanctioning  
14 physicians for speaking out in public fails because of its vagueness violation of due process.

### 15 **B. Irreparable Injury**

16 Plaintiffs' declarations show that protected free speech is actively being chilled, causing  
17 irreparable injury to the physicians and also the public that benefits from the free marketplace  
18 of ideas.

19 As indicated in Section II above, irreparable injury is presumed if there is strong  
20 evidence of a First Amendment freedom of speech violation. The Board's February 10-11,  
21 2022 announcement that it intended to effectuate the Federation's call-to-action has had a  
22 chilling effect on Plaintiff Mackenzie and other physicians. The Declaration of PIC's counsel  
23 Greg Glaser quotes an example of the types of communications he has received from PIC's  
24

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25  
26 <sup>5</sup> Bus. & Prof. Code Section 2234(e) makes Board sanctionable: "(e) The commission of any  
27 act involving dishonesty or corruption that is substantially related to the qualifications,  
28 functions, or duties of a physician and surgeon." Unless and until AB 2098 passes there is no  
other possible statute which could even arguably apply to Plaintiffs' conduct, and of course,  
the bill even if it because law could not be applied retroactively for ex post facto reasons.

1 members asking for guidance about what they are permitted to say about Covid in public. Mr.  
2 Glaser's declaration describes the adverse and chilling effects that the Board's announced  
3 policy (and AB 2098) is having on PIC's members.

#### 4 **C. Balancing the Equities**

5 The balance of equities favors protecting protected free speech. It favors the free  
6 marketplace of ideas. And here, it also favors recognition of the fact that scientific debate is,  
7 and needs to be vibrant regarding Covid.

8 The balance of equities further favors Plaintiffs because the Board does not have the  
9 statutory or regulatory authority to investigate or sanction physicians for speaking out in public  
10 about the pandemic, and its attempt to do so is based on an underground regulation, an  
11 unconstitutionally vague statute, and the ex post facto application of the underground  
12 regulation. In addition, seventy-five years of jurisprudence strongly suggests that the  
13 government cannot suppress content and viewpoint public speech.

14 It is otherwise hard to see how the Board can have any equities on its side when there  
15 does not appear to be a single case in United States jurisprudence which has affirmed a  
16 licensing board's attempt to sanction a licensee for public speech relating to a matter of public  
17 importance. And finally, the Board cannot demonstrate that investigation or even sanctioning a  
18 few or even many California physicians would have a meaningful impact on the public health  
19 discussion of the government's response to the pandemic. Thus, the Board's newly created  
20 investigative authority over protected speech is not only unconstitutional, it is futile.

#### 21 **D. The Public Interest**

22 Obviously, the public cannot have any interest in the Board acting illegally and in  
23 violation of the constitutional rights of its licensees. Beyond the manifest illegality, in an  
24 evolving pandemic, the public's interest is best served by having medically trained people  
25 speak in public, even if their viewpoint is against the currently accepted government views.  
26 Indeed, scientific progress made to date has depended upon free speech.

27 The Glaser Declaration presents several examples where the public health authorities  
28 had to walk-back their recommendations, in part based on criticism by physicians who might

1 have been accused of “Covid misinformation. One thing which the pandemic has surely taught  
2 us all is that the science is evolving, and that sometimes, what was thought to be so by the  
3 experts, has turned out not to be so.

4 It is not the job of a California Medical Board to police, investigate, sanction, censor or  
5 sanitize the thoughts and public speech of its licensees about matters of public importance.  
6 That is the fundamental truth of this case, and why the Court should stop the Board from doing  
7 so.

8 **V. REQUEST THAT NO BOND BE REQUIRED**

9 This case seeks to protect the First Amendment rights of physicians to speak out in  
10 public about important matters of public interest, and the First Amendment rights of the public  
11 to hear the views of physicians who disagree with the government’s prevailing (but continually  
12 changing) Covid narrative.

13 We have a long tradition in this country of allowing people to express their views about  
14 matters of public importance, subject to clearly defined categories of unprotected content-  
15 based speech. There is no tradition of suppressing physicians from speaking their minds, at  
16 least there was no such tradition until the Federation’s call-to-action attempt to create one.

17 No harm will befall the Board if the Court maintains the status quo of our long tradition  
18 of free speech by granting the requested preliminary injunctive relief. Therefore, Plaintiffs’  
19 request that no bond be required if the requested relief is granted.

20 WHEREFORE for the foregoing reasons, Plaintiffs request that the Motion for  
21 Preliminary Injunction be granted, and specifically that

- 22 1. the Board be ordered to stop all its investigations of physicians for protected  
23 free speech, including but not limited to the public expression of views about  
24 the pandemic, the mandates, vaccines, treatments or any other content  
25 relating to the pandemic,
- 26 2. All subjects of the Board’s current investigations for Covid misinformation  
27 (and disinformation) be notified that their investigation has been temporarily  
28 ordered withdrawn pending the final order of this Court;



