Nos. 22-56220, 22-55069

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK MCDONALD, ET AL.,

Plaintiffs-Appellants,

v.

KRISTINA D. LAWSON, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE MEDICAL BOARD OF CALIFORNIA, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 8:22-cv-01805-FWS-ADS
Hon. Fred W. Slaughter

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF REVERSAL

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Dated: February 2, 2023

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STATEMENT OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute has challenged laws across the country that regulate a wide array of occupational speech, including teletherapy, parenting advice, dietary advice, and veterinary advice. Amicus believes that the decision below, if allowed to stand, represents a serious threat to the constitutional protection afforded to these and countless other types of occupational speech.

SUMMARY OF ARGUMENT

When doctors talk with their patients, they are engaged in speech. It may be speech that the government has a particularly strong interest in regulating. It may be speech that the government has tried to regulate narrowly. And it may be speech for which doctors can be held liable or even speech that the government may prohibit outright. But whatever else it may be, communication between doctors and their patients is speech, and government regulation of that speech must comply with the First Amendment.

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[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than Amicus or its counsel paid for this brief's preparation or submission. All parties have consented to the filing of this brief.

The court below held otherwise, concluding that when the government regulates the advice doctors communicate to their patients, it is regulating not speech, but the "conduct" of practicing medicine. That was error under both Supreme Court precedent and the law of this Circuit.

The trial court's error stemmed from an overreading of this Court's ruling in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), a misreading of this Court's ruling in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), and a non-reading of the Supreme Court's ruling in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Together, these cases establish that, whatever authority the government has to regulate medical conduct that incidentally involves speech, that authority does not exempt regulations of pure advice from First Amendment scrutiny. The trial court's attempt to root such an exemption in the historical treatment of medical licensure generally also fails.

This Court should reverse the ruling below and either grant the motion for preliminary injunction or remand for the trial court to apply the appropriate level of First Amendment scrutiny.

ARGUMENT

California's AB 2098 declares it to be unprofessional conduct for a doctor to disseminate information—or advice based on information—that the state believes to be false to a patient "in the form of treatment *or* advice." Cal. Bus. & Prof. Code

§ 2270(a), (b)(3) (emphasis added). The First Amendment implications of such a rule would seem straightforward. The U.S. Supreme Court, after all, repeatedly "has held that the . . . dissemination of information [is] speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Even knowingly false statements of fact are generally entitled to First Amendment protection. *See United States v. Alvarez*, 567 U.S. 709 (2012). And, indeed, a different district court, reviewing the same law, recognized that "AB 2098 clearly implicates First Amendment concerns." *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC, 2023 WL 414258, at *7 n.6 (E.D. Cal. Jan. 25, 2023). Yet the court below held that AB 2098 did not implicate the First Amendment at all.

That was error. As discussed in Section I, precedent from this Circuit and the U.S. Supreme Court confirm that communication between doctors and their patients, even communication that takes the form of expert advice, is speech within the meaning of the First Amendment, and regulations of that speech must satisfy First Amendment scrutiny. As discussed in Section II, the trial court's attempt to fit the speech covered by AB 2098 into some historical exemption to the First Amendment for medical speech is not enough to eliminate the First Amendment concerns AB 2098 raises. The ruling below should be reversed.

I. Supreme Court and Circuit Precedent Both Establish That Expert Advice Is Speech, Not Conduct.

a. *Tingley v. Ferguson* confirms that medical advice is speech, not conduct.

To conclude that doctors giving advice to their patients are engaged in medical conduct, rather than protected speech, the court below relied mainly on this Circuit's recent ruling in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), in which this Court held that talk therapy is a form of medical conduct the regulation of which did not trigger First Amendment scrutiny. Even accepting *Tingley* as the law,[2] that ruling cannot support the decision below, which stretches the holding of *Tingley* far beyond its original narrow context.

Tingley involved a First Amendment challenge to a Washington law that forbade licensed mental health professionals from offering talk therapy to minors that was intended to change the minor's sexual orientation or gender expression (so-called "conversion therapy"). This Circuit had considered the constitutionality of a nearly identical law once before in *Pickup v. Brown*, in which this Court held that talk therapy, even though conducted solely through speech, is itself a form of "therapeutic treatment." 740 F.3d 1208, 1229–30 (9th Cir. 2014). *Tingley* involved

[2] That ruling has drawn sharp criticism from Judge O'Scannlain, who has argued persuasively that it is irreconcilable with binding Supreme Court precedent. *See Tingley v. Ferguson*, 2023 WL 353213, at *1 (9th Cir. Jan. 23, 2023) (statement respecting denial of rehearing en banc).

a new challenge in the wake of the Supreme Court's ruling in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), which had specifically identified *Pickup* as having been wrongly decided. 138 S. Ct. 2361, 2371 (2018),

Despite the Supreme Court's ruling in *NIFLA*, this Court in *Tingley* reaffirmed the central holding of *Pickup* that talk therapy was a form of medical conduct. 47 F.4th at 1077–78. In other words, *Tingley* held that, for purposes of the First Amendment, talk therapy is a treatment modality indistinguishable from performing surgery or dispensing medication—it is simply one carried out with words instead of scalpels or pills.

This case is distinguishable from *Tingley* because AB 2098 is not limited to speech that in itself constitutes medical treatment. By its own terms, the law extends to "the conveyance of information . . . to a patient . . . in the form of treatment *or advice*." Cal. Bus. & Prof. Code § 2270(b)(3) (emphasis added). And even *Pickup* distinguished between medical *treatment*, which is conduct, and medical *advice*, which is speech. 740 F.3d at 1228 (identifying "negligent medical advice" as "professional speech" that this Court held fell at "the midpoint of the continuum" between fully protected speech and unprotected conduct).[3]

[3] In *Pickup*, this Court held that medical advice was "professional" speech, which could be regulated under a lower standard of scrutiny than ordinary speech. 740 F.3d at 1227–29. *Tingley* recognizes that the distinction between "professional speech" and other forms of speech is no longer tenable in the wake of the Supreme

Far from supporting the ruling below, this Court's ruling in *Tingley* makes the distinction between unprotected medical treatment and protected medical advice even more stark. That is because *Tingley* recognized that the distinction between "professional speech" and other forms of speech is no longer tenable in the wake of the Supreme Court's ruling in *NIFLA*. In other words, what this Circuit previously identified as "professional speech"—including medical advice—is simply "speech," and must be treated accordingly. Because the ruling below instead treats plaintiffs' medical advice as a form of unprotected professional *conduct*, this Court should reverse.

b. This Court's ruling in *Conant v. Walters* further confirms that medical advice is speech, not conduct.

This Circuit's ruling in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), confirms that medical advice is speech within the meaning of the First Amendment. That case involved California physicians recommending marijuana to their patients for medical purposes after California decriminalized these uses. The federal government responded by threatening to revoke physicians' registration to prescribe controlled substances if they recommended marijuana.

Court's ruling in *NIFLA*. 47 F.4th at 1073. This simply means that medical advice must now be regulated as would advice on any other topic. It does not mean, as the trial court erroneously concluded, that medical advice may now be regulated as conduct.

This Circuit held that this policy violated the First Amendment, reasoning that the regulation "condemn[ed] expression of a particular viewpoint, *i.e.*, that medical marijuana would likely help a specific patient." *Id.* at 637. As the court below noted, this Court's analysis also referenced the fact that the "government's policy [sought] to punish physicians on the basis of the content of doctor-patient communications" and that "[o]nly doctor-patient conversations that included discussions of the medical use of marijuana trigger[ed] the policy." *Id.*

Conant applies straightforwardly to this case. Just as in *Conant*, Plaintiffs are physicians who wish to communicate advice to their patients—there, what the doctors viewed as the potential benefits of using marijuana; here, what doctors view as the potential benefits of certain courses of treatment for COVID-19. Just as in *Conant*, Plaintiffs cannot communicate this advice without risking government sanctions. Thus, just as in *Conant*, the court below should have analyzed AB 2098 under the First Amendment.

Instead, the court below tried to distinguish *Conant*, but its effort to do so fails. The trial court seems to have believed there to be a meaningful distinction between the "recommendations" that were prohibited in *Conant* and the "advice" that is prohibited under AB 2098. It is unclear what this distinction is supposed to signify, as recommendations and advice are both types of speech. But, in any event, this distinction is illusory. "Advice," after all, is simply a "*recommendation* regarding a

decision or course of conduct." *Advice*, Merriam-Webster, www.merriam-webster.com/dictionary/advice (last visited Jan. 30, 2023) (emphasis added). Certainly nothing in *Conant* suggests that the physicians prohibited from "recommending" marijuana to their patients could instead have freely "advised" their patients that the Schedule I drug would cure what ailed them. Nor is there any reason here to believe that California physicians may circumvent the prohibition on disfavored "advice" about COVID-19 by restyling it as "recommendations."

Perhaps the *scope* of recommendations/advice prohibited in *Conant* was broader than that prohibited under AB 2098, but that difference goes to the law's tailoring, not to whether it regulates speech. And if there is no meaningful difference between these types of speech, there should be no meaningful difference between the First Amendment protection to which they are entitled. The trial court's contrary holding was error.

c. The Supreme Court's ruling in *Holder v. Humanitarian Law Project* confirms that expert advice is speech.

That medical advice is speech within the meaning of the First Amendment—and not conduct—is also confirmed by the U.S. Supreme Court's decision in *Holder v. Humanitarian Law Project*. 561 U.S. 1 (2010). That decision is the Supreme Court's most recent clarification of the test for distinguishing speech

from conduct. Yet that case appears nowhere in the trial court's discussion of whether AB 2098 regulates speech or conduct.[4]

Humanitarian Law Project similarly considered a law that punished advice—in that case, a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorists. 561 U.S. at 6–11. The plaintiffs in that case included two U.S. citizens and six domestic organizations that wished, among other things, to provide "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 9, 14–15. In other words, like the Plaintiffs here, they wanted to give individualized advice through the spoken word.

They were prevented from doing so, however, because speech in the form of advice was illegal. Under federal law, the plaintiffs were prohibited from providing terrorist groups with "material support or resources." *Id.* at 12. That term was defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or

[4] *Humanitarian Law Project* appears once in the opinion below, in the separate discussion of whether AB 2098 is unconstitutionally vague. *See* slip op. at 11.

other specialized knowledge." *Id.* at 12–13. The plaintiffs challenged that prohibition as a violation of the First Amendment. *Id.* at 24–39.

The government defended the law by arguing that the material-support prohibition was aimed at conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore only incidentally burdened the plaintiffs' expression. *Id.* at 26–27. But the U.S. Supreme Court unanimously rejected that argument, holding that the material-support prohibition was a content-based regulation of speech subject to heightened scrutiny.[5] *Id.* The Court rejected the notion that the material-support prohibition could escape First Amendment scrutiny because it "*generally* function[ed] as a regulation of conduct." *Id.* at 27. As the Court observed, even when a law "may be described as directed at conduct," strict scrutiny is still appropriate when, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28.

Moreover, and in sharp conflict with the ruling below, the Supreme Court did not base its ruling on some metaphysical distinction between "speech" and "conduct." Instead, the Court took a commonsense approach to determining

[5] Although only six justices joined the majority opinion in *Holder*, all nine justices agreed that, as applied to the plaintiffs in that case, the material-support prohibition was a restriction on speech, not conduct. *See id.* at 26–28; *id.* at 45 (Breyer, J., dissenting).

whether the First Amendment was implicated, concluding that the material-support prohibition was a content-based restriction on speech because the plaintiffs were allowed to communicate some things to designated terrorist groups but not other things:

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (citations omitted).

This analysis applies to the First Amendment claim here. Plaintiffs wish to talk with their patients, and "whether they may do so . . . depends on what they say." *Id.* If Plaintiffs communicate advice that the state believes reflects whatever it sees as the prevailing scientific consensus, their speech is permitted. If, on the other hand, Plaintiffs communicate advice that the state believes runs against the prevailing scientific consensus, their speech may be punished. Further, just as in *Humanitarian Law Project*, although physician licensing law may generally function as a ban on conduct, the "conduct" triggering application of the statute to Plaintiffs consists entirely of speech.

This analysis also reinforces the similarities between this case and *Conant*, and further illustrates the distinction between pure speech, such as medical advice, and

speech that is merely incidental to regulable conduct. In *Conant*, for example, the parties agreed that it would not be protected speech for a physician to *prescribe* marijuana to a patient, even though a prescription is necessarily communicated through written language. The test set out in *Humanitarian Law Project* explains why: When the government regulates prescriptions, those regulations are not triggered the message being conveyed, but by the creation of a legal entitlement to access a controlled substance. By contrast, when the government regulates mere advice or recommendations—whether for marijuana or Ivermectin—it is regulating speech as speech.

In short, California's restrictions on the advice that physicians may offer pertaining to COVID-19 is a content-based restriction on speech and must be analyzed as such. That conclusion does not necessarily mean that the government will lose; Appellees may be able to show that such advice is sufficiently harmful—and California's law sufficiently narrow—that the law survives First Amendment scrutiny. But the government must be held to that burden. If it is not, countless others who speak for a living will be wrongly deprived of their First Amendment rights.

II. The Trial Court's Attempts to Fit This Case into a Category of Unprotected Speech Fail.

As the cases above show, AB 2098 cannot escape First Amendment scrutiny on the ground that it regulates only conduct, rather than speech. But the trial court

separately concluded that AB 2098 was exempt from First Amendment scrutiny on the ground that the speech it regulates "fall[s] into the tradition of regulations on the practice of medical treatments." Slip op. at 26 (citing *Tingley*, 47 F.4th at 1080). But that ruling overreads this Circuit's ruling in *Tingley*, crafting a broad First Amendment exemption that is irreconcilable with Supreme Court precedent.

The test for identifying previously unrecognized exceptions to the First Amendment is exceptionally demanding. It can be satisfied only in rare cases involving "historic and traditional categories" of speech that have been treated as unprotected "[f]rom 1791 to the present." *United States v. Stevens*, 559 U.S. 460, 468 (2010). Since the Court articulated that test more than a decade ago, it has found exactly zero instances in which the government has carried this heavy burden. *See NIFLA*, 138 S. Ct. at 2375 (finding insufficient evidence to show historical exception for "professional" speech); *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion) (same; false statements generally); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 796–98 (2011) (same; restricting children's access to depictions of violence); *Stevens*, 559 U.S. at 472 (same; depictions of animal cruelty). The district court's contrary holding—which examines no Founding Era history—just reinvents the "freewheeling" authority to create new exceptions that *Stevens* directly disclaimed.

To the extent there is any Founding Era evidence to support reduced protection for doctor-patient speech, it is limited to the context of medical malpractice, which existed as a private cause of action for centuries before the enactment of the First Amendment. *See* Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 Wis. L. Rev. 1193, 1196–97 (tracing the history of medical malpractice actions to the fourteenth-century reign of Henry IV). Thus, a physician whose advice causes harm—a doctor who tells a patient with cancer that he does not have cancer and should smoke all he pleases—will have trouble raising a First Amendment defense to a malpractice action. But it does not follow that all medical advice would be similarly unprotected. Indeed, it does not even follow that all *false* medical advice would be unprotected, at least if it caused no harm. *See United States v. Alvarez*, 567 U.S. 709, 719, 721 (2012) (plurality opinion) (acknowledging that "there are instances in which the falsity of speech bears upon whether it is protected," but refusing to accept a rule that would allow the government to categorically prohibit false speech in the absence of some "legally cognizable harm").

Even accepting that medical treatments delivered through speech are—like fraud, or defamation, or child pornography—categorically outside the scope of the First Amendment, this argument founders for the same basic reason as the trial

court's speech/conduct argument: it conflates medical advice (speech) with medical treatment (conduct).

The only alternative is to posit a First Amendment exception so broad that it covers all advice between doctors and their patients. But such a broad exception cannot be squared with the Supreme Court's ruling in *NIFLA*, which specifically identified "doctor-patient discourse" as falling within the scope of the First Amendment and condemned legislative efforts to "manipulat[e]" that discourse. 138 S. Ct. at 2374. Nor can it be squared with this Circuit's ruling in *Conant*, which recognizes a First Amendment right of doctors to recommend marijuana to their patients. If that speech were outside the First Amendment, *Conant* would have come out the other way. And it is no answer to say that *Conant* involved a federal regulation rather than a state law—doing so would go against the Supreme Court's repeated holdings that the provisions of the Bill of Rights incorporated against the states apply in the same manner as they do against the federal government.[6]

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[6] *See, e.g.*, *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) ("We have held that the guarantees of the First Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments." (cleaned up)).

In short, as applied to pure advice, the speech regulated under AB 2098 falls within the scope of the First Amendment. As such, burdens on that speech must satisfy First Amendment scrutiny.

* * *

The COVID-19 pandemic has posed public-health challenges that are unprecedented in modern history. California's legislature naturally wants to address these challenges. But it must do so in a manner consistent with the First Amendment.

The ruling below ignored the First Amendment's constraints and, if affirmed, its consequences will be felt far beyond the scope of the COVID-19 pandemic. The trial court adopted a constitutional rule that is not restricted to false speech or to narrowly tailored restrictions; it puts all doctor-patient speech at risk. It would mean giving legislatures a free hand to regulate doctors' ability to advise patients to get an abortion—or not. To seek out gender-affirming care—or not. But this Court cannot uphold AB 2098 at the expense of the First Amendment rights of every single medical professional in the Ninth Circuit. The trial court's ruling does precisely that, and it must be reversed.

CONCLUSION

This Court should reverse the ruling below and either grant the motion for preliminary injunction or remand for the trial court to apply the appropriate level of First Amendment scrutiny.

Dated: February 2, 2023

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS
9TH CIR. CASE NUMBERS 22-56220, 22-55069

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