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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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TRACY HØEG, M.D., Ph.D.; RAM  
DURISETI, M.D., Ph.D.; AARON  
KHERIATY, M.D.; PETE  
MAZOLEWSKI, M.D.; and AZADEH  
KHATIBI, M.D., M.S., M.P.H.,

Plaintiffs,

v.

GAVIN NEWSOM, Governor of the  
State of California, in his  
official capacity; KRISTINA  
LAWSON, President of the  
Medical Board of California, in  
her official capacity; RANDY  
HAWKINS, M.D., Vice President  
of the Medical Board of  
California, in his official  
capacity; LAURIE ROSE LUBIANO,  
Secretary of the Medical Board  
of California, in her official  
capacity; MICHELLE ANNE BHOLAT,  
M.D., M.P.H., DAVID E. RYU,  
RYAN BROOKS, JAMES M. HEALZER,  
M.D., ASIF MAHMOOD, M.D.,  
NICOLE A. JEONG, RICHARD E.  
THORP, M.D., VELING TSAI, M.D.,  
and ESERICK WATKINS, members of  
the Medical Board of  
California, in their official  
capacities; and ROB BONTA,  
Attorney General of California,

No. 2:22-cv-01980 WBS AC

MEMORANDUM AND ORDER RE:  
PLAINTIFFS' MOTIONS FOR  
PRELIMINARY INJUNCTION

1 in his official capacity;

2 Defendants.

3  
4 LETRINH HOANG, D.O.; PHYSICIANS  
5 FOR INFORMED CONSENT, a not-for  
6 profit organization; and  
7 CHILDREN'S HEALTH DEFENSE,  
8 CALIFORNIA CHAPTER, a  
9 California Nonprofit  
10 Corporation;

11 Plaintiffs,

12 v.

13 ROB BONTA, in his official  
14 capacity as Attorney General of  
15 California; and ERIKA CALDERON,  
16 in her official capacity as  
17 Executive Officer of the  
18 Osteopathic Medical Board of  
19 California;

20 Defendants.

No. 2:22-cv-02147 WBS AC

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22 Plaintiffs Tracy Høeg, Ram Duriseti, Aaron Kheriaty,  
23 Pete Mazolewski, and Azadeh Khatibi (collectively, "Høeg  
24 plaintiffs") brought a § 1983 action against Gavin Newsom, in his  
25 official capacity as Governor of California; Rob Bonta, in his  
26 official capacity as Attorney General of California; Kristina  
27 Lawson, in her official capacity as President of the Medical  
28 Board of California (the "Medical Board"); Randy Hawkins, in his  
official capacity as Vice President of the Medical Board; Laurie  
Rose Lubiano, in her official capacity as Secretary of the  
Medical Board; and Michelle Anne Bholat, David E. Ryu, Ryan  
Brooks, James M. Healzer, Asif Mahmood, Nicole A. Jeong, Richard  
E. Thorp, Veling Tsai, and Eserick Watkins, in their official

1 capacities as members of the Medical Board. (Høeg Compl. (Docket  
2 No. 1).) The Høeg plaintiffs are physicians licensed by the  
3 Medical Board.

4 Plaintiffs Letrinh Hoang, Physicians for Informed  
5 Consent, and Children's Health Defense, California Chapter<sup>1</sup>  
6 (collectively, "Hoang plaintiffs") brought a § 1983 action  
7 against defendants Rob Bonta, in his official capacity as  
8 Attorney General of California, and Erika Calderon, in her  
9 official capacity as Executive Officer of the Osteopathic Medical  
10 Board of California (the "Osteopathic Board"). (Hoang Compl.  
11 (Docket No. 1).) Plaintiff Hoang is a physician licensed by the  
12 Osteopathic Board. The remaining two plaintiffs are  
13 organizations representing the interests of doctors and patients.

14 Plaintiffs in these related cases (see Høeg Docket No.  
15 21; Hoang Docket No. 9.) allege that Assembly Bill ("AB") 2098<sup>2</sup>  
16 is unconstitutional under the First and Fourteenth Amendments of  
17 the U.S. Constitution. Plaintiffs filed separate motions seeking  
18 a preliminary injunction to enjoin the State of California from  
19 enforcing AB 2098. (Høeg Notice of Mot. and Mem. In Support of  
20 Mot. for Prelim. Inj. ("Høeg Mot.") (Docket No. 5); Hoang Mot.  
21 for Prelim. Inj. and Mem. of Law ("Hoang Mot.") (Docket No. 4).)

22 I. The Challenged Statute

23 A. Statutory Provisions

24 \_\_\_\_\_  
25 <sup>1</sup> Hereinafter, the court will refer to Children's Health  
26 Defense, California Chapter as "Children's Health Defense."

27 <sup>2</sup> AB 2098 has been codified at Cal. Bus. & Prof. Code §  
28 2270. Because the parties refer to the law as "AB 2098"  
throughout their briefs, the court will refer to the statute as  
AB 2098 for convenience.

1 AB 2098, codified at Cal. Bus. & Prof. Code § 2270,  
2 took effect on January 1, 2023. The statute provides that “[i]t  
3 shall constitute unprofessional conduct for a physician and  
4 surgeon to disseminate misinformation or disinformation related  
5 to COVID-19, including false or misleading information regarding  
6 the nature and risks of the virus, its prevention and treatment;  
7 and the development, safety, and effectiveness of COVID-19  
8 vaccines.” Cal. Bus. & Prof. Code § 2270(a) (emphasis added).

9 The statute defines “misinformation” as “false  
10 information that is contradicted by contemporary scientific  
11 consensus contrary to the standard of care.” Id. § 2270(b)(4)  
12 (emphasis added). The statute defines “disinformation” as  
13 “misinformation that the licensee deliberately disseminated with  
14 malicious intent or an intent to mislead.” Id. § 2270(b)(2)  
15 (emphasis added).

16 The misinformation or disinformation must be conveyed  
17 “[by] the licensee to a patient under the licensee’s care in the  
18 form of treatment or advice.” Id. § 2270(b)(3). Physicians and  
19 surgeons licensed by the Medical Board or the Osteopathic Board  
20 (the “Boards”) are covered by the statute. Id. § 2270(b)(5).

21 The Boards are tasked with enforcing AB 2098. The  
22 statute augments the definition of “unprofessional conduct,” id.  
23 § 2270(a), which is a pre-existing basis for disciplinary action  
24 by the Boards, see id. § 2234. Unprofessional conduct also  
25 includes, but is not limited to, “gross negligence,” “repeated  
26 negligent acts,” and “incompetence.” Id.

27 B. Legislative Findings

28 At the time AB 2098 was enacted, the California

1 Legislature made several findings. The Legislature found that  
2 “[t]he global spread of the SARS-CoV-2 coronavirus, or COVID-19,  
3 has claimed the lives of over 6,000,000 people worldwide,  
4 including nearly 90,000 Californians.” AB 2098, 2021-22 Reg.  
5 Sess. (Cal. 2022) § 1(a). The Legislature also found that  
6 “[d]ata from the federal Centers for Disease Control and  
7 Prevention (CDC) shows that unvaccinated individuals are at a  
8 risk of dying from COVID-19 that is 11 times greater than those  
9 who are fully vaccinated.” Id. § 1(b). It further stated that  
10 “[t]he safety and efficacy of COVID-19 vaccines have been  
11 confirmed through evaluation by the federal Food and Drug  
12 Administration (FDA) and the vaccines continue to undergo  
13 intensive safety monitoring by the CDC.” Id. § 1(c).

14 The Legislature then addressed the policy problems the  
15 bill was designed to remedy. The bill first states that “[t]he  
16 spread of misinformation and disinformation about COVID-19  
17 vaccines has weakened public confidence and placed lives at  
18 serious risk,” with “major news outlets [reporting that] some of  
19 the most dangerous propagators of inaccurate information  
20 regarding the COVID-19 vaccines are licensed health care  
21 professionals.” Id. §§ 1(d), 1(e). The bill states that in  
22 response to these concerns, the Legislature previously “declared  
23 health misinformation to be a public health crisis, and urged the  
24 State of California to commit to appropriately combating health  
25 misinformation and curbing the spread of falsehoods that threaten  
26 the health and safety of Californians.” Id. § 1(g). The  
27 Legislature also noted that “[t]he Federation of State Medical  
28 Boards has released a statement warning that physicians who

1 engage in the dissemination of COVID-19 vaccine misinformation or  
2 disinformation risk losing their medical license, and that  
3 physicians have a duty to provide their patients with accurate,  
4 science-based information.” Id. § 1(f).

5 II. Preliminary Injunction Standard

6 To succeed on a motion for a preliminary injunction,  
7 plaintiffs must establish that (1) they are likely to succeed on  
8 the merits; (2) they are likely to suffer irreparable harm in the  
9 absence of preliminary relief; (3) the balance of equities tips  
10 in their favor; and (4) an injunction is in the public interest.  
11 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008);  
12 Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 979 (9th Cir.  
13 2011). “[I]njunctive relief [i]s an extraordinary remedy that  
14 may only be awarded upon a clear showing that the plaintiff is  
15 entitled to such relief.” Winter, 555 U.S. at 22.

16 III. Article III Standing<sup>3</sup>

17 To determine whether plaintiffs are entitled to a  
18 preliminary injunction, the court must first determine whether  
19 they have standing to challenge AB 2098. “In order to invoke the  
20 jurisdiction of the federal courts, a plaintiff must establish  
21 ‘the irreducible constitutional minimum of standing.’” Lopez v.  
22 Candaele, 630 F.3d 775, 785 (9th Cir. 2010) (quoting Lujan v.  
23 Def. of Wildlife, 504 U.S. 555, 560 (1992)). Article III

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25 <sup>3</sup> Defendants initially disputed that the Høeg plaintiffs  
26 have standing (see Høeg Opp’n (Docket No. 23) at 6), though they  
27 all but conceded the issue at oral argument. Defendants did not  
28 argue that the Hoang plaintiffs lack standing. (See Hoang Opp’n  
(Docket No. 16).) Regardless, the court has a duty to evaluate  
all parties’ standing. See Bernhardt v. County of Los Angeles,  
279 F.3d 862, 868 (9th Cir. 2002).

1 standing has three elements: "(1) injury-in-fact--plaintiff must  
2 allege concrete and particularized and actual or imminent harm to  
3 a legally protected interest; (2) causal connection--the injury  
4 must be fairly traceable to the conduct complained of; and (3)  
5 redressability--a favorable decision must be likely to redress  
6 the injury-in-fact." Barnum Timber Co. v. U.S. EPA, 633 F.3d  
7 894, 897 (9th Cir. 2011) (citing Lujan, 504 U.S. at 560-61)  
8 (internal quotation marks omitted).

9 Challenges that involve First Amendment rights "present  
10 unique standing considerations" because of the "chilling effect  
11 of sweeping restrictions" on speech. Ariz. Right to Life Pol.  
12 Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003).

13 "In order to avoid this chilling effect, the Supreme Court has  
14 endorsed what might be called a 'hold your tongue and challenge  
15 now' approach rather than requiring litigants to speak first and  
16 take their chances with the consequences." Italian Colors Rest.  
17 v. Becerra, 878 F.3d 1165, 1171 (9th Cir. 2018) (internal  
18 quotation marks omitted). Accordingly, when the challenged law  
19 "implicates First Amendment rights, the [standing] inquiry tilts  
20 dramatically toward a finding of standing." LSO, Ltd. v. Stroh,  
21 205 F.3d 1146, 1155 (9th Cir. 2000).

22 A. Individual Physician Plaintiffs

23 In the context of a pre-enforcement challenge to the  
24 constitutionality of a law, "a plaintiff satisfies the injury-in-  
25 fact requirement where he alleges 'an intention to engage in a  
26 course of conduct arguably affected with a constitutional  
27 interest, but proscribed by a statute, and there exists a  
28 credible threat of prosecution thereunder.'" Susan B. Anthony

1 List v. Driehaus, 573 U.S. 149, 159 (2014) (quoting Babbitt v.  
2 United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)); see  
3 also Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1015 (9th Cir.  
4 2013) (applying this standard to a facial vagueness challenge).

5           The Ninth Circuit applies a “three-factor inquiry to  
6 help determine whether a threat of enforcement is genuine enough  
7 to confer an Article III injury”: “(1) whether the plaintiff has  
8 a ‘concrete plan’ to violate the law, (2) whether the enforcement  
9 authorities have ‘communicated a specific warning or threat to  
10 initiate proceedings,’ and (3) whether there is a ‘history of  
11 past prosecution or enforcement.’” Tingley v. Ferguson, 47 F.4th  
12 1055, 1067 (9th Cir. 2022) (quoting Thomas v. Anchorage Equal  
13 Rts. Comm’n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). In  
14 the context of a pre-enforcement challenge on First Amendment  
15 grounds, a plaintiff “need only demonstrate that a threat of  
16 potential enforcement will cause him to self-censor.” Id. at  
17 1068.

18           Plaintiffs Høeg, Duriseti, Kheriaty, Mazolewski, and  
19 Hoang have sufficiently alleged a concrete plan to violate the  
20 challenged law. Plaintiffs state that they have provided  
21 specific advice to patients about potential health risks of  
22 COVID-19 vaccines and boosters and have informed patients of  
23 flaws in the research supporting vaccines and boosters. (Suppl.  
24 Decl. of Dr. Tracy Høeg (“Høeg Suppl. Decl.”) (Høeg Docket No.  
25 26-1) ¶¶ 4-5; Suppl. Decl. of Dr. Aaron Kheriaty (“Kheriaty  
26 Suppl. Decl.”) (Høeg Docket No. 26-2) ¶ 12; Suppl. Decl. of Dr.  
27 Pete Mazolewski (“Mazolewski Suppl. Decl.”) (Høeg Docket No. 26-  
28 3) ¶ 5; Decl. of Dr. Letrinh Hoang (“Hoang Decl.”) (Hoang Docket



1 No. 4-1) ¶ 5.) Plaintiffs also state that they have informed  
2 patients about flaws in the research supporting universal  
3 masking, and at times have advised patients against wearing masks  
4 based on the patients' individual needs. (Høeg Suppl. Decl ¶ 6;  
5 Kheriaty Suppl. Decl. ¶¶ 3-6; Mazolewski Suppl. Decl. ¶ 3.)  
6 Plaintiff Duriseti states that he treated COVID-19 patients with  
7 non-invasive ventilatory support rather than intubation early in  
8 the pandemic. (Decl. of Ram Duriseti ("Duriseti Decl.") (Høeg  
9 Docket No. 1-3) ¶ 8.) Plaintiff Hoang additionally states that  
10 she has discussed the possible use of off-label treatments for  
11 COVID-19 with her patients. (Hoang Decl. ¶ 2.)

12           Physician plaintiffs state that, in these instances,  
13 their conduct contradicted the "scientific consensus" at the  
14 time, as determined by public health agencies like the CDC or by  
15 common practice in the medical field. (See, e.g., Decl. of Pete  
16 Mazolewski ("Mazolewski Decl.") (Høeg Docket No. 1-5) ¶ 13; Høeg  
17 Suppl. Decl. ¶¶ 6-7; Duriseti Decl. ¶ 8; Kheriaty Suppl. Decl. ¶  
18 7; Hoang Decl. ¶¶ 3-4.) The Hoang plaintiffs provide an expert  
19 declaration by Dr. Sanjay Verma, which similarly concludes that  
20 much of the advice and treatment provided in these situations has  
21 previously contradicted or currently contradicts the "consensus."  
22 Dr. Verma cites to numerous examples of contrary guidance  
23 provided by the CDC on the issues of masking and vaccination.  
24 (See Decl. of Dr. Sanjay Verma ("Verma Decl.") (Hoang Docket No.  
25 4-1) at 20-32.)

26           Some of the physician plaintiffs intend to continue  
27 providing such advice and treatment to patients in the future.  
28 (Kheriaty Suppl. Decl. ¶ 6; Mazolewski Suppl. Decl. ¶ 5; Hoang

1 Decl. ¶ 15.) Others indicate that their conduct will be chilled  
2 by AB 2098.<sup>4</sup> (Høeg Suppl. Decl. ¶ 3; Duriseti Decl. ¶ 16.) The  
3 physician plaintiffs have therefore established a concrete plan  
4 to violate the challenged law. See Tingley, 47 F.4th at 1068  
5 (the Ninth Circuit “do[es] not require plaintiffs to specify  
6 ‘when, to whom, where, or under what circumstances’ they plan to  
7 violate the law when they have already” engaged in conduct  
8 “arguably” proscribed by the law) (quoting Thomas, 220 F.3d at  
9 1139); id. (in the context of a pre-enforcement challenge on  
10 First Amendment grounds, a plaintiff “need only demonstrate that  
11 a threat of potential enforcement will cause him to self-  
12 censor”).

13 Physician plaintiffs have also established a credible  
14 threat of enforcement. They aver that they intend to convey  
15 truthful information and provide treatment consistent with the  
16 standard of care. However, plaintiffs’ beliefs about their  
17 conduct do not preclude the enforcing agencies from determining  
18 that their conduct violates the challenged statute. See Susan B.  
19 Anthony List, 573 U.S. at 162-63 (in determining whether  
20 plaintiffs have established a threat of enforcement, plaintiffs’  
21 conduct need only “arguably” be proscribed by the challenged  
22

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23 <sup>4</sup> Plaintiffs contend that the law was intended to  
24 intimidate them into not expressing their views. They point to  
25 the text of the statute, as well as its legislative history.  
26 See, e.g., Defs.’ Ex. E, Assembly Report on Third Reading of AB  
27 2098 (Høeg Docket No. 23-3 at 43-49) at 7 (noting that while the  
28 Boards may already have the ability to discipline licensees for  
the conduct proscribed by AB 2098, the statute will “make[]  
clear” that the Boards have such authority and thereby discourage  
licensees from sharing information that “undermine[s] public  
health efforts”).

1 statute and plaintiffs' beliefs about their conduct are not  
2 dispositive). Based on plaintiffs' explanations of the advice  
3 and treatment they provide contrary to public health  
4 recommendations, it is plausible that the Boards will determine  
5 that their conduct violates AB 2098. This fear is especially  
6 reasonable given the ambiguity of the term "scientific consensus"  
7 and of the definition of "misinformation" as a whole, as  
8 discussed in further detail in Section IV. The government's  
9 "failure to disavow enforcement of the law" further weighs in  
10 favor of standing. See Tingley, 47 F.4th at 1068.

11 "The third factor, concerning the history of  
12 enforcement, carries 'little weight' when the challenged law is  
13 'relatively new' and the record contains little information as to  
14 enforcement." Id. at 1068 (quoting Cal. Trucking Ass'n v. Bonta,  
15 996 F.3d 644, 653 (9th Cir. 2021)). AB 2098 has been in effect  
16 for less than a month, and this action was initiated prior to AB  
17 2098 coming into effect. Unsurprisingly, the parties have  
18 presented no history of enforcement. The lack of enforcement  
19 history "weighs against standing but is not dispositive." Id. at  
20 1069 (internal quotation marks omitted).

21 As the first and second factors weigh in favor of  
22 standing, the court concludes that plaintiffs have established an  
23 injury-in-fact. See id. Because the injury alleged--a credible  
24 threat of prosecution under AB 2098--is "clearly traceable" to AB  
25 2098, and "can be redressed through an injunction enjoining  
26 enforcement of that provision," physician plaintiffs have  
27 standing to challenge it. See Valle del Sol, 732 F.3d at 1016.

28 B. Individual Patient Plaintiff

1           Although plaintiff Khatibi is a physician licensed by  
2 the Medical Board, she asserts standing as a patient, on the  
3 basis that AB 2098 interferes with her right to receive  
4 information from her doctors.

5           The Supreme Court has stated that “the Constitution  
6 protects the right to receive information and ideas,” which “is  
7 an inherent corollary of the rights of free speech and press that  
8 are explicitly guaranteed by the Constitution.” Bd. of Educ.,  
9 Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853,  
10 867 (1982). Accordingly, “where the effect of a vague statute  
11 would infringe upon a party’s First Amendment rights, standing  
12 requirements to challenge the statute under the Fourteenth  
13 Amendment Due Process Clause are broader than they otherwise  
14 might be.” Arce v. Douglas, 793 F.3d 968, 987 (9th Cir. 2015)  
15 (citing Hynes v. Mayor & Council of Borough of Oradell, 425 U.S.  
16 610 (1976); Maldonado v. Morales, 556 F.3d 1037 (9th Cir. 2009)).  
17 Thus, where a statute interferes with a plaintiff’s First  
18 Amendment right to receive information, she has standing to  
19 challenge the law, even if it does not apply to her. Id. at 987-  
20 88.

21           Because AB 2098 implicates plaintiff Khatibi’s First  
22 Amendment right to receive information, she has standing. See  
23 id.; see also Conant v. Walters, 309 F.3d 629, 632 (9th Cir.  
24 2002) (deciding the merits of First Amendment challenge to  
25 statute prohibiting doctors from “recommending” medical  
26 marijuana, which was brought by patients who wanted access to  
27 treatment, physicians who feared enforcement of statute, and  
28 organizations representing such physicians and patients); Forbes

1 v. Napolitano, 236 F.3d 1009, 1010 (9th Cir. 2000), amended, 247  
2 F.3d 903 (9th Cir. 2000), amended, 260 F.3d 1159 (9th Cir. 2001)  
3 (deciding the merits of vagueness challenge to statute  
4 criminalizing certain medical procedures, which was brought by  
5 patients who wanted access to treatment and physicians who feared  
6 prosecution under statute).

7 C. Organizational Plaintiffs

8 In addition to the individual plaintiffs in both  
9 matters, there are two organizational plaintiffs in the Hoang  
10 matter: Physicians for Informed Consent and Children's Health  
11 Defense.

12 "When suing on behalf of its members, an organization  
13 must show that its members would have individual standing, the  
14 issues are germane to the organization's purpose, and neither the  
15 claim nor the requested relief requires individual  
16 participation." Inland Empire Waterkeeper v. Corona Clay Co., 17  
17 F.4th 825, 831 (9th Cir. 2021) (citing Hunt v. Wash. State Apple  
18 Advert. Comm'n, 432 U.S. 333, 342-43 (1977)).

19 Plaintiff Physicians for Informed Consent is a non-  
20 profit organization whose educational mission is to "deliver data  
21 on infectious diseases and vaccines, and unite doctors,  
22 scientists, healthcare professionals, attorneys, and families who  
23 support voluntary vaccination." (Decl. of Dr. Shira Miller  
24 (Hoang Docket No. 4-6) ¶ 3.) The claims here are clearly  
25 relevant to the organization's mission.

26 Physicians for Informed Consent's membership includes  
27 physicians who intend to violate AB 2098 or who have been chilled  
28 by AB 2098, and patients who contend that AB 2098 interferes with

1 their right to receive information. (See id. ¶¶ 4-6.) Like the  
2 individual physician and patient plaintiffs discussed above, the  
3 organization's members would have individual standing. The  
4 participation of individual members is not necessary for this  
5 action to proceed.

6 Plaintiff Children's Health Defense is a non-profit  
7 organization whose mission is to "end childhood health epidemics  
8 by working aggressively to eliminate harmful exposures, hold  
9 those responsible accountable, and to establish safeguards to  
10 prevent future harm," which "includes advocating for medical  
11 freedom, bodily autonomy, and an individual's right to receive  
12 the best information available based on a physician's best  
13 judgment." (Hoang Compl. ¶ 31.) The claims here are clearly  
14 relevant to the organization's mission.

15 Children's Health Defense's membership includes parents  
16 in California who contend that AB 2098 interferes with their  
17 right to receive information pertinent to their children's  
18 health. (Id. ¶ 33.) Like plaintiff Khatibi, the organization's  
19 members would have individual standing. The participation of  
20 individual members is not necessary for this action to proceed.

21 Because both organizations' members would have  
22 individual standing, the issues raised here are germane to the  
23 organizations' purposes, and neither the claims nor the requested  
24 relief require individual participation, the court concludes that  
25 Physicians for Informed Consent and Children's Health Defense  
26 have standing. See Inland Empire Waterkeeper, 17 F.4th at 831.

1 IV. Vagueness Challenge<sup>5</sup>

2 Having determined that plaintiffs have standing, the  
3 court next considers whether they have demonstrated a likelihood  
4 of success on the merits. Plaintiffs contend that the law's  
5 definition of "misinformation" is unconstitutionally vague under  
6 the Due Process Clause of the Fourteenth Amendment. AB 2098  
7 defines misinformation as "false information that is contradicted  
8 by contemporary scientific consensus contrary to the standard of  
9 care." Cal. Bus. & Prof. Code § 2270.

10 A statute is unconstitutionally vague when it either  
11 "fails to provide a person of ordinary intelligence fair notice  
12 of what is prohibited, or is so standardless that it authorizes  
13 or encourages seriously discriminatory enforcement." United  
14 States v. Williams, 553 U.S. 285, 304 (2008); see also Hill v.  
15 Colorado, 530 U.S. 703, 732 (2000); Tingley, 47 F.4th at 1089.

16 "The operative question under the fair notice theory is  
17 whether a reasonable person would know what is prohibited by the  
18 law." Tingley, 47 F.4th at 1089. "The terms of a law cannot  
19 require 'wholly subjective judgments without statutory  
20 definitions, narrowing context, or settled legal meanings.'" Id.  
21 (quoting Holder, 561 U.S. at 20). The standardless enforcement  
22

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23 <sup>5</sup> Judge Fred W. Slaughter of the Central District of  
24 California recently issued an order denying a similar motion for  
25 preliminary injunction in McDonald v. Lawson, No. 8:22-cv-01805.  
26 Judge Slaughter concluded that the physician plaintiffs had  
27 failed to establish a likelihood of success on the merits of  
28 their First and Fourteenth Amendment claims. 2022 WL 18145254,  
at \*6, 16 (C.D. Cal. Dec. 28, 2022). The court notes that it is  
not bound by the McDonald court's decision, and for the reasons  
discussed herein, does not find that decision's reasoning on the  
vagueness issue persuasive.

1 theory asks whether the law provides “objective standards” that  
2 “establish minimal guidelines to govern . . . enforcement.” See  
3 Gonzales v. Carhart, 550 U.S. 124, 150 (2007).

4 Vague statutes are particularly objectionable when they  
5 “involve sensitive areas of First Amendment freedoms” because  
6 “they operate to inhibit the exercise of those freedoms.” Cal.  
7 Tchrs. Ass’n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir.  
8 2001) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09  
9 (1972)). The Supreme Court has said that “when a statute  
10 ‘interferes with the right of free speech or of association, a  
11 more stringent vagueness test should apply.’” Holder v.  
12 Humanitarian L. Project, 561 U.S. 1, 19 (2010) (quoting Hoffman  
13 Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495  
14 (1982)); see also McCormack v. Herzog, 788 F.3d 1017, 1031 (9th  
15 Cir. 2015), abrogated on other grounds by Dobbs v. Jackson  
16 Women’s Health Org., 142 S. Ct. 2228 (2022) (applying heightened  
17 clarity requirement in vagueness challenge to statute that  
18 implicated a then-existing constitutional right).<sup>6</sup>

19 When the challenged law implicates First Amendment  
20 rights, a facial challenge based on vagueness is appropriate.  
21 Cal. Tchrs. Ass’n, 271 F.3d at 1149; see also City of Chicago v.  
22 Morales, 527 U.S. 41, 55 (1999). In considering a facial

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23  
24 <sup>6</sup> Though the court does not reach plaintiffs’ First  
25 Amendment challenges, AB 2098 clearly implicates First Amendment  
26 concerns. See Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 138  
27 S. Ct. 2361, 2375 (2018) (stating that professional speech,  
28 including speech by medical providers, “is [not] exempt from  
ordinary First Amendment principles”); Conant, 309 F.3d at 637  
(recognizing “the core First Amendment values of the doctor-  
patient relationship”). Accordingly, the court will apply a more  
exacting vagueness analysis.



1 vagueness challenge, the court “consider[s] whether a statute is  
2 vague as applied to the particular facts at issue, for ‘[a]  
3 plaintiff who engages in some conduct that is clearly proscribed  
4 cannot complain of the vagueness of the law as applied to the  
5 conduct of others.’” Holder, 561 U.S. at 18-19 (quoting Hoffman  
6 Estates, 455 U.S. at 495).

7 A. “Contemporary Scientific Consensus”

8 “Usually, [courts] look to a term’s common meaning, but  
9 if the law regulates the ‘conduct of a select group of persons  
10 having specialized knowledge,’ then the ‘standard is lowered’ for  
11 terms with a ‘technical’ or ‘special meaning.’” Tingley, 47  
12 F.4th at 1090 (quoting United States v. Weitzenhoff, 35 F.3d  
13 1275, 1289 (9th Cir. 1993)). In Tingley, the Ninth Circuit  
14 applied a lower vagueness standard to psychologists, who  
15 challenged the terms “sexual orientation” and “gender identity”  
16 as unconstitutionally vague. Based on an expert declaration and  
17 the plaintiff’s own usage of the term “gender identity” in  
18 describing his expertise, the Ninth Circuit concluded that the  
19 terms at issue were within the specialized knowledge of the  
20 regulated group. Id.

21 In contrast, it is inappropriate to apply a lower  
22 vagueness standard here because, based on the record before the  
23 court, it appears that the primary term at issue--“contemporary  
24 scientific consensus”--does not have an established technical  
25 meaning in the medical community. Physician plaintiffs provide  
26 declarations explaining that “scientific consensus” is a poorly  
27 defined concept. (See Duriseti Decl. ¶¶ 7-13; Decl. of Dr. Tracy  
28 Høeg (“Høeg Decl.”) (Docket No. 1-2) ¶¶ 11-24; Decl. of Dr. Aaron

1 Kheriaty ("Kheriaty Decl.") (Docket No. 1-4) ¶¶ 7-10; Decl. of  
2 Dr. Pete Mazolewski ("Mazolewski Decl.") (Docket No. 1-5) ¶¶ 7-  
3 13; Decl. of Dr. Azadeh Khatibi ("Khatibi Decl.") (Docket No. 1-  
4 6) ¶¶ 8-11.) For example, Dr. Khatibi explains that there are  
5 different notions of scientific "consensus." These include  
6 "informal consensus," which refers to the general opinion of  
7 doctors, and "formal consensus," which refers to a process by  
8 which "a group of doctors with expertise in a particular topic  
9 come together to . . . discuss[] and debate the evidence around a  
10 topic," and "arrive at some conclusions for general patient care  
11 guidelines," which are then published. (Khatibi Decl. ¶ 8.)  
12 Expert declarant Dr. Verma also explains that the term  
13 "scientific consensus," as it has come to be used during the  
14 pandemic, often refers to the pronouncements of public health  
15 officials. (See Verma Decl. ¶ 8.)

16 Defendants provide no evidence that "scientific  
17 consensus" has any established technical meaning; the expert  
18 declarations they offer are notably silent on the topic. (See  
19 Decl. of Dr. James Nuovo (Høeg Docket No. 23-1); Decl. of Dr.  
20 Angela Lim (Hoang Docket No. 16-2).) And contrary to defendants'  
21 argument, the mere fact that the statute regulates medical  
22 professionals does not trigger a lower vagueness standard. See  
23 Forbes, 236 F.3d at 1013 (applying a typical vagueness analysis  
24 and holding that challenged terms in statute regulating medical  
25 providers were unconstitutionally vague). The court therefore  
26 will not apply a lower vagueness standard here.

27 In Forbes, the Ninth Circuit considered a vagueness  
28 challenge to a law prohibiting medical "experimentation" or

1 "investigation" involving fetal tissue from abortions unless  
2 necessary to perform a "routine" pathological examination. 236  
3 F.3d at 1010. The court relied on testimony from the plaintiffs  
4 (who were physicians) and expert witnesses to evaluate the  
5 challenged terms, which were not defined by the statute. The  
6 experts "highlight[ed] doctors' lack of consensus about what  
7 procedures are purely experimental" and pointed out difficulties  
8 arising from the changing nature of scientific understanding, by  
9 which some "experiments" will eventually become recognized as  
10 "treatment." Id. at 1011-13. The terms "investigation" and  
11 "routine" were problematic because multiple common definitions  
12 could apply in the medical community, which "[lacked] any  
13 official standards to help" define the terms. Id. at 1012. The  
14 Ninth Circuit reasoned that because the contested terms lacked  
15 sufficiently clear, commonly understood definitions in the  
16 medical community, and the statute failed to provide narrowing  
17 definitions, the statute was unconstitutionally vague. Id. at  
18 1013. The lack of definitional clarity failed both to give  
19 doctors fair notice of what conduct was prohibited, and to give  
20 courts and law enforcement sufficient standards by which to  
21 narrow the terms' meanings. Forbes, 236 F.3d at 1013 (citing  
22 Kolender v. Lawson, 461 U.S. 352, 358 (1983); and Papachristou v.  
23 City of Jacksonville, 405 U.S. 156, 162 (1972)).

24 Like the contested terms in Forbes, "contemporary  
25 scientific consensus" lacks an established meaning within the  
26 medical community, and defendants do not propose one.<sup>7</sup> The

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27 <sup>7</sup> At oral argument, defense counsel declined to explain  
28 what specific conduct the law may prohibit, arguing that

1 statute provides no clarity on the term's meaning, leaving open  
2 multiple important questions. For instance, who determines  
3 whether a consensus exists to begin with? If a consensus does  
4 exist, among whom must the consensus exist (for example  
5 practicing physicians, or professional organizations, or medical  
6 researchers, or public health officials, or perhaps a  
7 combination)? In which geographic area must the consensus exist  
8 (California, or the United States, or the world)? What level of  
9 agreement constitutes a consensus (perhaps a plurality, or a  
10 majority, or a supermajority)? How recently in time must the  
11 consensus have been established to be considered "contemporary"?  
12 And what source or sources should physicians consult to determine  
13 what the consensus is at any given time (perhaps peer-reviewed  
14 scientific articles, or clinical guidelines from professional  
15 organizations, or public health recommendations)? The statute  
16 provides no means of understanding to what "scientific consensus"  
17 refers.

18           Judicial references to the concept of scientific  
19 consensus--in the context of COVID-19 as well as other disputed  
20 scientific topics--confirm that the term lacks an established  
21 meaning. Courts have based their understanding of scientific  
22 consensus on a wide range of sources, including U.S. professional  
23 organizations, international professional organizations, state  
24 and federal courts, U.S. scientific studies, international  
25 scientific studies, various federal agencies, and the state of

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26  
27 application of the law is highly fact-specific.  
28

1 California.<sup>8</sup>

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3 <sup>8</sup> See, e.g., Coonce v. United States, 142 S. Ct. 25, 28  
4 (2021) (Sotomayor, J., dissenting) (clinical determinations by  
5 professional organizations including the American Psychological  
6 Association were “powerful evidence of medical consensus” on  
7 definition of intellectual disability); United States v.  
8 Scheffer, 523 U.S. 303, 309–10 (1998) (citing “polarization”  
9 within the scientific community and disagreement among state and  
10 federal courts as evidence of “lack of scientific consensus” on  
11 efficacy of polygraphs); S. Bay United Pentecostal Church v.  
12 Newsom, 985 F.3d 1128, 1133–34 (9th Cir. 2021), cert. granted,  
13 judgment vacated, 141 S. Ct. 2563 (2021) (citing public health  
14 framework published by State of California concerning COVID-19  
15 masking, social distancing, and activity restrictions as  
16 representative of “scientific consensus”); Edmo v. Corizon, Inc.,  
17 935 F.3d 757, 769 (9th Cir. 2019) (citing an international  
18 professional organization’s official standards of care as  
19 representative of scientific consensus on healthcare for  
20 transgender people); Ledezma-Cosino v. Sessions, 857 F.3d 1042,  
21 1054 (9th Cir. 2017) (Thomas, J., dissenting) (citing  
22 determinations by American Medical Association and U.S. Surgeon  
23 General as reflecting “medical consensus”); Alaska Oil & Gas  
24 Ass’n v. Pritzker, 840 F.3d 671, 679 (9th Cir. 2016) (federal  
25 agency’s consultation of “the best available research” was  
26 evidence of “scientific consensus” on climate change-related  
27 issue); Planned Parenthood Fed’n of Am., Inc. v. Gonzales, 435  
28 F.3d 1163, 1172 (9th Cir. 2006), rev’d sub nom. Gonzales v.  
Carhart, 550 U.S. 124 (2007) (“By medical consensus, we do not  
mean unanimity or that no single doctor disagrees, but rather  
that there is no significant disagreement within the medical  
community.”); Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311,  
1314 (9th Cir. 1995) (citing FDA’s approval of a medication and  
“every published study here and abroad” as evidence of “consensus  
within the scientific community”); Keene v. City & Cnty. of San  
Francisco, No. 22-cv-01587 JSW, 2022 WL 4454362, at \*3 (N.D. Cal.  
Sept. 23, 2022) (citing California Department of Public Health’s  
determinations as evidence of “scientific consensus” on COVID-  
19); United States v. Smith, 538 F. Supp. 3d 990, 995, 997 (E.D.  
Cal. 2021) (Mueller, J.) (citing CDC public health guidelines as  
representative of scientific consensus on COVID-19 vaccination);  
United States v. Avalos-Villasenor, No. 16-cr-02189 GPC, 2021 WL  
3534983, at \*4 (S.D. Cal. Aug. 11, 2021) (citing “a recent study”  
conducted by the CDC for the proposition that COVID-19 vaccines  
are effective); Brach v. Newsom, No. 2:20-cv-06472 SVW AFM, 2020  
WL 6036764, at \*7 (C.D. Cal. Aug. 21, 2020) (characterizing  
“scientific consensus” as a higher standard than “the most  
reliable scientific evidence”).

1           Because the term “scientific consensus” is so ill-  
2 defined, physician plaintiffs are unable to determine if their  
3 intended conduct contradicts the scientific consensus, and  
4 accordingly “what is prohibited by the law.” See Tingley, 47  
5 F.4th at 1089. As discussed in greater detail in Section III of  
6 this Order, plaintiffs represent that they have provided and  
7 would like to continue providing certain COVID-19-related advice  
8 and treatment that contradict the positions of public health  
9 agencies like the CDC. If the “consensus” is determined by  
10 United States public health recommendations, physician  
11 plaintiffs’ intended conduct would contradict that consensus; if  
12 the same term is defined by other metrics, their conduct may be  
13 permissible. The language of the statute provides no way to  
14 determine which of multiple interpretations is appropriate.

15           Rather than merely providing the statute with  
16 “flexibility and reasonable breadth,” the term “scientific  
17 consensus” makes it impossible to understand “what the ordinance  
18 as a whole prohibits.” See Grayned, 408 U.S. at 110. See also  
19 McCormack, 788 F.3d at 1030-31 (quoting Tucson Woman’s Clinic v.  
20 Eden, 379 F.3d 531, 55 (9th Cir. 2004)) (statute requiring  
21 abortion providers to be “properly” staffed and have  
22 “satisfactory” admitting arrangements with hospitals was  
23 unconstitutionally vague because its terms “lack[ed] precise  
24 definition, and ‘subject[ed] physicians to sanctions based not on  
25 their own objective behavior, but on the subjective viewpoints of  
26 others.’”); Tucson Woman’s Clinic, 379 F.3d at 554-55, abrogated  
27 on other grounds by Dobbs, 142 S. Ct. 2228 (statute requiring  
28 health care providers to “ensure that a patient is . . . treated

1 with consideration, respect, and full recognition of the  
2 patient's dignity and individuality" was unconstitutionally vague  
3 because meanings of terms were "widely variable" and terms were  
4 "not medical terms of art"). Cf. Planned Parenthood of Cent. &  
5 N. Ariz. v. State of Ariz., 718 F.2d 938, 949 (9th Cir. 1983)  
6 ("counseling for abortion procedures" was not a vague term  
7 because it had a commonly understood meaning that a reasonable  
8 person would understand, and previous case law on abortion  
9 statutes sufficiently defined the term).

10 Defendants argue that while the scientific consensus  
11 may sometimes be difficult to define, there is a clear scientific  
12 consensus on certain issues--for example, that apples contain  
13 sugar, that measles is caused by a virus, or that Down's syndrome  
14 is caused by a chromosomal abnormality. (Høeg Opp'n at 21; Hoang  
15 Opp'n at 21.) However, AB 2098 does not apply the term  
16 "scientific consensus" to such basic facts, but rather to COVID-  
17 19--a disease that scientists have only been studying for a few  
18 years, and about which scientific conclusions have been hotly  
19 contested. COVID-19 is a quickly evolving area of science that  
20 in many aspects eludes consensus.

21 Physician plaintiffs explain how, throughout the course  
22 of the COVID-19 pandemic, scientific understanding of the virus  
23 has rapidly and repeatedly changed. (Høeg Decl. ¶¶ 15-29;  
24 Duriseti Decl. ¶¶ 7-15; Kheriaty Decl. ¶¶ 7-10; Mazolewski Decl.  
25 ¶¶ 12-13.) Physician plaintiffs further explain that because of  
26 the novel nature of the virus and ongoing disagreement among the  
27 scientific community, no true "consensus" has or can exist at  
28 this stage. (See id.) Expert declarant Dr. Verma similarly

1 explains that a “scientific consensus” concerning COVID-19 is an  
2 illusory concept, given how rapidly the scientific understanding  
3 and accepted conclusions about the virus have changed. Dr. Verma  
4 explains in detail how the so-called “consensus” has developed  
5 and shifted, often within mere months, throughout the COVID-19  
6 pandemic. (Verma Decl. ¶¶ 13-42.) He also explains how certain  
7 conclusions once considered to be within the scientific consensus  
8 were later proved to be false. (Id. ¶¶ 8-10.) Because of this  
9 unique context, the concept of “scientific consensus” as applied  
10 to COVID-19 is inherently flawed. (See id.) See also Forbes,  
11 236 F.3d at 1012 (indicating that the changing nature of a  
12 medical term’s meaning is evidence of vagueness).

13           The use of a poorly-defined, subjective term is  
14 particularly objectionable here because it serves to define the  
15 prohibited conduct, rather than merely explain the context in  
16 which the prohibition applies. See Gammoh v. City of La Habra,  
17 395 F.3d 1114, 1120 (9th Cir. 2005), amended on denial of reh’g,  
18 402 F.3d 875 (9th Cir. 2005). The term “scientific consensus”  
19 therefore lacks a sufficient “statutory definition[], narrowing  
20 context, or settled legal meaning[],” Tingley, 47 F.4th at 1089,  
21 and fails to provide sufficiently objective standards to “focus  
22 the statute’s reach,” Forbes, 236 F.3d at 1013, rendering the  
23 definition of “misinformation” unconstitutionally vague.

24           B. “Contrary to the Standard of Care”

25           The Ninth Circuit has held that “otherwise imprecise  
26 terms may avoid vagueness problems when used in combination with  
27 terms that provide sufficient clarity.” Gammoh, 395 F.3d at 1120  
28 (emphasis added).



1 Defendants argue that the inclusion of the phrase  
2 "contrary to the standard of care" provides the definition of  
3 misinformation with adequate clarity. The court agrees that  
4 "standard of care" in itself is a well-defined concept in the  
5 realm of professional negligence. The standard of care "requires  
6 that medical service providers exercise that degree of skill,  
7 knowledge and care ordinarily possessed and exercised by members  
8 of their profession under similar circumstances." Barris v.  
9 County of Los Angeles, 20 Cal. 4th 101, 108 (1999).

10 However, far from clarifying the statutory prohibition,  
11 the inclusion of the term "standard of care" only serves to  
12 further confuse the reader. Under the language of AB 2089, to  
13 qualify as "misinformation," the information must be  
14 "contradicted by contemporary scientific consensus contrary to  
15 the standard of care." Cal. Bus. & Prof. Code § 2270. Put  
16 simply, this provision is grammatically incoherent. While  
17 "statutes need not be written with 'mathematical' precision, they  
18 must be intelligible." Valle del Sol, 732 F.3d at 1020 (quoting  
19 Forbes, 236 F.3d at 1011) (alterations adopted). It is  
20 impossible to parse the sentence and understand the relationship  
21 between the two clauses--"contradicted by contemporary scientific  
22 consensus" and "contrary to the standard of care."

23 One possible reading, as defendants argue, is that the  
24 two elements are entirely separate requirements that each modify  
25 the word "information." See also McDonald, 2022 WL 18145254, at  
26 \*7 (adopting this construction). However, this interpretation is  
27 hard to justify. If the Legislature meant to create two separate  
28 requirements, surely it would have indicated as such--for

1 example, by separating the two clauses with the word "and," or at  
2 least with a comma. Further, the concept of "standard of care"  
3 pertains to the nature and quality of treatment that doctors  
4 provide or fail to provide. It is thus difficult to accept  
5 defendants' contention that the term "standard of care" modifies  
6 the word "information." By its very nature, the standard of care  
7 applies to care, not information. See Alef v. Alta Bates Hosp.,  
8 5 Cal. App. 4th 208, 215 (1992) (the standard of care determines  
9 "the minimum level of care to which the patient is entitled")  
10 (emphasis added).<sup>9</sup>

11 Another equally plausible (or perhaps equally  
12 implausible) interpretation is that any time a doctor's conduct  
13 contradicts the scientific consensus, it is therefore contrary to  
14 the standard of care. Such a reading would distort the existing  
15 meaning of the term "standard of care" by creating an additional  
16 statutory definition in the context of COVID-19.

17 Even if the court adopted defendants' interpretation,  
18 the mere inclusion of an entirely separate element does not  
19 resolve the definition's vagueness. The term "standard of care"  
20 fails to provide additional context in which to understand the  
21 meaning of the term "scientific consensus." See Gammoh, 395 F.3d

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22 <sup>9</sup> The provision of AB 2098 stating that misinformation or  
23 disinformation must be conveyed "in the form of treatment or  
24 advice" is confusing for the same reason. See Cal. Bus. & Prof.  
25 Code § 2270(b)(3). A doctor's advice might suggest a particular  
26 course of action or treatment (e.g., "you should not get the  
27 vaccine"). This advice is distinct from any information that  
28 might be conveyed to a patient in conjunction with the advice  
(e.g., "scientific studies show that the vaccine carries a risk  
of health complications for patients in your situation"). The  
statute improperly conflates "information" with "advice" or  
"treatment."

1 at 1120. More importantly, defendants' interpretation does  
2 nothing to address the chilling effect caused by the statute's  
3 unclear phrasing and structure. See Holder, 561 U.S. at 19 ("a  
4 more stringent vagueness test" applies when the challenged  
5 statute chills First Amendment speech). As it stands, doctors  
6 reading the statute have no assurance that the statute will be  
7 interpreted by courts or applied by the Boards consistently with  
8 defendants' proposed interpretation.

9 C. "False Information"

10 Defendants also argue that the inclusion of the term  
11 "false information" as a separate element further clarifies the  
12 definition, or at least provides truthfulness as a defense. (See  
13 Høeg Opp'n at 21-22; Hoang Opp'n at 21-22.) See also McDonald,  
14 2022 WL 18145254, at \*7. While this reasoning may appear sound  
15 at first, drawing a line between what is true and what is settled  
16 by scientific consensus is difficult, if not impossible. The  
17 term "scientific consensus" implies that the object of consensus  
18 is provable or true in some manner. This is evident in the  
19 examples of "consensus" given by defendants--that apples contain  
20 sugar, that measles is caused by a virus, and that Down's  
21 syndrome is caused by a chromosomal abnormality. (See Høeg Opp'n  
22 at 21; Hoang Opp'n at 21.) These propositions are so universally  
23 agreed upon that they are considered factual. It is hard to  
24 imagine a scenario in which the Boards consider a proposition to  
25 be settled by the scientific consensus, yet not also "true."

26 Moreover, as discussed above, because COVID-19 is such  
27 a new and evolving area of scientific study, it may be hard to  
28 determine which scientific conclusions are "false" at a given

1 point in time. The term “false information” thus fails to cure  
2 the provision’s vagueness.<sup>10</sup>

3 D. Defendants’ Proposed Construction

4 Defendants argue that even if the statutory text is  
5 unclear, the court should adopt the “narrower construction” they  
6 propose--namely that the definition of “misinformation” contains  
7 three separate requirements: (1) false information, (2) that is  
8 contradicted by contemporary scientific consensus, and (3) that  
9 is contrary to the standard of care. (See Høeg Opp’n at 20;  
10 Hoang Opp’n at 20.) See also McDonald, 2022 WL 18145254, at \*7  
11 (adopting this construction of the statute). While the court  
12 must “consider any limiting construction that a state court or  
13 enforcement agency has proffered,” CPR for Skid Row v. City of  
14 Los Angeles, 779 F.3d 1098, 1103 (9th Cir. 2015) (quoting Hoffman  
15 Estates, 455 U.S. at 494 n.5), what defendants propose is not a  
16 narrowing or limiting construction at all. Rather, the proposed  
17 construction would require the court to essentially “[r]ewrite[e]  
18 the statute.” See Valle del Sol, 732 F.3d at 1021. This “is a  
19 job for the [California] legislature, if it is so inclined, and  
20 not for this court.” See id.

21 Because the definition of misinformation “fails to  
22 provide a person of ordinary intelligence fair notice of what is  
23 prohibited, [and] is so standardless that it authorizes or  
24 encourages seriously discriminatory enforcement,” Williams, 553

25 <sup>10</sup> The McDonald court noted that “scienter requirements  
26 alleviate vagueness concerns.” See Gonzales, 550 U.S. at 149.  
27 While the definition of “disinformation” includes a scienter  
28 requirement, there is no such requirement in the definition of  
“misinformation,” which is at issue here. See Cal. Bus. & Prof.  
Code §§ 2270 (b) (2), (b) (4).

1 U.S. at 304, the provision is unconstitutionally vague.  
2 Accordingly, the court concludes that plaintiffs have  
3 demonstrated a likelihood of success on the merits of their  
4 vagueness challenges.<sup>11</sup>

5 V. Non-Merits Factors

6 In addition to establishing a likelihood of success on  
7 the merits, plaintiffs must establish that they are likely to  
8 suffer irreparable harm in the absence of preliminary relief;  
9 that the balance of equities tips in their favor; and that an  
10 injunction is in the public interest. Winter, 555 U.S. at 20.

11 “[B]y establishing a likelihood that [the challenged  
12 law] violates the U.S. Constitution, [p]laintiffs have also  
13 established that both the public interest and the balance of the  
14 equities favor a preliminary injunction.” Ariz. Dream Act Coal.  
15 v. Brewer, 757 F.3d 1053, 1069 (9th Cir. 2014). The plaintiffs  
16 have thus established the elements necessary to obtain a  
17 preliminary injunction.

18 IT IS THEREFORE ORDERED that plaintiffs’ motions for  
19 preliminary injunction (Høeg Docket No. 5; Hoang Docket No. 4)  
20 be, and the same hereby are, GRANTED. Pending final resolution  
21 of this action, defendants, their agents and employees, all  
22 persons or entities in privity with them, and anyone acting in  
23 concert with them are hereby ENJOINED from enforcing Cal. Bus. &  
24 Prof. Code § 2270 as against plaintiffs, plaintiffs’ members, and  
25 all persons represented by plaintiffs.

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26 <sup>11</sup> Because plaintiffs have established a likelihood of  
27 success on the grounds of their Fourteenth Amendment vagueness  
28 challenges, the court need not address the merits of their First  
Amendment arguments.

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Dated: January 25, 2023



WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE