



Re: Testimony in Support of Assembly Bill 2098, An Act to Add Section 2270 to the Business and Professions Code, Relating to Healing Arts

Members of the California Senate Standing Committee on Business, Professions, and Economic Development:

My name is Andrew Wylam, Esq., and I am the President of Pandemic Patients, which is a 501(c)(3) non-profit organization that works to relieve the harm caused by COVID-19 and Post-COVID Conditions. I am writing to you to support the passage of Assembly Bill 2098 (AB 2098), which would designate the dissemination or promotion of misinformation or disinformation related to COVID-19 as unprofessional conduct. Additionally, this bill would authorize the Medical Board of California and the Osteopathic Medical Board of California to discipline physicians and surgeons who engage in such unprofessional conduct.

Pandemic Patients supports AB 2098 because false and misleading information about COVID-19 has undermined our country's ability to effectively respond to the coronavirus pandemic. Further, misinformation and disinformation about COVID-19 have diminished public trust in public health officials and the medical profession, which has resulted in preventable infections and deaths from COVID-19. Enacting AB 2098 will reduce the ability of physicians and surgeons in California to spread misinformation about COVID-19 to their patients and will protect the credibility of the medical profession. While critics of AB 2098 claim that the legislation would result in violation of the First Amendment rights of health care professionals, we argue that AB 2098 represents the permissible regulation of professional speech supported by the Supreme Court of the United States' existing First Amendment caselaw.

A study published in *Vaccines* in May 2022 analyzed the connection between misinformation and COVID-19 vaccine hesitancy and found that vaccine hesitant individuals identify primary care providers as their most trusted source of information on COVID-19 vaccines.¹ The findings of this study emphasize that health care professionals occupy a role as "sought out and trusted resources for guidance" who are in a unique position to influence vaccine hesitant individuals to get vaccinated against COVID-19. This is consistent with the duty of care that physicians owe their patients.² However, health care professionals betray the trust of their patients and the public when they knowingly spread misinformation about COVID-19, which has contributed to widespread vaccine hesitancy.³ AB 2098 will ensure that physicians and surgeons act in the best interests of their patients by subjecting them to discipline if they disseminate false or misleading information about COVID-19 to patients under their care.

The Johns Hopkins Center for Health Security estimates that between 2 and 12 million Americans have chosen not to get vaccinated against COVID-19 because of misinformation or disinformation about the

¹ <https://pubmed.ncbi.nlm.nih.gov/35632573/>

² <https://www.findlaw.com/injury/medical-malpractice/what-is-actionable-medical-malpractice.html>

³ <https://www.theatlantic.com/politics/archive/2021/09/doctors-tell-patients-not-vaccinated-covid-19/620024/>

COVID-19 vaccines.⁴ The Johns Hopkins Center for Health Security also found that misinformation and disinformation about COVID-19 cause between \$50 and \$300 million of total harm each day, which places a considerable strain on limited public health resources and diminishes our ability to curb the spread of COVID-19 and protect the health of the American public.⁵ The Medical Board of California and Osteopathic Medical Board of California must be authorized to discipline physicians and surgeons who disseminate harmful misinformation about COVID-19 to bolster public health efforts to end the pandemic.

In recognition of the estimates published by the Johns Hopkins Center for Health Security, the American Medical Association (AMA) House of Delegates has adopted a policy to counter public health disinformation spread by health professionals.⁶ This policy calls on the AMA to “collaborate with relevant health professional societies and other stakeholders to combat public health disinformation disseminated by health professionals in all forms of media and address disinformation that undermines public health initiatives.”⁷ The AMA House of Delegates adopted this policy because public health disinformation jeopardizes the health of patients and damages the credibility of physicians, who act as “trusted sources of accurate, evidence-based information.”⁸ Additionally, the AMA has urged state medical boards to be vigilant in addressing “disinformation that undermines public health and vaccine confidence.”⁹ This action by the AMA calls into focus how seriously members of the medical profession view the spread of medical misinformation by their colleagues.

Data released by the Federation of State Medical Boards (FSMB) in December 2021 reveals that complaints against licensed medical professionals for spreading false or misleading information about COVID-19 have risen in the majority (67%) of jurisdictions, but only a minority (21%) have taken disciplinary action against a physician for engaging in this conduct.¹⁰ These complaints may fail to result in disciplinary action because state medical boards’ regulation of misinformation spread by health care professionals could exceed their existing authority to regulate the medical profession. Some state medical boards have been vocal about the need for additional guidance regarding the limits of their regulatory authority and they have called attention to the absence of laws and regulations that expressly permit disciplining health care professionals for this conduct.¹¹ AB 2098 is responsive to the concerns expressed by various state medical boards by unambiguously authorizing the Medical Board of California and Osteopathic Medical Board of California to discipline physicians and surgeons for spreading misinformation about COVID-19, which will dispel any uncertainty they may have about the limits of their authority.

⁴ https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2021/20211020-misinformation-disinformation-cost.pdf

⁵ https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2021/20211020-misinformation-disinformation-cost.pdf

⁶ <https://www.ama-assn.org/press-center/press-releases/ama-adopts-policy-combat-disinformation-health-care-professionals>

⁷ <https://www.ama-assn.org/press-center/press-releases/ama-adopts-policy-combat-disinformation-health-care-professionals>

⁸ <https://www.ama-assn.org/press-center/press-releases/ama-adopts-policy-combat-disinformation-health-care-professionals>

⁹ <https://www.ama-assn.org/about/leadership/flow-damaging-covid-19-disinformation-must-end-now>

¹⁰ <https://www.fsmb.org/advocacy/news-releases/two-thirds-of-state-medical-boards-see-increase-in-covid-19-disinformation-complaints/>

¹¹ <https://jamanetwork.com/journals/jama/fullarticle/2789369>

Even when authorized to do so, state medical boards approach the regulation of health care professionals' speech with caution because it has the potential to infringe upon their First Amendment right to freedom of speech. An article published in the *Journal of the American Medical Association* in March 2022 describes how regulating false claims can be harmful to public discourse:

Although some claims are demonstrably false, others are less so, and regulators may err in distinguishing among them. Especially in the scientific realm, the knowledge that makes statements demonstrably true or false evolves. In addition, some people who disseminate false statements know they are lies, whereas others believe they are true. Thus, there is a risk of suppressing speech that ultimately proves to be truthful, and of chilling discourse by making people worry about whether they can back up their claims.¹²

Indeed, regulating the speech of health care professionals can have a chilling effect on the medical and scientific communities' ability to participate in public discourse. However, Pandemic Patients believes the regulatory approach employed by AB 2098 represents a limited, permissible restriction on licensed health care professionals' speech that does not impose on their First Amendment rights.

The Supreme Court has historically ruled that misinformation, or "false speech," is protected by the First Amendment because "false statements can often be valuable in terms of allowing people to challenge widely held beliefs without fear of repercussions."¹³ However, physicians and surgeons do not enjoy the same degree of freedom protected by the First Amendment because their professional speech is subject to regulation by their governing body – state medical boards. In his concurring opinion in *Lowe v. SEC*, Justice White articulates the distinction between protected speech and professional speech that can be policed as the regulation of a profession:

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.¹⁴

Here, Justice White defines professional speech, which occurs when one is "engaged in the practice of a profession" and "exercises judgment on behalf of [a] client."¹⁵ For health care professionals, professional speech occurs when they dispense medical advice to patients.¹⁶ This type of speech does not receive heightened protection under the First Amendment, which is known as the "Professional Speech Doctrine."¹⁷ By regulating this type of speech, the government can ensure that patients receive "accurate,

¹² <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2790169>

¹³ <https://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf>; <https://law.stanford.edu/2022/04/22/does-free-speech-protect-covid-19-vaccine-misinformation/>

¹⁴ <https://caselaw.findlaw.com/us-supreme-court/472/181.html>

¹⁵ <https://caselaw.findlaw.com/us-supreme-court/472/181.html>

¹⁶ <https://www.mtsu.edu/first-amendment/article/1551/professional-speech-doctrine>

¹⁷ <https://www.yalelawjournal.org/forum/limits-professional-speech>

comprehensive, and reliable advice.”¹⁸ In contrast to professional speech, Justice White goes on to describe instances where professionals may engage in public speech that is protected by the First Amendment:

Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁹

Justice White’s definition of public speech above articulates why health care professionals who spread misinformation about COVID-19 publicly are provided greater protection by the First Amendment than health care professionals who spread misinformation about COVID-19 directly to their patients.²⁰ However, Stanford Medicine professor of health policy and Stanford Law professor Michelle Mello describes exactly how misinformation about COVID-19 spread by health care professionals publicly has amplified the threat of the coronavirus pandemic:

Many people — including some medical practitioners — have made it harder for Americans to understand how to protect themselves during the pandemic by crowding the information space with claims that aren’t evidence-based. It can be hard for people to distinguish between reliable and unreliable sources of information, especially about a new health threat and especially when unreliable information is disseminated by individuals who seem trustworthy by dint of their professional role.²¹

In summary, the First Amendment does not prohibit the government from regulating speech that is incidental to the conduct of the medical profession. As applied to health care professionals spreading misinformation about COVID-19, the government is empowered to regulate direct communications between licensed health care professionals and their patients. A physician or surgeon cannot claim that their First Amendment rights are violated by government regulation when they are disciplined for privately disseminating misinformation about COVID-19 to their patients in the form of medical advice. AB 2098 only authorizes bringing a disciplinary action against a physician or surgeon who conveys misinformation or disinformation related to COVID-19 “from the licensee to a patient under the licensee’s care in the form of treatment or advice.”²² Accordingly, AB 2098 permissibly regulates professional speech in alignment with the Professional Speech Doctrine.

I urge you to vote in favor of AB 2098. By enacting this bill into law, California will create a powerful disincentive for health care practitioners in the state who may be interested in spreading misinformation

¹⁸ <https://www.yalelawjournal.org/forum/limits-professional-speech>

¹⁹ <https://caselaw.findlaw.com/us-supreme-court/472/181.html>

²⁰ AB 2098’s regulatory approach does not reach misinformation spread publicly by health care professionals. Nevertheless, health care professionals who spread misinformation about COVID-19 publicly have contributed greatly to this public health crisis and they warrant additional scrutiny from the California legislature.

²¹ <https://law.stanford.edu/2022/04/22/does-free-speech-protect-covid-19-vaccine-misinformation/>

²² https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2098

about COVID-19. Additionally, California will set an example for other states as they weigh how to best address the issues caused by misinformation and disinformation about COVID-19.

Thank you for considering our position on this matter.

Respectfully

A handwritten signature in black ink, consisting of the letters 'A' and 'W' in a cursive, stylized font.

Andrew Wylam, Esq.
President
Pandemic Patients