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October 31, 2023

Via Electronic Filing

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *McDonald v. Lawson* & *Couris v. Lawson* (Consolidated)
Nos. 22-56220 and 23-55069
Defendants-Appellees' Response to Court's October 17, 2023 Order Directing Supplemental Briefing

Dear Ms. Dwyer:

These appeals arise out of two lawsuits. Each challenges Assembly Bill 2098 (AB 2098) (2022), which added California Business & Professions Code § 2270. This new statutory section defined the dissemination of "misinformation" or "disinformation" about COVID-19 by physicians to patients in their care as unprofessional conduct. *See* Cal. Bus. & Prof. Code § 2270. Plaintiffs-appellants are physicians who alleged that AB 2098 violated their First Amendment rights to speak to their patients and was unconstitutionally vague. Plaintiffs in both matters filed motions for preliminary injunctions. The district court in *McDonald* denied the motion, while the district court in *Couris* stayed resolution of the motion. Both plaintiffs appealed, and this Court held argument on July 17, 2023.

Intervening events have now overtaken these appeals, however. In September 2023, the California Legislature passed Senate Bill 815 (SB 815), which included a provision repealing section 2270. The Governor signed SB 815 into law on September 30, 2023. SB 815 will take effect on January 1, 2024. *See* Cal. Const. art. IV, § 8(c)(1). That is just a few weeks from now, and until then, in light of the Legislature's action and the imminent repeal, the Medical Board has committed not to enforce section 2270.

Given these events, these appeals have become moot. Obviously, once SB 815 takes effect on January 1, plaintiffs can have no reasonable fear of enforcement under the repealed statute. And the Medical Board has committed not to enforce section 2270 during the short window of time until then. Any threat of enforcement under section 2270 that plaintiffs might

have faced before is completely gone. Consequently, these appeals have become moot and should be dismissed.[1]

The mootness doctrine, drawn from the case-or-controversy requirement of Article III, "requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011). "This means that, at all stages of the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant that is likely to be redressed by a favorable judicial decision." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014) (cleaned up). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). That is precisely the situation here.

Case law is clear that the repeal of a statute moots a challenge to that statute. *E.g., Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc). As this Court has explained, "the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it." *Id.* In cases involving repeal, the party asserting that a case is *not* moot bears the burden of showing "such a reasonable expectation exists . . . in the record . . . rather than on speculation alone." *Id.* There is no basis to conclude that the California Legislature has tangible plans to reenact section 2270 or a similar provision. And unlike where mootness hinges on some future action, here there are no contingencies that need to be cleared: SB 815 will take effect automatically on January 1, 2024, repealing the only law that plaintiffs challenge. At that point, even the plaintiffs would be hard pressed to argue that their challenge is anything other than moot.

And the case is likewise moot during the few weeks that remain before January 1. The Medical Board will not enforce section 2270, consistent with the legislative intent expressed by SB 815's repeal of that section, including no longer referring or directing their agents to investigate allegations of violations of section 2270 or disciplining physicians whose conduct violates section 2270. *See generally* Exhibit A, Decl. of Reji Varghese. Plaintiffs thus do not face the "credible threat of prosecution" under section 2270 that would be necessary to support injunctive relief. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citation omitted).

This Court has repeatedly recognized that an agency's change in policy can moot a case. *See, e.g., Rosebrock v. Mathis*, 745 F.3d 963, 974 (9th Cir. 2014) (email affirming agency position consistent with plaintiff's interpretation mooted injunctive relief claim); *American Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179-1180 (9th Cir. 2010) (federal agency's adoption of plaintiff's interpretation of statute mooted injunctive relief claim); *Lyons v. City of*

[1] This Court's precedent indicates that, when these appeals are dismissed as moot, the decision under review should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See, e.g., Donovan v. Vance*, 70 F.4th 1167, 1173 (9th Cir. 2023).

Los Angeles, 615 F.2d 1243, 1245-1246 & n.4 (9th Cir. 1980) (City Attorney's announcement of new official policy mooted claims). In such situations, this Court has held the agency's adoption of a position aligned with that of the plaintiff mooted the plaintiff's injunctive relief claims because there was no longer "a strong possibility of a recurrence of the behavior of which the [plaintiff] complains." *Lyons*, 615 F.2d at 1245 n.4. That is precisely the case here. Indeed, here, the case for mootness is even stronger than in *Rosebrock*, *American Cargo*, and *Lyons*. The Medical Board's decision not to enforce section 2270 is not simply an expression of its own preference; it instead serves to align its interim policy with an impending *statutory* requirement. This is, therefore, not a situation where there is a reasonable chance the agency might change its mind later. Rather, the Medical Board will soon lack any authority to change its mind and will have no legal power to enforce section 2270.

Although "[c]ourts are understandably reluctant to declare a case moot based on the defendant's voluntary cessation of the challenged activity," *American Cargo*, 625 F.3d at 1179, "[t]he government's change of policy presents a special circumstance in the world of mootness," *id.* at 1180. Courts "presume the government is acting in good faith" when it changes its policy, *id.*—a presumption that is all the more warranted when the change in policy occurs in response to an enacted statute that will soon take effect. Nor is this a situation where an agency's change in position "'could be easily abandoned or altered in the future,'" *Rosebrock*, 745 F.3d at 972 (citation omitted), or that presents concerns about a defendant who has "engaged in gamesmanship" to avoid review, *id.* at 973. Instead, the Medical Board made a reasonable decision not to enforce a statutory provision that it will, in approximately two months, have no power to enforce anyway.

This Court should therefore dismiss the appeals as moot.

Sincerely,

/s/ Kristin Liska

KRISTIN A. LISKA
Deputy Attorney General

For ROB BONTA
Attorney General

EXHIBIT A

DECLARATION OF REJI VARGHESE

I, Reji Varghese, declare:

1. I am the Executive Director of the Medical Board of California, Department of Consumer Affairs ("Medical Board"). I have held this position since June 23, 2023. Prior to becoming the Executive Director, I served as the Deputy Director from August 2020 until February 2023, and as the Interim Executive Director from February 2023 until I was sworn in as the Executive Director. In my official capacity as the Executive Director for the Medical Board, I have personal knowledge of the facts set forth below and if called as a witness, I could and would competently testify to them.

2. As the Executive Director for the Medical Board, I have a wide variety of roles and responsibilities, which include, but are not limited to, carrying out the policies of the Medical Board of the State of California and for planning, organizing and directing the activities of the Medical Board in the areas of Administration, Licensing, Enforcement and Education. The Executive Director maintains and enforces the overall policies established by the Medical Board of California relating to its programs as authorized by California Business and Professions Code sections 2000, et. seq.; oversees the development, implementation and evaluation of the full range of Medical Board policies, procedures and functions; and implements all actions and

decisions approved by the Medical Board of the State of California. In my official capacity, I am responsible for approving and signing accusations that are filed against physicians licensed in California. The accusation is the pleading seeking formal discipline against a physician that specifies the statutes and rules the physician is alleged to have violated. (Cal. Gov. Code § 11503(a).) I also have authority to make instructions that govern the Medical Board employees' execution of acts that further the Medical Board's enforcement authority.

3. On September 14, 2023, the California Legislature passed Senate Bill 815. The Governor signed the bill on September 30, 2023. The bill has been enrolled at 2023 California Statutes, chapter 294. The legislative history and text of the bill can be found online at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB815 (as of October 30, 2023).

4. Medical Board employees and agents, including investigators who investigate matters on behalf of the Medical Board, have been instructed not to enforce Business and Professions Code section 2270, and will not be enforcing section 2270 through January 1, 2024. After that,

section 2270 will no longer be a law of the State of California, and the Medical Board will have no legal authority to enforce it.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 31 day of October, 2023, at Sacramento, California.

Dated: October 31, 2023

Reji Varghese

Reji Varghese, Executive Director of the Medical Board of California