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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:
MOTIONS TO DISMISS

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 brought these now-related § 1983 actions
23 challenging the constitutionality of California Business &
24 Professions Code § 2270, also referred to as Assembly Bill ("AB")
25 2098, which made it "unprofessional conduct" for doctors to
26 "disseminate misinformation or disinformation related to COVID-
27 19." The court preliminarily enjoined enforcement of AB 2098
28 against the plaintiffs on January 25, 2023. (Høeg Docket No. 35;
Hoang Docket No. 30.) The California Legislature subsequently
repealed AB 2098, effective January 1, 2024. See Cal. Senate
Bill 815 (Sept. 30, 2023).

Before the court are defendants' motions to dismiss.
(Høeg Docket No. 63; Hoang Docket No. 52.) The Høeg plaintiffs

1 oppose dismissal (Høeg Docket No. 65), while the Hoang plaintiffs
2 do not (Hoang Docket Nos. 54-55).

3 I. Mootness

4 Defendants argue that the repeal of AB 2098 moots the
5 plaintiffs' claims in both actions insofar as they seek
6 declaratory and injunctive relief. "A private defendant's
7 voluntary cessation of challenged conduct does not necessarily
8 render a case moot because, if the case were dismissed as moot,
9 the defendant would be free to resume the conduct." Bd. of Tr.
10 of Glazing Health & Welfare Tr. v. Chambers, 941 F.3d 1195, 1198
11 (9th Cir. 2019). However, in the Ninth Circuit, courts "assume
12 that the repeal, amendment, or expiration of legislation will
13 render an action challenging the legislation moot, unless there
14 is a reasonable expectation that the legislative body will
15 reenact the challenged provision or one similar to it." Id. at
16 1199. "The party challenging the presumption of mootness need .
17 . . only [show] that there is a reasonable expectation of
18 reenactment. But a determination that such a reasonable
19 expectation exists must be founded in the record . . . rather
20 than on speculation alone." Id.

21 On February 29, 2024, the Ninth Circuit issued an
22 opinion in McDonald v. Lawson, 94 F.4th 864 (9th Cir. 2024), a
23 consolidated appeal involving two cases challenging AB 2098 from
24 the Central and Southern Districts of California. The Ninth
25 Circuit held that the repeal of AB 2098 mooted the actions and
26 remanded to the district courts with instructions to dismiss the
27 cases. See id. at 870.

28 As the Ninth Circuit held, "[b]ecause there is no

1 indication that California is reasonably likely to reenact AB
2 2098 or anything substantially similar to it, and because the
3 possibility of California enforcing AB 2098 following its repeal
4 is at best remote, there is no longer an ongoing case or
5 controversy.” Id. (internal quotation marks and citation
6 omitted). In coming to this conclusion, the Ninth Circuit relied
7 upon a statement by the Executive Director of the Medical Board
8 that its employees would not enforce AB 2098 and pointed to the
9 lack of evidence of potential reenactment in the record. See id.
10 at 869-70.

11 Despite the Ninth Circuit’s clear holding that the
12 repeal of AB 2098 moots challenges to that law, the Høeg
13 plaintiffs argue that McDonald does not dictate the same outcome
14 here because they raise arguments that were not before the Ninth
15 Circuit. But like the McDonald plaintiffs, the plaintiffs here
16 have failed to overcome the presumption of mootness, as they
17 present no allegations or evidence suggesting that the California
18 Legislature might reenact AB 2098 or similar legislation. See
19 id. at 869-70.

20 The Høeg plaintiffs point to a medical board proceeding
21 allegedly brought against a physician for advising patients not
22 to receive a COVID-19 vaccine as evidence that there is a risk of
23 enforcement or reenactment of AB 2098. (See Hoang Docket No. 39
24 at 21, ¶ 30.) This proceeding apparently commenced in June 2023.
25 (See id.) Yet there is no indication -- and plaintiffs do not
26 argue -- that this disciplinary action was initiated pursuant to
27 AB 2098. Indeed, plaintiffs’ counsel in the Hoang matter has
28 filed a separate action challenging such disciplinary actions as

1 brought under the medical boards' pre-existing statutory
2 authority. (See Kory v. Bonta, 2:24-cv-1 WBS AC, Docket No. 1.)
3 Further, the actions of administrative agencies like the Medical
4 Board do not provide evidence that the Legislature intends to
5 reenact a similar statute. The possibility that the Board may
6 discipline doctors for "disseminating misinformation" under
7 preexisting statutory authority (as opposed to a statute brought
8 to reenact the provisions of AB 2098) does not support a
9 challenge to AB 2098. Cf. Ne. Fla. Chapter of Associated Gen.
10 Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656,
11 662 (1993) (action was not moot where challenged ordinance had
12 been repealed, but city subsequently enacted a similar
13 ordinance).

14 Plaintiffs also point to a statement allegedly made by
15 Assemblyman Evan Low, a sponsor of AB 2098, that following the
16 repeal of the law, "the Medical Board of California will continue
17 to maintain the authority to hold medical licensees accountable
18 for deviating from the standard of care and misinforming their
19 patients about COVID-19 treatments." (Høeg Opp'n (Docket No. 65)
20 at 6; Høeg Suppl. Brief (Høeg Docket No. 53) at 8.) This
21 purported statement does not indicate any legislative intent to
22 reenact AB 2098. On the contrary, it would appear therefrom that
23 Mr. Low has no intention of reintroducing similar legislation,
24 instead referring to the Medical Board's preexisting statutory
25 authority. See Cal. Bus. & Prof. Code § 2234(c) ("departure from
26 the applicable standard of care" is a basis for discipline by the
27 Medical Boards). Potential disciplinary actions brought under §
28 2234 -- an entirely different statute that predates AB 2098 --

1 cannot sustain a challenge to AB 2098, particularly because the
2 court's prior order showed the peculiar language of AB 2098 to be
3 central to its unconstitutionality. See Høeg v. Newsom, 652 F.
4 Supp. 3d 1172, 1185-91 (E.D. Cal. 2023).

5 Finally, plaintiffs rely on West Virginia v.
6 Environmental Protection Agency, 597 U.S. 697 (2022). There, the
7 Supreme Court held that a voluntary decision by the federal
8 Environmental Protection Agency ("EPA") not to enforce a
9 challenged regulation did not moot the case because the EPA had
10 "vigorously defend[ed]" the legality of the challenged regulation
11 and "nowhere suggest[ed] that . . . it w[ould] not reimpose" a
12 similar measure. See id. at 718-20 (quotation marks omitted).
13 Plaintiffs argue that the instant case is analogous because
14 defendants have never conceded that AB 2098 is unconstitutional.
15 However, West Virginia v. EPA is inapposite (and, contrary to
16 plaintiffs' argument, fully reconcilable with Glazing Health)
17 because it involved administrative agency action, the rulemaking
18 agency responsible for the voluntary cessation was a party to the
19 litigation, and there was evidence that a new regulation was
20 forthcoming. See id. at 718-20. Further, here, the only
21 evidence in the record of legislative intent -- the statement
22 from Assemblyman Low, discussed above -- indicates that the
23 Legislature does not intend to reintroduce similar legislation.

24 Accordingly, the court concludes that plaintiffs'
25 claims for declaratory and injunctive relief are moot and must be
26 dismissed.

27 II. Availability of Damages

28 The court next addresses the viability of plaintiffs'

1 request for nominal damages, which is not mooted by the repeal of
2 AB 2098 to the extent it seeks relief for constitutional
3 violations that occurred while the law was in effect. See
4 Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797, 801-02 (2021) (“a
5 request for nominal damages satisfies the redressability element
6 of standing where a plaintiff’s claim is based on a completed
7 violation of a legal right” and thus presents a live controversy,
8 even where the corresponding claim for injunctive relief is moot
9 due to voluntary cessation); Collins v. Yellen, 141 S. Ct. 1761,
10 1780 (2021) (holding that constitutional claim was not entirely
11 moot following repeal of challenged regulation because plaintiffs
12 sought “retrospective relief”).

13 Defendants assert that they are immune from the Høeg
14 plaintiffs’ request for nominal damages to the extent they are
15 sued in their official capacity.¹ The Høeg plaintiffs argue that
16 defendants have waived the sovereign immunity defense by failing
17 to timely raise it. See In re Bliemeister, 296 F.3d 858, 861
18 (9th Cir. 2002) (sovereign immunity is an “affirmative defense”
19 that “may be forfeited where the state fails to assert it,”
20 either through a “clear declaration that it intends to submit
21 itself to [federal] jurisdiction” or “conduct that is
22 incompatible with an intent to preserve that immunity”)
23 (quotation marks omitted). The court disagrees.

24 The only other motion decided by the court thus far was
25 plaintiffs’ motion for preliminary injunction. Defendants had no
26 reason to raise the issue of immunity from money damages at that

27 ¹ The Hoang plaintiffs do not seek damages. (See Hoang
28 Docket No. 1 at 19.)

1 juncture, as the motion only pertained to injunctive relief, and
2 raising sovereign immunity would not have disposed of the case.
3 And defendants have yet to file an answer to the complaint
4 (pursuant to the parties' stipulation, see Høeg Docket No. 41).
5 Defendants therefore have timely raised the sovereign immunity
6 defense, as the instant motion is the first pleading filed by
7 defendants in which it would be appropriate to raise the
8 sovereign immunity defense.² See Aholelei v. Dep't of Pub.
9 Safety, 488 F.3d 1144, 1148 (9th Cir. 2007) (state did not
10 forfeit sovereign immunity defense where it raised it at first
11 opportunity, in answer to complaint, and did not cause any
12 delay); cf. In re Bliemeister, 296 F.3d at 862 (state forfeited
13 sovereign immunity defense by failing to assert it in motion for
14 summary judgment).

15 As the Høeg plaintiffs appear to concede, damages are
16 not available from state officials sued in their official
17 capacity under § 1983. See Hafer v. Melo, 502 U.S. 21, 22-23
18 (1991) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58,
19 71 (1989)) ("state officials 'acting in their official
20 capacities' are outside the class of 'persons' subject to
21 liability under . . . § 1983"); Platt v. Moore, 15 F.4th 895, 910
22 (9th Cir. 2021) (quoting Kentucky v. Graham, 473 U.S. 159, 166-69
23

24 ² The court also sua sponte requested briefing on the
25 issue of mootness stemming from the repeal of AB 2098, though
26 later decided to defer the issue pending the filing of a
27 dispositive motion raising the issue. (See Høeg Docket Nos. 49,
28 58.) Defendants would have had no reason to raise the issue of
immunity from money damages in response to that order, yet did
raise the issue when damages were brought up during oral argument
on that briefing.

1 (1985)) (“absent waiver by the State or valid congressional
2 override,’ state sovereign immunity protects state officer
3 defendants sued in federal court in their official capacities
4 from liability in damages, including nominal damages”).

5 Plaintiffs argue that they can nonetheless maintain a
6 claim for nominal damages against defendants in their individual
7 capacity. A claim for money damages against a state official in
8 his individual capacity must allege “conduct fairly attributable
9 to the officer himself.” See Alden v. Maine, 527 U.S. 706, 757
10 (1999); see also Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
11 2002) (“[i]n order for a person acting under color of state law
12 to be liable under section 1983 there must be a showing of
13 personal participation in the alleged rights deprivation”).
14 Here, there is no indication that AB 2098 was ever enforced.
15 There is therefore no basis to sue any of the Medical Board
16 defendants or the Attorney General in their individual capacity,
17 as they have not engaged in any conduct that violated the
18 plaintiffs’ rights.


19 As far as the court can see, the only affirmative
20 conduct by any defendant was Governor Gavin Newsom’s enactment of
21 AB 2098. However, a governor cannot be held liable for the
22 passage of a law, which is subject to absolute legislative
23 immunity. See Bogan v. Scott-Harris, 523 U.S. 44, 54-55 (1998)
24 (“[a]bsolute legislative immunity attaches to all actions taken
25 in the sphere of legitimate legislative activity,” and “a
26 Governor’s signing or vetoing of a bill constitutes part of the
27 legislative process”) (quotation marks omitted).

28 When questioned about their proposal to amend the

1 complaint at oral argument, plaintiffs' counsel was unable to
2 explain to the court what facts they would allege to support a
3 claim against defendants in their individual capacity. Because
4 there does not appear to be any set of facts that plaintiffs
5 could allege to support a claim against defendants in their
6 individual capacity, the court will deny the Høeg plaintiffs'
7 request for leave to amend as futile. See Missouri ex rel.
8 Koster v. Harris, 847 F.3d 646p, 655-56 (9th Cir. 2017).

9 IT IS THEREFORE ORDERED that defendants' motions to
10 dismiss both actions (Høeg Docket No. 63; Hoang Docket No. 52)
11 be, and the same hereby are, GRANTED. The pending motion for
12 summary judgment in the Høeg matter (Høeg Docket No. 48) is
13 DENIED AS MOOT. The Clerk of Court is directed to close both
14 cases.

15 Dated: April 2, 2024


16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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