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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RIVERSIDE DIVISION

JACQUELINE PALMER, *et al.*,

Plaintiffs,

vs.

ROB BONTA, in his official capacity as Attorney General of the State of California, *et al.*,

Defendants.

Case No. 5:23-cv-01047-JGB-SP

Action Filed: June 6, 2023

AMICUS CURIAE BRIEF BY THE CALIFORNIA MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: Sept. 18, 2023
Time: 9:00 am
Court: 1
Judge: Hon. Jesus G. Bernal

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INTRODUCTION

The art and practice of modern American medicine is expansive and complex, providing lifesaving care or health and wellbeing to millions of people. While many types of practitioners participate in the delivery of care, physicians historically have been the central, authoritative provider. Accordingly, the instant action brought on behalf of nurse practitioners who wish to be called "doctor" or use the title "Dr." is no trivial matter. It implicates almost a century of well-developed laws and policies governing how medical care is delivered.

Defendants' motion to dismiss presents the Court with constitutional questions involving an 86-year-old statutory rule designed to protect Californians who interface with the health care delivery system. The Legislature has determined there is a government interest in preventing confusion over who patients deal with when they encounter health care practitioners, and since at least 1937 the Legislature has reserved the terms "doctor" and "Dr." only for use by California-licensed allopathic and osteopathic physicians.[1]

While questions about the constitutionality of Business and Professions Code section 2054 ("Section 2054")[2] are legal in nature, amici curiae the California Medical Association ("CMA") and the American Medical Association ("AMA") (collectively, "Medical Associations") herein emphasize that such questions cannot be resolved in a vacuum. Rather, the Court should have a full understanding of the factual and policy underpinnings of Section 2054 to take accurate account of its legislative purposes. As stated by one court that examined Section 2054, "[t]he health and perhaps the lives of California citizens may be at stake." *People v. Sapse*, 104 Cal. App. 3d Supp. 1, 10 (App. Dept. L.A. Super. Ct., Feb. 29, 1980).

[1] The law also restricts use of the terms "physician" and "M.D.", but those restrictions are not at issue in this action and will be omitted from the discussion herein.

[2] Unless otherwise noted, all statutory references herein are to the California Medical Practice Act, Business and Professions Code sections 2000 – 2529.6.

With this amicus curiae brief and for the reasons stated by the defendants in support of their motion to dismiss [ECF no. 19], the Medical Associations urge the Court to uphold the constitutionality of Section 2054, as many courts before have.

INTERESTS OF THE AMICI CURIAE

The CMA is a California non-profit, incorporated professional physician association of nearly 50,000 members, most of whom practice medicine in all modes and specialties throughout California. Founded in 1856, CMA's primary purposes today are "to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA and its members share the objective of promoting high quality, safe, and cost-effective health care for the people of California.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including California.

The Medical Associations serve as amici in this action in their own right and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

BACKGROUND

A. History of California's Restrictions on Use of "Doctor" or "Dr."

Section 2054 has been around for 43 years. *See* Cal. Stats. 1980, ch. 1313, §2 (1979-80 leg. sess.). Since inception, its prohibitory terms have always been clear:

only those possessing a valid, unrevoked, and unsuspended license to practice medicine can hold themselves out in any sign, business card, letterhead, or advertisement, to be, among other things, a "doctor" or "Dr.," or to use any other terms or letters "indicating or implying that he or she is a physician and surgeon, physician, surgeon, or practitioner." Cal. Bus. & Prof. Code §2054(a).[3]

Though Section 2054 was originally enacted in 1980, its statutory prohibitions have existed since 1937. A now-repealed section of the Medical Practice Act – section 2142 (Cal. Stats. 1937, ch. 414, p. 1377) – contained language virtually identical to the language in Section 2054.[4] Hence, for 86 years since near the original enactment of the Medical Practice Act itself, California law has reserved the terms "doctor" and "Dr." only for use by those possessing a state license to practice medicine (i.e., allopathic and osteopathic physicians), even though "it is true that there are nonmedical uses of the title in question, such as doctors of divinity, doctors of jurisprudence, doctors of philosophy, and other holders of religious or academic degrees." *Dare*, 127 P.2d at 983.

Section 2142 and Section 2054 are premised on the Legislature's recognition that, "[i]n common parlance the term 'doctor' is customarily used to refer to physicians and surgeons." *Id.* Accordingly, the Legislature "was justified in believing that the use of such title by others without descriptive designation would

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[3] Subdivision (a) of Section 2054 has never been amended. It applies to both allopathic physicians with M.D. degrees and osteopathic physicians with D.O. degrees. In other words, only allopathic and osteopathic physicians who possess a "physician's and surgeon's certificate" may use the terms "doctor" and "Dr." under Section 2054.

[4] As quoted in *Dare v. Bd. of Med. Examiners*, 127 P.2d 977, 983 (Cal. Ct. App. 1943), section 2142 provided:

> Any person, who uses in any sign or in an advertisement the word "doctor," the letters or prefix "Dr.," the letters "M. D.," or any other term or letters indicating or implying that he is a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, . . . without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor.

tend to indicate to the public that the user is a physician or surgeon." *Id.*

B. Similar "Truth in Advertising" Laws in Other States.

Section 2054 is colloquially known as a "truth in advertising" law in medicine. The problem it is designed to address – confusion when non-physicians use the term "doctor" or "Dr." – is not unique to California. Many other states have passed similar "truth in advertising" laws, including the following.

- The District of Columbia prohibits use of the term "physician," "medical doctor," "doctor of osteopathy," and "M.D." by non-physicians (D.C. Code §3-1210.03(g));
- Indiana prohibits use of "M.D.," "physician," and "doctor of medicine" by non-medical-licensed individuals (Ind. Code Ann. §25-22.5-1.1(a)(3));
- Minnesota prohibits use of "physician," "medical doctor," and "M.D." by non-licensed individuals (Minn. Stat. §147.082);
- Mississippi limits the use of "medical doctor," "doctor of medicine," and "M.D." to "[p]ractitioners of allopathic medicine" (MS Code Ann. §41-121-5(c)(ii));
- Oklahoma limits use of "physician" to a defined set of individuals, not including nurses, and limits use of "medical doctor," "doctor of medicine," and "M.D." to allopathic medical doctors (OK ST. T. 59 §725.2); and
- Tennessee limits use of the terms "medical doctor," "physician," "medical doctor and surgeon," "medicine" or "surgeon" to practitioners of medicine and surgery (T.C.A. § 63-1-109).

DISCUSSION

A. Section 2054 Was Meant to Protect the Public Against Confusion Over Non-Physicians Using the Term "Doctor" or "Dr."

Section 2054 and its predecessor statute have been subject to numerous constitutional challenges, including First Amendment challenges, testing the legitimacy of the government purpose that underlies the restrictions on use of the term "doctor," "Dr.," "physician," or "M.D." Over nearly 40 years, the courts have consistently relied upon a readily discernible goal of the Legislature to prevent confusion and potential harm to members of the public who may be misled into

believing they are dealing with physicians whenever those terms are used by non-physicians.

As the *Dare*[5] court explained 80 years ago, in enacting the predecessor to Section 2054, the Legislature found that the term "doctor" or "Dr." was "in common parlance" strongly associated with physicians and surgeons, even though other professions and practitioners can hold "doctor of ___" titles, including doctors of philosophy or "Ph.D." *Dare*, 127 P.2d at 983. In this light, the restriction against non-physicians using those terms was clearly intended by the Legislature to prevent confusion by the public in believing that they were dealing with or receiving services from physicians and surgeons whenever they encountered anyone using those terms to represent themselves. *See id.* ("that the use of such title[s] by others without descriptive designation would tend to indicate to the public that the user is a physician or surgeon"). And in no uncertain terms, the Legislature determined that such confusion was to be avoided in the name of protecting the public welfare by permitting only California-licensed physicians to use the terms "doctor," "Dr.," "physician," and "M.D." *Id.*[6]

In 1956, another constitutional challenge to section 2142 was rejected in *Lawton v. Bd. of Med. Examiners*, 143 Cal. App. 2d 256 (1956). The litigant there was an Ohio doctor who did not possess a California medical license but used the term "M.D." in advertising his school in Beverly Hills to teach medicine. *Id.* at 259. He argued that "section 2142 has no relation to the public health or safety as applied to him, and is for that reason unconstitutional." *Id.* at 261. However, the

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[5] *Dare* is directly on point to the constitutional questions herein, but plaintiffs failed to address it in their opposition brief.

[6] California law permits other health care practitioners to use the term "doctor" but only when clearly also identifying that they are not a doctor of medicine. Optometrists, for instance, cannot use "doctor" but can use "doctor of optometry." *See* Cal. Bus. & Prof. Code §3098; *see also id.* at §3661 (a "naturopathic doctor who uses the term or designation 'Dr.' shall further identify himself or herself as 'Naturopathic Doctor' . . . .").

Lawton court explained that, even as applied to the Ohio medical professor, "[i]t is plainly apparent that the Legislature may well have deemed it wise that those who instruct in the science of medicine should be forced to disclose their educational backgrounds and that they should not be allowed to mislead students into thinking their instructors are licensed to practice medicine in California." *Id.* at 259. Additionally, the court observed, "[t]he intent of the Legislature [in enacting section 2142] was to shield the public against those who for any reason have not been duly licensed." *Id.* at 260 (emphasis added). *See also People v. Christie*, 95 Cal. App. 2d Supp. 919, 923 (App. Dept. San Diego Super. Ct., Dec. 13, 1949) (denying chiropractor's use of "chiropractic physician" and finding "[t]here can be no use of the word 'physician' by a practitioner of the healing arts except to color and imply a license to practice [medicine]").

People v. Sapse, *supra*, examined section 2142 shortly before it was replaced with Section 2054. The court there turned away a First Amendment challenge, unhesitatingly finding that "[t]he proposition that section 2142 . . . relates to an important state interest hardly admits of argument." *Id.*, 104 Cal. App. 3d Supp. at 10. What is more, according to the court, "[t]he health and perhaps the lives of California citizens may be at stake." *Id.* The court thus held, "Section 2142 is drawn with sufficient clarity and narrowness, and it relates to a sufficiently important state interest to pass constitutional muster . . . ." *Id.* at 10-11.

Courts have repeatedly found a legitimate government interest for Section 2054 and its predecessor. As most succinctly put in *Lawton*: the statute "was not aimed particularly at the person who was willing to incur the odium of actual fraud, but was designed to offer a much wider protection to the public by assuring to it a reasonable certainty of knowing in every case precisely with whom it was dealing." *Lawton*, 143 Cal. App. 2d at 261 (citation omitted) (emphasis added). The potential for confusion around "doctor" and "Dr." is especially heightened when other health care practitioners, as opposed to non-health related PhDs, misuse those terms. In

other words, there is greater likelihood of confusion and potential for harm when a nurse or medical assistant represents themselves to patients as "doctor" or "Dr." in the course of providing medical care.

B. The Legitimate Government Interests Served by Section 2054 Remain Relevant and Vital in Modern Health Care.

The original purpose of Section 2054 and its predecessor remains as relevant and vital today as in 1937 when section 2142 was enacted. Physicians today are educated and trained differently and more deeply and robustly than any other professional health care provider; and industry practice and the law continues to place physicians at the center of medical care. As it was in the early part of the last century, the public continues to view physicians as the pillar of health care and closely associates the term "doctor" or "Dr." with physicians and surgeons. These foundational facts demonstrate the continuing need for Section 2054, which has proven effective in serving an important government purpose for almost a century.

1. The Breadth and Rigors of Physician Education and Practical Training Eclipse Nurse Training and Education.

The rigorous requirements for physician education and training aim to not just create practitioners to handle routine issues, but leaders in modern health care who are able to coordinate health care teams and solve complex medical issues, identify critical diagnoses, and render timely treatment decisions. To obtain a California "physician's and surgeon's certificate," physicians must pass several exams, complete medical education, and complete a certain amount of post-graduate training. *See, e.g.*, Cal. Bus. & Prof. Code §§2084, 2096, 2170. However, virtually all physicians' training goes beyond these minimum requirements for state medical licensure, as modern specialization and credentialing demands of medical groups, hospitals, and other health care organizations demand full three-to-seven-year residencies, post-residency fellowships, or other subspecialty clinical training.

See Amy E. Thompson, MD, "A Physician's Education," JAMA 2014; 312(22): 2456. Once a license is obtained, physicians must satisfy periodic continuing medical education requirements. *See, e.g.*, 16 Cal. Code Regs. §1336. Additionally, most physicians who are certified in a specialty also have to fulfill Maintenance of Certification requirements imposed by the American Board of Medical Specialties.

On average, as compared to nurse credentials, a physician's training may include twice the amount of academic education, more than twice the clinical training hours, and a selective, accredited and structured residency program generally lasting three years with some specialties lasting up to seven years. *See* 16 Cal. Code Regs. §1482.3(a)(13); *compare* Accreditation Council for Graduate Medical Education, Program Requirements for Graduate Medical Education in Family Medicine (July 2022) ("ACGME Requirements") *with* Commission on Collegiate Nursing Education, Standards for Accreditation of Baccalaureate and Graduate Nursing Program (2018).

The rigorous education and training regimen allows physicians to have a wider scope of practice than any other mid-level practitioner, including specifically nurse practitioners. Indeed, California issues only one type of medical license to allopathic and osteopathic physicians, designated as a "physician's and surgeon's certificate." Cal. Bus. & Prof. Code §§2050 and 2450. Such a license is plenary, meaning it "authorizes the holder to use drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions." *Id.* at §2051.

By contrast, a nurse practitioner's license mandates that they "verbally inform all new patients in a language understandable to the patient that a nurse practitioner is not a physician and surgeon." *Id*. at §§2837.103(d), 2837.104(d). This requirement applies even for nurse practitioners who hold doctorate of nursing degrees. Nurse practitioners further must "refer a patient to a physician and surgeon

or other licensed health care provider if a situation or condition of a patient is beyond the scope of the education and training of the nurse practitioner." *Id.* at §2837.103(f). They must establish "a plan for referral of complex medical cases and emergencies to a physician and surgeon" for situations that are beyond their training, experience, and education of a nurse practitioner. *See Id.* at §2837.104(c)(4).

A nurse practitioner's skillset simply does not match a physician's training and education. Nurse practitioner programs cover less material than medical school, are less science-oriented, and lack comparable depth. Additionally, in 2019, 60 percent of nurse practitioner programs were provided almost completely online, leading to less hands-on clinical experience during their education. *See* David I. Auerbach, *et al.*, Implications of the Rapid Growth of the Nurse Practitioner Workforce in the US, 39 HEALTH AFFAIRS 273, 278 (Feb. 2020). The medical school curriculum, by contrast, provides an exacting deep dive into the sciences underpinning human life; it covers all organ systems and all phases of the human life cycle, training students to identify and understand the root cause and impact of disease. *See* Accreditation Commission on Colleges of Medicine, Standards of Accreditation for Schools of Medicine (May 2023).

In short, while nurse practitioners may competently conduct guidelines-driven clinical decision-making for uncomplicated illness, often under the supervision of a physician, they are not prepared to engage in differential diagnoses or to navigate medical complexity. A physician, however, has the training, education, and licensure to possess a plenary license and provide medical care well beyond the care nurse practitioners can or are authorized to perform.

2. Physicians Lead and Are Central to Health Care Delivery.

It should be no surprise that, in practice and under the law, physicians are placed at the center of the delivery of medical care and that there are special protections for the relationship between patients and their physicians. Physicians

personally diagnose patients and perform medical procedures that, in their sole professional medical judgment, are necessary. No other practitioner in health care stands in these shoes, and the law raises special protections to preserve and foster the independence of physician judgment and practice.

California laws broadly put physicians in charge of health care delivery. For instance, all hospitals in California must have medical staffs, which are organizations of health care practitioners given responsibility with the medical care in that hospital. *See* 22 Code Cal. Regs. §70703(a). Membership on the medical staff is restricted to physicians or, to the extent dental or podiatry services are provided at the hospital, dentists and podiatrists. *Id.* at §70703(a)(1). Nurses, by comparison, currently cannot be full members of the medical staff with the same rights and practice privileges as physicians. Additionally, federal law requires that the executive committee of the medical staff be ruled by physicians. *See* 42 C.F.R. §482.22(b)(2). The chief of staff also must be a physician. *Id.* at §482.22(b)(3). In similar regard, when an emergency department patient needs to be transferred, the law requires that a physician, and none other, must certify that the benefits of the transfer outweigh any risks. *See* 42 U.SC. §1395dd(c)(1). Finally, only physicians can carry out the duties and responsibilities of aid in dying under California's End of Life Option Act. *See* Cal. Health & Safety Code §§443.1(c), 443.5(a)(5).

Given physicians' primary role in health care delivery, California Evidence Code section 994 applies privilege protections around "a confidential communication between patient and physician." *See also Doe v. Bolton*, 410 U.S. 179, 219 (1973) ("The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship") (Douglas, J., concurring). The dual purposes of this privilege are "to protect the patient from the humiliation that might follow the disclosure of his or her ailment and to encourage full disclosure to the physician of information necessary for diagnosis and treatment." *Snibbe v. Superior Ct.*, 224 Cal. App. 4th 184, 191-92

(2014). The privilege does not, however, apply to communications between patients and nurses; there is no nurse-patient privilege recognized in California. *See Duronslet v. Kamps*, 203 Cal. App. 4th 717, 736 (2012).

3. The Public Will Be Confused By Non-Physician Use of "Doctor" or "Dr."

As noted above, the Legislature enacted Section 2054's predecessor to prevent confusion in patients dealing with non-physicians who may use the title "doctor" or "Dr." because, "[i]n common parlance the term 'doctor' is customarily used to refer to physicians and surgeons." *Dare*, 127 P.2d at 983. That potential for confusion is even greater today.

When encountering the health care system, patients immediately confront an array of practitioners and acronyms that can cause confusion over the practitioner's level of licensing, education, and training. In a review of over 2,000 primary care providers' biographies, a researcher found 181 unique combinations of alphabetic acronyms next to the practitioners' names (e.g., FNP-BC, PA-C). *See* Evan K. Perrault, "Campus Health Centers' Lack of Information Regarding Providers: A Content Analysis of Division-I Campus Health Centers' Provider Websites," 33 HEALTH COMMUNICATIONS 860 (2018). Even if a patient is able to comprehend the level of licensing of a practitioner, uncertainty remains about the role and capabilities of nurse practitioners and physician assistants. A survey study found that 45% of adults surveyed did not agree that it was easy to identify who is or is not a licensed medical doctor by reading what services they offer, their title, and other licensing credentials in advertising materials. Baselice & Assocs., "Scope of Practice Survey" (July 12-19, 2018).[7]

[7] Baselice & Associates is a national research organization that provides public opinion research. It conducted this internet survey of 801 adults on behalf of the AMA Scope of Practice Partnership. The overall margin of error is +/- 3.5 percent at the 95 percent confidence level.

Patients cannot be expected to quickly discern the meanings of these acronyms, which can cause ambiguity about the kind of care each of these practitioners can provide and the level of education and training they have received. For example, researchers have reported responses to questions whether a physician assistant can diagnose an illness and found 51% indicated true, 26% indicated false, and 22% indicated unsure. *See* Evan K. Perrault & Grace M. Hildenbrand, "Primary Care Confusion – Public Knowledge of NP and PA Duties and Their Information Gathering Behavior," 33 J. GEN. INTERN. MED. 1857 (2018). Such confusion extended to whether the midlevel practitioner can prescribe certain medications or order certain lab tests. *Id.*

Other surveys repeatedly show that patients strongly support and prefer a physician-led health care team, with 91% of survey respondents stating that a physician's years of medical education and training (compared to a nurse practitioner) are vital to optimal care, especially in the event of a complication or a medical emergency. Baselice & Assocs., "Scope of Practice Survey" (May 1–June 6, 2014), (March 8–12, 2012), (Nov. 4−8, 2010); Global Strategy Group, "Scope of Practice Survey" (Aug. 13-18, 2008).[8] Finally, over 88% of surveyed adults agree that only a medical doctor or doctor of osteopathy should be able to use the title "physician." Baselice & Assocs., "Scope of Practice Survey" (July 12-19, 2018).

A misrepresentation of the practitioner's level of licensing is misleading and can jeopardize patient safety as a patient may mistakenly believe that the midlevel practitioner possesses the same level of training and qualification as physicians licensed by the California Medical Board. *See American Academy of Pain Management v. Joseph,* 353 F.3d 1099, 1108 (9th Cir. 2004). With the different

[8] Baselice & Associates and the Global Strategy Group conducted these internet surveys of between 801-850 adults from 2008 to 2014 on behalf of the AMA Scope of Practice Partnership. The overall margins of error were between +/- 3.4-3.5 percent at the 95 percent confidence level.

focus and requirements in their education and experience, a nurse practitioner's approach to patient care can provide disparate outcomes from that of a medical doctor. For example, recent studies have found significantly increased levels of prescription of opioids and overprescription of antibiotics by nurse practitioners compared to physicians, especially when the nurse practitioner is not practicing under physician supervision. *See* M. James Lozada, *et al.*, "Opioid Prescribing by Primary Care Providers: a Cross-Sectional Analysis of Nurse Practitioner, Physician Assistant, and Physician Prescribing Patterns," 35 J. GEN. INTERN. MED. 2584 (Sep. 2020); Monica L. Schmidt, *et al.*, "Patient, Provider and Practice Characteristics Associated with Inappropriate Antimicrobial Prescribing in Ambulatory Practices," 39 INFECTION CONTR. & HOSP. EPIDEM. 307 (March 2018).

As shown, research and empirical evidence based on medical practice today confirm the Legislature's concerns when it enacted Section 2054 and its predecessor that, given the widespread and strong association between "doctor" or "Dr." and physicians, there is great likelihood for public confusion that justifies California's restrictions on the use of such terms.

CONCLUSION

For the foregoing reasons, the CMA and the AMA respectfully urge the Court to find that Section 2054 is constitutional because, for 86 years, it has effectively served a legitimate government interest to address a concrete public welfare problem that continues to exist today.

Respectfully submitted,

Dated: September 6, 2023.

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