

California's COVID Misinformation Law Is Entangled in Lawsuits, Conflicting Rulings

The law define misinformation as false information that is contradicted by contemporary scientific consensus.

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Gov. Gavin Newsom may have been prescient when he acknowledged free speech concerns as he signed California's [COVID misinformation bill](#) last fall. In a [message to lawmakers](#), the governor warned of "the chilling effect other potential laws may have" on the ability of doctors to speak frankly with patients but expressed confidence that the one he was signing did not cross that line.

Yet the law — meant to discipline doctors who give patients false information about COVID-19 — is now in legal limbo after two federal judges issued conflicting rulings in recent lawsuits that say it violates free speech and is too vague for doctors to know what it bars them from telling patients.

In two of the lawsuits, Senior U.S. District Judge William Shubb in Sacramento issued a [temporary halt](#) on enforcing the law, but it applies only to the plaintiffs in those cases. Shubb said the law was "unconstitutionally vague," in part because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." His ruling last month clashed with one handed down in Santa Ana in December; in that case, U.S. District Judge Fred Slaughter [refused to halt the law](#) and said it was "likely to promote the health and safety of California COVID-19 patients."

The legal fight in the nation's most populous state is to some extent a perpetuation of the pandemic-era tussle pitting supporters of public health guidelines against groups and individuals who resisted masking orders, school shutdowns, and vaccine mandates.

California's COVID misinformation law, which took effect January 1, is being challenged by vaccine skeptics and civil liberties groups. [Among those suing](#) to get the law declared unconstitutional is a group founded by Robert F. Kennedy Jr., who has questioned the science and safety of vaccines for years.

But doubts about the law are not confined to those who have battled the scientific mainstream.

Dr. Leana Wen, a health policy professor at George Washington University who previously served

as president of Planned Parenthood and as Baltimore's health commissioner, [wrote in an op-ed](#) a few weeks before Newsom signed the law that it would exert "a chilling effect on medical practice, with widespread repercussions that could paradoxically worsen patient care."

The Northern California affiliate of the American Civil Liberties Union has [weighed in](#) against the law on free speech grounds, though the national organization [has affirmed](#) the constitutionality of COVID vaccine mandates.

"If doctors are scared of losing their licenses for giving advice that they think is helpful and appropriate, but they don't quite know what the law means, they will be less likely to speak openly and frankly with their patients," said Hannah Kieschnick, an attorney with the ACLU of Northern California.

The law establishes that doctors who give false information about COVID to patients are engaging in unprofessional conduct, which could subject them to discipline by the Medical Board of California or the Osteopathic Medical Board of California.

Proponents of the law [sought to crack down](#) on what they believe are the most clear-cut cases: Doctors who tout treatments [such as ivermectin](#), an anti-parasitic agent that is unproven as a COVID treatment and can be dangerous; who exaggerate the risk of getting vaccinated compared with the dangers of the disease; or who spread unfounded theories about the vaccines, including that they can [cause infertility](#) or [harm DNA](#).

But the law lacks such specifics, defining misinformation only as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care."

Michelle Mello, a professor of law and health policy at Stanford University, said the wording is confusing.

"On a matter like COVID, science is changing all the time, so what does it mean to say there is scientific consensus?" she asked. "To me, there are lots of examples of statements that clearly, with no vagueness involved, meet the definition of the kind of conduct that the legislature was going after. The problem is that there are all kinds of other hypothetical things that people can say that don't clearly violate it."

Dr. Christine Cassel, a professor of medicine at the University of California-San Francisco, said she expects the law to be applied only in the most flagrant cases. "I trust scientists enough to know where there's a legitimate dispute," she said.

Cassel's view mirrors Newsom's rationale for signing the legislation despite his awareness of potential free speech concerns. "I am confident," he wrote in his message to lawmakers, "that discussing emerging ideas or treatments including the subsequent risks and benefits does not constitute misinformation or disinformation under this bill's criteria."

Plaintiffs in the [Santa Ana case](#), two doctors who have sometimes diverged from public health

guidelines, appealed Slaughter’s ruling allowing the law to stand. The case has been combined in the 9th U.S. Circuit Court of Appeals with another case in which a San Diego judge declined to rule on a similar request to temporarily halt the law.

Newsom spokesperson Brandon Richards said in early February that the administration would not appeal the two Sacramento cases in which Shubb issued the narrow injunction. The plaintiffs’ lawyers had expected the state to appeal the decision, thinking all four lawsuits would then be decided by the appeals court, providing greater clarity for all parties.

Richard Jaffe, lead attorney in one of the Sacramento cases — brought by a doctor, Kennedy’s Children’s Health Defense, and a group called Physicians for Informed Consent — said Newsom’s decision not to appeal is “just going to increase the level of chaos in terms of who the law applies to.”

But the Newsom administration has decided to wait for the appeals court to rule on the other two judges’ decisions that left the law intact for now.

Jenin Younes, a lawyer with the New Civil Liberties Alliance who is lead counsel in the [other Sacramento case](#) in which Shubb issued his injunction, said Newsom may be calculating that “you’re in a stronger position going up on a win than on a loss.”

A victory for Newsom in the appeals court, Jaffe and others said, could dampen the impact of the two Sacramento cases.

Opponents of California’s COVID misinformation law question why it is needed at all, since the medical boards already have authority to discipline doctors for unprofessional conduct. Yet only about 3% of the nearly 90,000 complaints the Medical Board of California received over a decade resulted in doctors being disciplined, according to a [2021 investigation](#) by the Los Angeles Times.

That could be good news for doctors who worry the new law could constrain their ability to advise patients.

“I don’t see medical boards being particularly vigorous in policing physicians’ competence in general,” said Stanford’s Mello. “You have to be really bad to get their attention.”

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