No. 24-3108

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Azadeh Khatibi, M.D., Marilyn M. Singleton, M.D., and Do No Harm,

Plaintiffs – Appellants,

v.

Randy W. Hawkins, Laurie Rose Lubiano, Ryan Brook, Reji Varghese, Marina O'Connor, in their official capacities as members and officials of the Medical Board of California,

Defendants – Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable Mónica Ramírez Almadani, District Judge

APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE

Plaintiff Do No Harm Inc. is a nonprofit corporation organized under the laws of the Commonwealth of Virginia. It has no parent corporation and no publicly held corporation owns any stock in Do No Harm.

s/ *Joshua P. Thompson*
JOSHUA P. THOMPSON

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INTRODUCTION

Plaintiff Azadeh Khatibi is an ophthalmologist who provides Continuing Medical Education (CME) courses in California. ER-031. Plaintiff Do No Harm is an organization of medical professionals that has at least one member who has given CMEs in California. ER-031. Throughout Dr. Khatibi's[1] career, she has given many CMEs. ER-036. She imagined the ideas for these courses. *Id*. She did the necessary research. *Id*. She wrote the content. *Id*. She delivered them. *Id*. At no point did the Medical Board of California review, edit, oversee, judge, or even know about Dr. Khatibi's CMEs. *Id*. When physicians who took Dr. Khatibi's courses claimed the corresponding credit hours, the Board did not object. *Id*.

A recently adopted California law, Cal. Bus. & Prof. Code § 2190.1(d)(1), requires Dr. Khatibi to inject discussion of implicit bias[2]

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[1] Plaintiffs-Appellants refer to Dr. Khatibi here for clarity. Both Dr. Khatibi and Do No Harm's physician members are similarly situated.

[2] CMEs must either provide "[e]xamples of how implicit bias affects perceptions and treatment decisions," or "[s]trategies to address how unintended biases in decisionmaking may contribute to health care disparities." Cal. Bus. & Prof. Code § 2190.1(d)(1). As alleged in Dr. Khatibi's complaint, there is no scientific consensus that implicit bias has any effect on disparate treatment outcomes. ER-035. And there is

into her CMEs. ER-034. Dr. Khatibi's CMEs have never included discussion of implicit bias, and she does not want them to include discussion of implicit bias now. ER-035–036. Because the Medical Board of California (Board) requires her to include discussion of implicit bias in her CMEs, she brought this challenge to the constitutionality of Cal. Bus. & Prof. Code § 2190.1 and § 2190.1(d)(1). She alleges that the implicit bias mandate compels her private speech in violation of the First Amendment to the United States Constitution. ER-039–043.

Despite the absence of its involvement in the creation, editing, and delivery of CMEs, the Board argues that Dr. Khatibi's CMEs constitute government speech. Answering Brief of Defendants-Appellees (Ans. Br.) at 1. But how can CMEs constitute government speech if the government doesn't even know what's being said?

The Board's answer is that CMEs are part of California's "long-standing tradition of regulating the medical profession." Ans. Br. at 2. According to the Board, Dr. Khatibi "speak[s] for the State when teaching CME courses." *Id.* However, CME instructors do not "speak for the State"

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evidence to suggest implicit bias training is counterproductive, resulting in anger and resentment from attendees. *Id.*

simply because their courses meet regulatory requirements; they remain independent professionals delivering their own speech. Compliance with licensure standards is not equivalent to being a government spokesperson.

The Board has nothing to support CMEs as government speech other than its role as regulator of the medical profession. On each of the government speech factors, the Board reiterates some form of this response. Ans. Br. at 15–32. For example, according to the Board, there is a history of CMEs as government speech because California has a long history of using CMEs in licensure. *Id.* at 17–21. Similarly, the public perceives CMEs as coming from the government because the state created the CME licensure requirements. *Id.* at 21–25. And the state controls the content because it is the licensing body and sets the licensing standards. *Id.* at 25–32.

However, compliance with regulations is a hallmark of licensure, not a marker of government speech. The government speech factors are not a mere formality that can be glossed over because the Board licenses physicians. Each factor asks a distinct question, and for the reasons set forth in Dr. Khatibi's opening brief, Appellants' Opening Brief (AOB), at

14–29, each factor weighs heavily in favor of CMEs being categorized as private speech.

To hold otherwise allows the state to dictate content without First Amendment limits, forcing private citizens to deliver a government message. That's the definition of compelled speech, and it's why Dr. Khatibi brings her compelled speech claim. ER-039–041.

The Board's rejoinder to Dr. Khatibi's First Amendment concerns is incredibly thin. It all but concedes that its theory would apply to judges and lawyers in the exact same way it applies to doctors. Ans. Br. at 32, 34. And the Board's response to concerns about established First Amendment doctrines—like compelled speech or government-employee speech—is just *ipse dixit*. *See* Ans. Br. at 37 ("compelled speech doctrine only applies to speech that is protected by the First Amendment, government speech is not"); *id.* at 38 ("Plaintiffs are not government employees speaking in their private capacity but private citizens.").

Finally, the Board's argument against Dr. Khatibi's unconstitutional conditions claim is improper at this stage in the case. Ans. Br. at 39–45. The Board insists that implicit bias instruction is necessary for medical instruction in California, and it insists that

mandated implicit bias instruction will satisfy the Legislature's goals of reducing racial health disparities. These fact-bound arguments are directly contradicted by the allegations in Dr. Khatibi's complaint. ER-034–035. As such, the Court should not consider them at this stage. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

Because CMEs are not government speech, the decision below should be reversed.

I. CMEs ARE NOT GOVERNMENT SPEECH

Both parties agree that to determine whether CMEs constitute government speech courts look to: (1) "the history of the expression at issue;" (2) "the public's likely perception as to who (the government or a private person) is speaking;" and, (3) "the extent to which the government has actively shaped or controlled the expression." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–14 (2015)); *see also* AOB at 13–14; Ans. Br. at 16–17. Each of these factors demonstrates that

Dr. Khatibi is engaged in private speech when she creates and delivers CMEs.[3]

A. There Is No History of the Board Using CMEs to Speak a Government Message

Dr. Khatibi's opening brief explains that every Supreme Court decision recognizing government speech involves situations where the government has a historical practice of conveying a government *message*. AOB at 14–18. For example, the government speech doctrine applies to the erection of monuments because there is a long history, dating back to "ancient times," of governments using monuments to communicate messages. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). "When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Id.* at 470. Similarly, in *Walker*, the Court recognized that license plate designs "long have communicated *messages* from the States." 576 U.S. at 211 (emphasis added).

Because the message CMEs convey varies from speaker to speaker and course to course, the Board's response is to focus on its role as

[3] Dr. Khatibi applies the government speech factors to CMEs in detail in her opening brief. AOB at 13–29.

regulator. It notes a "longstanding history of regulating the medical profession," and that "[s]ince the 1980s, California has used CME programming to ensure that licensed physicians are adequately trained in subjects the State considers essential." Ans. Br. at 17–18. However, a history of regulation and licensure is not equivalent to a history of conveying a message. In this regard, the Board cannot demonstrate any historical practice of regulating the content—or the message—delivered in CMEs.

If mere regulation were enough, *Matal v. Tam*, 582 U.S. 218 (2017), would have come out differently. Notably, the Board avoids discussing *Tam* when addressing the history of government speech. This omission is telling because the federal government's regulation of trademarks has a history just as lengthy as California's regulation of the medical profession. But that is precisely the point—it is not *regulatory* history that matters. What matters is whether the medium has "traditionally been used to convey a Government *message*." *Id.* at 238 (emphasis added). When a surgeon delivers a CME on appendectomies, the "message" conveyed pertains to appendicitis and surgery—not some variant of: "this

is available for credit."[4] There is absolutely no history of the Board co-opting *the surgeon's* message.

Here, and elsewhere, the Board finds it important that "Plaintiffs do not contest the constitutionality" of CME requirements related to "pain management and geriatric medicine." Ans. Br. at 1, 18; *see also* Cal. Bus. & Prof. Code § 2190.5 (pain management course); *id.* § 2191.2 (geriatric medicine course). However, this does not carry the decisive weight the Board appears to attribute to it. Crucially, these courses don't compel Dr. Khatibi's speech. These are standalone courses that doctors take to meet their CME requirements.[5] As such, CME *instructors* can choose whether to teach those courses.

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[4] It's doubtful whether this statement even qualifies as a "message" under the government speech doctrine. In *Kotler*, the California Department of Motor Vehicles argued that license plate configurations—not the license plate designs at issue in *Walker*—were government speech. *Kotler v. Webb*, No. CV 19-2682-GW-SKx, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019). The court questioned the very premise, under the first government speech factor, that license plate configurations are a message. "[T]he randomly assigned registration configurations unique to individual vehicles—while certainly achieving a significant state function—do not express a government-approved message in the same way as specialty plate designs." *Id.* at *7. The same is true here. The fact that a course is available for credit serves a significant state function, but it does not express a government-approved "message."

[5] Indeed, it was Dr. Khatibi who noted in her opening brief that California lawyers are required to take a course on implicit bias. AOB at 22 n.9.

As an ophthalmologist, Dr. Khatibi is not an expert in geriatric medicine, so she has no desire to teach it. She also has no expertise in implicit bias, but the Board compels her to speak on it. Under California law, *every* CME course must include discussion of implicit bias. *Id.* § 2190.1(d)(1). That's true of the courses on ophthalmology; it's true of courses on geriatric medicine; it's true of courses on appendicitis. Dr. Khatibi cannot escape it. If doctors want to teach CMEs in California, they are compelled to include discussion of implicit bias regardless of the subject matter of the course.

B. The Public Perceives CMEs as Private Instruction

There is no doubt—and the Board does not dispute—that Dr. Khatibi makes multiple allegations in her complaint that attendees of her CMEs perceive the content as originating from her. *See* AOB at 19; Ans. Br. at 22–24; *see also* ER-036–037. At this stage of the case, those allegations—and the reasonable inferences that follow—must be construed in Dr. Khatibi's favor. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1080–81 (8th Cir. 2024); *see also* AOB at 19–20. Under this standard, the allegations suffice to defeat the Board's motion to dismiss Dr. Khatibi's complaint.

The Board has three responses to a straightforward application of *Iqbal*. It argues: (1) The Board's regulation of doctors through CMEs means the public perceives CMEs as coming from the Board; (2) Dr. Khatibi's allegations are "conclusory" and not entitled to the presumption of truth; and (3) Dr. Khatibi's allegations support the inference that the public perceives CMEs as coming from the Board. The Board is wrong on all counts.

First. There is no support for the Board's contention that the scope of its licensure authority leads the public to perceive CME content as originating from the state. Ans. Br. at 21–22. Merely reiterating its role as regulator does not establish that the public views private CME courses as state-issued. Stating this repeatedly does not make it true. The Board has presented no studies, surveys, or any other concrete evidence—nor has it cited any precedent—indicating that the public identifies private CME content with the state. Instead, the Board merely reiterates its regulatory role as if it inherently proves that the public associates private CMEs with the state.

By the Board's logic, the public should also believe that every continuing legal education course comes from the government, simply

because lawyers and judges are licensed and regulated by the state. It would assume every privately held cooking class is government speech just because the public health department licenses restaurants, or that any privately offered construction safety course stems from the government because building contractors must follow state-issued codes. Such conclusions contradict basic common sense; people regularly distinguish between government oversight and private content creation.

The Board insists, however, that "content meeting state requirements" and "content coming from the state" is a "distinction without a difference." Ans. Br. at 23. It goes so far as to call Dr. Khatibi "illogical to argue otherwise." *Id.* The Board's assertion conflates the role of a standard-setter with that of a content creator. Meeting state requirements simply means that private providers must adhere to a baseline of quality or subject matter—it does not transform them into mouthpieces for the government.

The public is perfectly capable of distinguishing between the broad guardrails set by the state and the specific lessons, opinions, or methodologies offered by a private instructor. Just because the

government sets building codes doesn't mean it "authored" the architecture of every home built within those codes.

Second. Plaintiffs' allegations about the public's perception are not conclusory. Dr. Khatibi makes at least three factual allegations in the complaint that directly relate to the public's perception of her CMEs:

> (1) It is not uncommon for attendees to approach Dr. Khatibi following a course taught by her to ask questions and engage in conversation about the course and material discussed; (2) CME attendees also often ask questions of Dr. Khatibi during CME courses taught by her and even debate with her; (3) Both during and after CME courses taught by Dr. Khatibi, attendees treat her as the person responsible for the content discussed.

ER-036 (cleaned up).[6] These allegations are not "conclusory." They do not merely assert a legal conclusion or opinion; rather, they report specific, observable events and behaviors. Collectively, these statements present tangible facts from actual experiences. For such "well-pleaded factual allegations, a court should assume their veracity." *Iqbal*, 556 U.S. at 679.

Third. Just like the veracity of her well-pleaded allegations, Dr. Khatibi is also entitled to any reasonable inferences that can be drawn in her favor. *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir.

[6] Dr. Singleton made similar allegations in the complaint. *See* ER-038.

2008). The Board disagrees and counters that the lower court was correct to construe one of her allegations *against* her. Ans. Br. at 23–24.

This particular allegation—that doctors attend Dr. Khatibi's CMEs at least partly because of the CME credit, ER-037—supports her claim that the implicit bias mandate injures her. It reflects that doctors seek credit for their continuing education and are thus motivated to attend courses meeting the official standards. Compliance with state requirements indicates that the course is credentialed, not that the public attributes its substantive content to the state. While doctors value accreditation, it does not follow that they assume the state is responsible for the substance of the material they learn.

At bottom, the Board argues that the public perceives CMEs as state speech because it bears the government's "seal of approval." *Tam*, 582 U.S. at 235. It has nothing more. But this is precisely what the Supreme Court cautioned against in *Tam*. *Id.* At this stage in the proceedings, the Court's role is not to weigh competing stories but to accept Dr. Khatibi's well-pleaded factual allegations as true and draw all reasonable inferences in her favor. The Board's contrary assertions—

lacking any factual support—cannot overcome the presumption afforded to Plaintiffs' allegations.

C. Government Control of CMEs Is Minimal

In her opening brief, Dr. Khatibi contrasts the level of government control over CMEs with the level of control discussed by the Supreme Court in *Shurtleff*, *Tam*, *Walker*, and *Summum*. AOB at 25–29. In each of those cases—even those where the Court held there was no government speech—the state exerted significantly more control than it does here. *See, e.g.*, *Tam*, 582 U.S. at 235–36 (every trademark must be approved by the government); *Shurtleff*, 596 U.S. at 256 (Boston maintained control over date, time, and even physical premises).

The Board ignores this discussion and instead insists that *Walker* stands for the proposition that "final approval authority" alone is sufficient to satisfy this element of the government speech analysis.[7] Ans.

[7] The Board also cites a pre-*Summum* case out of this Court, *Downs v. L.A. Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000), for the proposition that "final approval authority" suffices to establish the third government speech factor. Ans. Br. at 30. That case concerned a school-district approved message, on a school's bulletin board, that was strictly maintained by school officials. To the extent the analysis in *Downs* survives *Shurtleff*, *Tam*, *Walker*, and *Summum*, it is so factually inapposite as to be unhelpful.

Br. at 30–31. Because *Tam* expressly holds differently, 582 U.S. at 235–36, the Board attempts to grapple with it. But the Board offers no substantive explanation or analysis that reconciles its position with *Tam*.

Instead of explaining how its purported final approval authority differs substantively from the "seal of approval" the Supreme Court found insufficient in *Tam*, the Board highlights its "detailed curriculum requirements" and its sole authority "to determine which courses are eligible for credit." Ans. Br. at 31. But "determining which courses are eligible for credit" is just another way of describing a "seal of approval"—the exact concept *Tam* rejected. Nor is the reference to "detailed curriculum requirements" persuasive. After all, the Lanham Act imposes equally detailed statutory requirements that a trademark must meet before the Patent and Trademark Office grants approval. *See* 15 U.S.C. § 1052(a)–(f).

The Board is doing precisely what *Tam* forbids: conflating the existence of state-imposed standards or review procedures with the government actively shaping or originating the speech itself. In the absence of any concrete showing that the government is crafting,

adopting, or endorsing the substantive content of CMEs, the Board's reliance on "final approval authority" falls flat.[8]

Dr. Khatibi's opening brief also makes two additional points concerning the level of editorial control exerted by the Board: (1) the outsourcing of CME standards; and (2) the sheer volume of CME courses available for credit. AOB at 25–26. The Board's opposition addresses the first point, but it ignores the second altogether.

With respect to outsourcing standards, the Board's response is that despite its outsourcing, its role as auditor suffices to establish sufficient control. Ans. Br. at 31–32. But that misses the point. A backend auditor evaluates compliance with predetermined standards after content has been created and disseminated. In contrast, an editor or content

[8] It's highly questionable whether the Board's role as "auditor after-the-fact" even gives it "final approval authority." Someone with final approval authority would have the power to review and shape the content before it goes forward, effectively controlling what is ultimately presented to the public. That was true in *Walker*. In contrast, a backend auditor merely checks the already-disseminated material against predetermined standards to determine compliance. This post-hoc verification process does not empower the auditor to guide, revise, or veto the content—it only allows the auditor to assess whether what has already been provided meets certain criteria. In any event, at this stage of the proceedings it is unclear what the Board's audits of CMEs entail, as none of Dr. Khatibi's courses have ever been audited. ER-036.

controller would review, guide, and potentially alter the message before it reaches the audience, actively determining what is included and how it is presented.

Equally problematic is the sheer volume of CMEs available for credit, which the Board never addresses. It simply cannot be that the Board attributes all that speech to the government. This was famously relevant in *Tam*. And just like the PTO there, so too here. If CMEs are considered government speech, California would be "babbling prodigiously and incoherently." 582 U.S. at 236.

II. A RULING FOR THE BOARD WOULD HAVE DRASTIC IMPACTS ON PRIVATE SPEECH

In her opening brief, Dr. Khatibi raises a significant concern: under the Board's view, CLEs—and countless other professions' continuing education courses—would also qualify as government speech. This would encompass courses authored by judges, justices, and attorneys from organizations like the ACLU and ADF. AOB at 31–33. The Board attempts to allay this concern, claiming it is "not necessarily true that all professional development courses would [qualify as government speech]." Ans. Br. at 34. Yet the Board offers no meaningful explanation for why CLEs would be treated differently, and it's difficult to identify any

distinguishing factor. The Board's repeated emphasis on a history of regulatory oversight applies equally to other professions, such as lawyers, real estate brokers, and veterinarians.[9]

Dr. Khatibi also argues that the Board's rule would render the compelled speech doctrine meaningless. AOB at 33–36. The Board responds that "[t]he compelled speech doctrine only applies to speech that is protected by the First Amendment; government speech is not." Ans. Br. at 37. This circular reasoning is the entirety of the Board's argument. It refuses to engage with Dr. Khatibi's broader point: that the Board's rule would sweep in substantial amounts of private, protected speech.

The Board's failure to address *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 585 U.S. 755 (2018), is particularly striking. *NIFLA* involved highly regulated, licensed pregnancy centers that were required to post controversial government messages. The Supreme Court held that such mandates violated the First Amendment as compelled speech. *Id.* at

[9] To its credit, the Board concedes this understanding of CMEs gives the government the right to censor their content (as well as the content of other continuing education courses). Ans. Br. at 37 (calling Dr. Khatibi "absolutely correct" about this fact). Where Dr. Khatibi and the Board part ways is whether such censorship should concern the Court.

775. Despite clear parallels to the Board's implicit bias mandate, the Board does not even acknowledge *NIFLA* in its opposition.

The Board's approach also risks erasing the boundary between the government speech doctrine and the government-employee speech doctrine. AOB at 37–40. Dr. Khatibi warns that if the Board can control the speech of private individuals on public matters, it could also suppress the speech of government employees on similar topics. Such a result would undermine precedents like *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Yet again, the Board's response just begs the question: "Plaintiffs are not government employees speaking in their private capacity but private citizens." Ans. Br. at 38.

The Board's reluctance to grapple with the First Amendment implications of its rule is deeply concerning. As the Supreme Court has cautioned, courts "must exercise great caution before extending our government-speech precedents," because failing to do so renders the doctrine "susceptible to dangerous misuse." *Tam*, 582 U.S. at 235. For the reasons discussed here and in Dr. Khatibi's opening brief, classifying CMEs as government speech would be a drastic misuse.

III. PLAINTIFFS ALLEGE AN UNCONSTITUTIONAL CONDITION ON SPEECH

As alleged in Dr. Khatibi's complaint, ER-041–042, and as stated in the AOB at 43, it is Dr. Khatibi's ability *to teach* CMEs for credit that is being unconstitutionally conditioned by the Board. The Board misstates the conditioned benefit, arguing instead that Dr. Khatibi challenges a physician's right to *receive* CME credit. *See* Ans. Br. at 40.

From this incorrect premise, the Board concludes that the condition "is rationally related to the benefit conferred." Ans. Br. at 40 (quoting *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 700 (9th Cir. 1984)). According to the Board, Cal. Bus. & Prof. Code § 2190.1(d) "ensur[es] that residents of all demographic groups receive quality healthcare" because "implicit bias 'contributes to health disparities by affecting the behavior of physicians.'" Ans. Br. at 43. But we are in this Court on a motion to dismiss, and the Board's argument is directly disputed by allegations in Plaintiffs' First Amended Complaint.

Plaintiffs allege that "the efficacy of implicit bias training in reducing disparities and negative outcomes in healthcare is controversial in the medical community and lacks evidence." ER-030. Plaintiffs also allege that: (1) "[t]here is inconsistent evidence that implicit bias in

healthcare is prevalent and results in disparate treatment outcomes"; (2) that "there is no evidence-based consensus that trainings intended to reduce implicit bias are effective"; (3) that implicit bias trainings can be counterproductive; (4) that "there are no measures to assure [implicit bias] trainings are effective"; and (5) that section 2190.1(d) "is unlikely to address the problem of implicit bias in healthcare, if [there is] any." ER-035 (cleaned up).

The district court was wrong to ignore these well-pled allegations in favor of the Board's unsupported views of implicit bias. *Dent v. National Football League*, 968 F.3d 1126, 1130 (9th Cir. 2020) ("Dismissal is only proper where the allegations in the complaint do not factually support a cognizable legal theory."). *See also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 214–15 (2013) (condition unconstitutional where government employs it to "regulate speech outside the contours of the [government] program"). Discovery is necessary to determine whether section 2190.1(d) contributes to the Board's stated aims of reducing disparities in healthcare and ensuring doctors are adequately trained in implicit bias.

The need for discovery here is underscored by the Board's belief that "nothing prevents instructors from providing their own viewpoints on implicit bias or informing students that they do not agree with the State's viewpoint on the topic." Ans. Br. at 24–25. If that's true—and there is no reason to believe it is[10]—it would undermine the Board's rationale for the rule. After all, if CME instructors can inform course attendees that they believe implicit bias to be ridiculous, unproven, prejudicial, and morally repugnant, then how are physicians being "adequately trained" in a topic the "State considers essential to maintaining competence" in the medical field? *See* Ans. Br. at 43. Likewise, the Board does not explain how physicians can be properly trained in implicit bias when *all* CME instructors must include discussion of implicit bias regardless of their knowledge of or expertise in the subject.

Nor is this a case where "any individual" seeks to "enjoin State-mandated curriculum they deem controversial." *See* Ans. Br. at 44. This

[10] Similarly, the Board's claim that Plaintiffs "are free to speak and receive whatever messages they want outside the context of CME instruction," Ans. Br. at 40, is contradicted by Plaintiffs' allegations, *see* ER-037 ("it is unlikely that physicians would elect to take" a course taught by Plaintiffs if it did not qualify for CME credit).

case concerns decorated physicians who have long taught CME courses approved by the Board. They allege that section 2190.1(d) does not satisfy the professional, evidence-based standards of the profession. The Board's contrary view—that implicit bias is "closely related," Ans. Br. at 43, to serving the Board's interest in ensuring availability of quality healthcare—has no basis in any fact this Court can credit. *See Swartz*, 476 F.3d at 763 ("[O]n a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice."). The controversy over implicit bias trainings is highly relevant to whether teaching CMEs can be conditioned on including such trainings.

The Board's motion to dismiss Plaintiffs' unconstitutional-condition claim is premised on the Court's unquestioning acceptance of the Board's view that implicit bias is a prevalent problem in health care. *See* Ans. Br. at 43. Because Plaintiffs have alleged otherwise—allegations that must be construed as true at this stage of the proceedings—the district court's dismissal of Plaintiffs' claim must be reversed.

CONCLUSION

The decision of the district court should be reversed.

DATED: December 16, 2024.

Respectfully submitted,

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I hereby certify that on December 16, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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9th Cir. Case Number: 24-3108

I am the attorney or self-represented party.

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