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

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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

TABLE OF CONTENTS

CORPORATE DISCLOSURE i
TABLE OF AUTHORITIES iv
JURISDICTIONAL STATEMENT 1
STATEMENT OF THE ISSUES 1
STATUTORY PROVISION RULE 28-2.7 2
INTRODUCTION 2
STATEMENT OF THE CASE 5
A. The Controversial Implicit Bias Training Mandate 5
B. Dr. Khatibi's and Do No Harm's CMEs 7
C. Procedural History 9
SUMMARY OF ARGUMENT 10
ARGUMENT 12
I. STANDARD OF REVIEW 12
II. CME INSTRUCTION IS PRIVATE SPEECH 13
A. There Is No History of CMEs as Government Speech 14
B. The Public Perceives the Content of CMEs as Coming from Private Instructors 19
C. The Government Does Not Control the Content of CMEs 26
III. TREATING CMEs AS GOVERNMENT SPEECH WOULD SIGNIFICANTLY UNDERMINE FIRST AMENDMENT PROTECTIONS 30
A. Treating Continuing Education Courses as Government Speech Expands the Government Speech Doctrine Beyond Reason 32
B. Treating Continuing Education Courses as Government Speech Would Swallow the Compelled Speech Doctrine 34
C. Treating Continuing Education Courses as Government Speech Would Swallow the Government-Employee Speech Doctrine 38

IV. PLAINTIFFS SUFFICIENTLY ALLEGE AN UNCONSTITUTIONAL CONDITION 42
CONCLUSION 45
CERTIFICATE OF SERVICE 46
CERTIFICATE OF COMPLIANCE FOR BRIEFS 47

TABLE OF AUTHORITIES

Page(s)

Cases

303 Creative LLC v. Elenis,
600 U.S. 570 (2023) 38

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,
570 U.S. 205 (2013) 35–36

All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.,
651 F.3d 218 (2d Cir. 2011), *aff'd* 570 U.S. 205 (2013) 36

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 13, 18, 20, 44

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 12

Byrum v. Landreth,
566 F.3d 442 (5th Cir. 2009) 17

Cajune v. Indep. Sch. Dist. 194,
105 F.4th 1070 (8th Cir. 2024) 16–17, 20–21, 28

Chambers v. Herrera,
78 F.4th 1100 (9th Cir. 2023) 12

Demers v. Austin,
746 F.3d 402 (9th Cir. 2014) 39–40

Dobbs v. Jackson Women's Health Org.,
597 U.S. 215 (2022) 4

Downs v. Los Angeles Unified Sch. Dist.,
228 F.3d 1003 (9th Cir. 2000) 24

Epstein v. Washington Energy Co.,
83 F.3d 1136 (9th Cir. 1996) 13, 18, 22

Fayer v. Vaughn,
649 F.3d 1061 (9th Cir. 2011) 12

Garcetti v. Ceballos,
547 U.S. 410 (2006) 3, 39, 41

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 24

Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 38

Kotler v. Webb,
No. 19-2682-GW-SKx, 2019 WL 4635168
(C.D. Cal. Aug. 29, 2019) 15, 25, 29

Matal v. Tam,
582 U.S. 218 (2017) 2, 13–16, 19, 21, 25, 27, 29, 33

Nampa Classical Academy v. Goesling,
447 F. App'x 776 (9th Cir. 2011) 24, 40

Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra,
585 U.S. 755 (2018) 31, 34, 36–37

Ogilvie v. Gordon,
No. 20-cv-01707-JST, 2020 WL 10963944
(N.D. Cal. July 8, 2020) 15, 25, 29

Perry v. Sindermann,
408 U.S. 593 (1972) 42–44

Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty.,
391 U.S. 563 (1968) 31, 38–40

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009) 3, 14, 28

Roe v. Wade,
410 U.S. 113 (1973) 4

Rust v. Sullivan,
500 U.S. 173 (1991) 35

Shurtleff v. City of Boston,
596 U.S. 243 (2022) 2, 13–14, 16–17, 28–29

W. Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 35, 38

Walker v. Texas Div., Sons of Confederate Veterans, Inc.,
576 U.S. 200 (2015) 2–3, 11, 14–15, 17, 22, 28

Wooley v. Maynard,
430 U.S. 705 (1977) 37

Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio, 471 U.S. 626 (1985) 37

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

Cal. Bus. & Prof. Code § 2190 .... 16, 26

Cal. Bus. & Prof. Code § 2190.1 .... 5, 7–8

Cal. Bus. & Prof. Code § 2190.1(a) 22, 26

Cal. Bus. & Prof. Code § 2190.1(d) 8, 20, 23, 27, 29

Cal. Bus. & Prof. Code § 2190.1(d)(1) 2, 4–5, 22

Cal. Bus. & Prof. Code § 2190.1(d)(3) 27, 30

Cal. Bus. & Prof. Code § 2190.1(e) 3, 6, 30

Cal. Educ. Code § 48222 19

Rules of Court

Fed. R. App. P. 4(a)(1)(A) 1

Fed. R. Civ. P. 25(a) 7

Other Authorities

Alliance Defending Freedom, Legal Academy,
https://adflegal.org/training/legal-academy 33

American Bar Association,
https://www.americanbar.org/events-cle/mtg/web/445092563/ 41

American Civil Liberties Union, LGBTQ Cultural Competency CLE, https://www.aclu-ms.org/en/lgbtq-cultural-competency-cle 33

American Medical Association, AMA EdHub,
https://edhub.ama-assn.org/by-topic 26, 33

Cal. Code Regs. tit. 16, § 87.1 19

Cal. Code Regs. tit. 16, § 1336(a) 22

Cal. Code Regs. tit. 16, § 1337(a) 26

Cal. Code Regs. tit. 16, § 1337.5(b) 27

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. The district court's order dismissing Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief is a final decision over which this Court has appellate jurisdiction. *See* 28 U.S.C. § 1291. The district court's order was entered on May 2, 2024. Plaintiffs-Appellants filed a notice of appeal on May 14, 2024. *See* ER-044. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE ISSUES

The issues on appeal are:

(1) Whether the district court was correct to dismiss this action because creators and presenters of continuing medical education courses are engaged in "government speech" to which the protections of the First Amendment do not apply.

(2) Whether plaintiffs have stated a claim that the right to teach continuing medical education courses for credit is unconstitutionally conditioned on forgoing their First Amendment rights.

STATUTORY PROVISION RULE 28-2.7

Cal. Bus. & Prof. Code § 2190.1(d)(1): "On and after January 1, 2022, all continuing medical education courses shall contain curriculum that includes the understanding of implicit bias."

INTRODUCTION

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), the Supreme Court held that government messages on license plates constitute government speech. It so held, because the government had a long history of speaking on license plates, the public typically understood license plate messages like "America's Dairyland" or "Sportsman's Paradise" as coming from the government, and the government had exercised significant control over the content of the messages. *Id.* at 209–14. A later court would remark that *Walker* marked the "outer bounds" of the government speech doctrine. *Matal v. Tam*, 582 U.S. 218, 238 (2017). And in two cases decided since *Walker*, the Supreme Court has refused to extend the government speech doctrine further. *See Tam*, 582 U.S. 218 (Lanham Act's trademark registration not government speech); *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) (Boston's flag raising program not government speech).

If *Walker* marks the outer bounds of the government speech doctrine, the decision below must be reversed. At issue is a government mandate that requires creators of continuing medical education courses (CMEs) to include discussion of implicit bias in every course they teach.[1] The court below dismissed this case because it held that "CME courses in California [are] government speech." ER-016. That simply cannot be. CMEs are private speech, just like the continuing legal education courses (CLEs) in law. CMEs are created by private speakers about medical topics so doctors can improve at their jobs. Government oversight is minimal.

A holding by this Court that continuing education courses constitute government speech would be momentous. If such courses are government speech, the government can censor the content of such courses. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) (government can choose which messages it wants to convey). The government could punish speakers who don't toe the government line.

[1] The mandate is not a ministerial recitation of the concept. Private instructors must include instruction on how implicit bias affects health outcomes or how implicit biases lead to racial and gender disparities in medicine. Cal. Bus. & Prof. Code § 2190.1(e).

See Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (government may discipline employees for non-conforming speech). One state could, for example, require all CLE courses to include discussion on the virtues of *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 241 (2022), and it could punish those lawyers who refuse to include such a discussion. Another could do the same for *Roe v. Wade*, 410 U.S. 113 (1973). Still another state's medical board could require that CMEs include content on the dangers of COVID-19 vaccinations, while a neighboring state could mandate each course laud the benefits of vaccination. Censorship of content and punishment for speaking contrary views would be permissible if CMEs are government speech.

These dangers are not mere hypotheticals, they are the precise allegations made by Plaintiffs Dr. Khatibi and Do No Harm in this case. California is dictating that Dr. Khatibi include discussion of implicit bias in each of the CMEs she teaches. Cal. Bus. & Prof. Code § 2190.1(d)(1); ER-036. Implicit bias has nothing to do with the courses she teaches. ER-036–037. The nature of implicit bias is controversial, and the idea that trainings help overcome implicit biases is even more controversial and patently unproven. ER-034–035. Dr. Khatibi objects to the inclusion of

implicit bias in her courses for personal and scientific reasons. ER-036–037. Yet, she is punished if she does not include it in her well-regarded courses as they will not be eligible for credit. ER-037.

Reversing the decision below does not automatically mean Plaintiffs win on the merits of their compelled speech and unconstitutional condition claims. There are still traditional First Amendment questions that need to be litigated. Is the implicit bias mandate a content- or viewpoint-based distinction? Does it compel speech? Does the government have a compelling interest for the mandate? Is the law properly tailored? But none of these questions can be litigated until this Court reverses the patently incorrect decision below.

STATEMENT OF THE CASE

A. The Controversial Implicit Bias Training Mandate

In 2019, the California legislature enacted, and the Governor signed, AB 241. Relevant here, the bill amended Cal. Bus. & Prof. Code § 2190.1 to require that "[o]n and after January 1, 2022, all continuing medical education courses shall contain curriculum that includes the understanding of implicit bias." § 2190.1(d)(1). To qualify for continuing education credit with the Medical Board of California, all CMEs must

now include: "[e]xamples of how implicit bias affects perceptions and treatment decisions of physicians and surgeons, leading to disparities in health outcomes," or "[s]trategies to address how unintended biases in decisionmaking may contribute to health care disparities by shaping behavior and producing differences in medical treatment along lines of race, ethnicity, gender identity, sexual orientation, age, socioeconomic status, or other characteristics," or a combination of both. § 2190.1(e).

There is no consensus definition of "implicit bias," but the concept refers to stereotypical beliefs or attitudes that individuals unconsciously possess toward others, which can result in discriminatory actions taken by an implicitly biased individual when those beliefs or attitudes are activated. ER-034. Some are concerned that if a physician is implicitly biased toward a patient under his or her care, then that patient will receive disparately worse care. ER-034. However, that point of view is not commonly accepted and is controversial. There is inconsistent evidence that implicit bias is even prevalent in healthcare or that it causes disparate treatment outcomes. ER-035.

More controversial still is the effectiveness of implicit bias *training*. Assuming there are implicit biases in healthcare that are the cause of

disparate outcomes, there remains a dearth of evidence that trainings intended to reduce implicit bias are effective. ER-035. Instead, ample evidence shows that such trainings can be counterproductive by causing anger, frustration, and resentment among attendees. ER-035. Neither section 2190.1, nor any other California statute or regulation, ameliorates the counterproductive results of implicit bias trainings by implementing recognized criteria for effective trainings. ER-035.

B. Dr. Khatibi's and Do No Harm's CMEs[2]

Plaintiff-Appellant Azadeh Khatibi, M.D., is an ophthalmologist in Los Angeles. ER-035. Over the years, the CME courses she organizes and teaches have covered many topics in medicine and ophthalmology, including retinal tumors, glaucoma, and other ocular diseases, as well as systemic diseases. ER-035–036.

Dr. Khatibi enjoys sharing her knowledge and teaching CMEs. ER-036. Each of the courses that Dr. Khatibi taught and organized were approved by authorized continuing medical education accreditors. ER-

[2] After the Notice of Appeal was filed in this case, Plaintiff-Appellant Marilyn M. Singleton, M.D., passed away. As the relief sought by Dr. Singleton was for prospective declaratory and injunctive relief, Dr. Singleton should be dismissed from this appeal. *See* Fed. R. Civ. P. 25(a)(1)–(2).

036. The content for each of the courses taught by Dr. Khatibi was created and compiled by her alone. ER-036.

While Dr. Khatibi would like to continue teaching CMEs, the implicit bias requirement of section 2190.1 is problematic for her. She does not want to include discussion of implicit bias in her courses. It is not relevant to her topics, and it would eat away at the limited time she could use to discuss topics that are relevant. ER-036–037. This is especially true given the lack of evidentiary support for implicit bias trainings and the significant time constraints usually present in delivering CMEs, which limit the amount of information capable of being presented. ER-036–037. Dr. Khatibi also disagrees that implicit bias is the primary factor driving disparities in healthcare. ER-037. And because Dr. Khatibi's courses do not generally cover disparities in care, and there is limited time available for instruction in a given course, section 2190.1(d)'s mandate to include discussion of implicit bias prevents her from having a more robust and appropriate discussion of the topics in her CMEs. ER-037.

Plaintiff-Appellant Do No Harm is a national nonprofit corporation with members comprised of physicians, healthcare professionals, medical

students, patients, and policymakers united by a mission to protect healthcare from radical, divisive, and discriminatory ideologies. ER-031, 039. Do No Harm's members believe that all patients deserve access to the best possible care and that barriers to care should be broken down. ER-039. Do No Harm has at least one member who teaches, has taught, and intends to teach CMEs in the future for credit in California, but that member does not want to include discussion of implicit bias in those CMEs because such trainings have not been shown to successfully reduce barriers to healthcare, and instead risk infecting healthcare decisions with divisive and discriminatory ideas. ER-039.

C. Procedural History

The initial Complaint in this case was filed on August 1, 2023. Plaintiffs challenged the implicit bias requirement as compelling their speech in violation of the First Amendment. They also challenged the implicit bias requirement as an unconstitutional condition on their right to teach CMEs for credit. The Medical Board sought dismissal of the Complaint on the grounds that CMEs and the implicit bias requirement are government speech not subject to the protections of the First Amendment. The district court (Judge Fischer) granted the motion on

December 11, 2023, with leave to amend. ER-020–028. Plaintiffs then filed their First Amended Complaint on December 22, 2023, ER-029–043, and the Medical Board again sought dismissal renewing its government speech defense to Plaintiffs' compelled speech and unconstitutional conditions claims. The district court (Judge Almadani) dismissed the First Amended Complaint without leave to amend on May 2, 2024. ER-003–019. This appeal followed. ER-044.

SUMMARY OF ARGUMENT

CMEs are private speech. They are clearly and unequivocally private speech. From the moment a creator thinks up an idea for a CME and reviews the medical literature to discover what is known and unknown about a topic, to the day it's given to an audience of doctors and medical professionals, the content of that talk is not subject to the government for editing or approval. That the Medical Board exerts some regulatory control over the medical profession generally—or CMEs specifically—does not transform these private ideas, words, and presentations into government speech.

That is the commonsense answer to this case, but it also follows directly from the Supreme Court's government speech precedent. To

determine whether CMEs are government speech, courts consider: (1) the historical context of the expression; (2) how the public is likely to perceive the speaker; and (3) the degree to which the government has actively influenced or controlled the expression. *Walker*, 576 U.S. at 209–14. Each factor weighs heavily in favor of finding that CMEs are private speech.

First, there is no history of government *expression* through CMEs. While the government has long regulated the medical profession, that is different in kind than expressing itself through CMEs. Second, Plaintiffs plainly allege that the public considers that CMEs come from the speaker, not the government. Those allegations ought to suffice at this stage of this case, but they are also plainly true. When attending a CME on how to treat rare cancers, for example, no attendee thinks they are hearing from the government. Third, the government involvement in CME creation, production, and dissemination is minimal. At most, it randomly audits CMEs *after* they are given, but that is far from exerting the tight editing and content control that would be needed to transform CMEs into government speech.

A clear application of the government speech doctrine requires reversal of the decision below. It is unsurprising then, that a contrary

ruling could have disastrous effects on traditional First Amendment protections. Because when the government speaks, it can censor the speech, and it can punish those who speak contrary to its goals. If CMEs were to be considered government speech, the amount of private speech that would come under government control is staggering. Not just the thousands of CMEs available for credit in California would be subject to government censorship and punishment, but also the tens of thousands of continuing education courses available in any host of private professions. Moreover, the ruling would swallow the compelled speech and government-employee speech doctrines whole, as any such right to expression could simply be recast as government speech.

The decision below should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A district court's dismissal of a complaint is reviewed *de novo*. *Chambers v. Herrera*, 78 F.4th 1100, 1103 (9th Cir. 2023). Motions to dismiss "will only be granted if the complaint fails to allege 'enough facts to state a claim to relief that is plausible on its face.'" *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Yet courts "must accept as true all the factual

allegations contained in the complaint," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and construe those allegations "in the light most favorable to [p]laintiffs," *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

II. CME INSTRUCTION IS PRIVATE SPEECH

The government speech doctrine prevents the government from being muzzled. *See Shurtleff*, 596 U.S. at 251–52. Just as the First Amendment protects individuals from being compelled to express messages they otherwise would not, the First Amendment does not bar the government from exercising selectivity in expressing its own messages. This is necessary "for government to work." *Id.* at 252. However, courts "must exercise great caution before extending our government-speech precedents," because the failure to do so renders the doctrine "susceptible to dangerous misuse." *Tam*, 582 U.S. at 235.

That is precisely the worry here. The district court held that "teaching CME courses in California constitutes government speech." ER-016. That decision extends the government speech doctrine to cover literally thousands of private speakers who speak in their private capacities on countless medical topics. It's not hyperbole to recognize that

the decision "constitute[s] a huge and dangerous extension of the government-speech doctrine." *Tam*, 582 U.S. at 239.

Courts must "conduct a holistic inquiry" to determine whether expression is government speech. *Shurtleff*, 596 U.S. at 252. In conducting that inquiry, the Supreme Court considers three main factors: (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." *Id*. (citing *Walker*, 576 U.S. at 209–14). All three weigh heavily in favor of CMEs being protected speech.

A. There Is No History of CMEs as Government Speech

In considering the history of the speech at issue, this Court must examine whether CMEs have historically been an avenue for the government to speak. For example, in *Summum*, the Supreme Court held that permanent monuments displayed on public property are government speech, in part, because "[g]overnments have long used monuments to speak to the public." 555 U.S. at 470. Similarly, in *Walker*, "the history of license plates shows that … they have long communicated messages from the States." 576 U.S. at 210–11. When immigrants see the

Statue of Liberty in New York Harbor, they know the government is telling them that this is a nation built on freedom. When drivers see Idahoans driving with a license plate that says, "Famous Potatoes," everyone understands that is the government's message, not the driver's. In short, because the government has historically spoken through public monuments and specialty license plate designs, that factor weighed in favor of finding the speech at issue in those cases was government speech.

On the other hand, in *Tam*, federal registration of trademarks did not convert the marks into government speech. 582 U.S. at 239. There, the Court recognized that trademarks are not created or edited by the government, and that they have not traditionally been used to express government messages. *Id.* at 235, 238. Likewise, in *Kotler v. Webb*, No. 19-2682-GW-SKx, 2019 WL 4635168, at *6–7 (C.D. Cal. Aug. 29, 2019), the district court held that—unlike the specialty license plates in *Walker*—it was "unaware of any history of states using" custom vanity license plates to speak to the public. *See also Ogilvie v. Gordon*, No. 20-cv-01707-JST, 2020 WL 10963944, at *3 (N.D. Cal. July 8, 2020) (same).

In each of these government speech cases, the courts undertook an analysis to determine if the speech at issue had a history of generally *and*

specifically being used by government to communicate with the public.[3] There is no such history with respect to CMEs. The government does not dream up CME content; it does not edit it; CMEs have never traditionally been used to convey government messages. *Cf. Tam*, 582 U.S. at 235–39.

Surprisingly, the district court agreed. ER-009 ("The Court agrees … that 'CMEs are not designed as a means of [government] expression.'"); ER-010 (CME requirements "ensure[] the continuing competence of licensed physicians and surgeons") (citing Cal. Bus. & Prof. Code § 2190). Yet even though the district court agreed that there is no history of government expression with respect to CME content, it faulted Plaintiffs for analogizing to the leading Supreme Court government speech cases. It noted that the subject matter of trademarks and monuments are not

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[3] Even where there is some history of the government communicating its message, courts must look further to determine whether the particular speech at issue has an historic pedigree. For example, in *Shurtleff*, the Supreme Court recognized that flying flags outside of government buildings has traditionally been used to "convey a governmental message" either by the content of the flag itself or by its "presence and position." 596 U.S. at 253–55. Nevertheless, the Court inquired deeper and found that the specific history of Boston's flag-flying program revealed a private purpose for the program. *Id.* at 255, 257–58; *see also Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1079 (8th Cir. 2024) (despite traditional history of schools using posters to communicate government message, the school's specific history demonstrated that the school district had opened the forum to private expression).

the same as CMEs.[4] ER-009. That's true as far as it goes, but Plaintiffs relied—and continue to rely—on those decisions because they are the leading Supreme Court cases on government speech. They ought to form the backbone of any legal analysis of a government speech defense.[5]

Rather than rely on those cases, the lower court looked to the history of government "supervision of licensing requirements" to hold that the use of CMEs to further the state's regulatory scheme "supports [] finding that teaching CME [] is government speech," ER-010, 012. The district court's novel focus on the history of regulation,[6] rather than examining the history of government expression, is not from *Shurtleff* or *Walker* or any other government speech case. *Cf. Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) (legislature could not "license speech and reduce its constitutional protection by means of the licensing alone").

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[4] The Eighth Circuit saw no issue with applying the Supreme Court's government speech cases to guide its own analysis, even though school posters were "dissimilar forms of [] expression." *Cajune*, 105 F.4th at 1079–82; ER-009.

[5] The fact that CMEs are so unlike other government speech cases ought to have signaled to the district court that the government speech defense has no applicability here.

[6] To be clear, this case does not challenge the government's ability to regulate medical professionals or to require CME. This case only challenges one specific CME requirement applicable to CME *instructors*.

Because of its myopic focus on the regulatory function of the Medical Board, the district court conjured an historical medium where the California Legislature "communicat[es] through [CME] curricula requirements the subjects it views as essential for continued medical practice in the State."[7] ER-011. But plaintiffs are not objecting to the subject matter mandated by the state in its regulatory capacity; they object that they are being compelled to include irrelevant, controversial, and unhelpful speech in the content of the CMEs they have created on their own in their personal expressive capacity. At most, the district court's conclusion shows that the government is communicating the importance of certain subjects to medical professionals, but that does not establish that the content of CMEs taught by CME instructors is used by the government to communicate to the public.

Were *regulatory history* sufficient to transform private speech into government speech, the results would be sweeping. For example, in

[7] It is troubling that the district court, *sua sponte*, hypothesized a separate communication that may have historical pedigree. *See Iqbal*, 556 U.S. at 678 (courts "must accept as true all the factual allegations" in the complaint"); *Epstein*, 83 F.3d at 1140 (allegations must be construed "in the light most favorable to [p]laintiffs"). In any event, for the reasons stated above, even the district court's hypothesized justification fails.

California alone, licensed professions from accountants to pest control operators to veterinarians have continuing education requirements and a history of extensive state regulation. *See* Cal. Code Regs. tit. 16, §§ 87.1; 1950; 2085.1. Even *private* K-12 instruction could qualify as government speech due to the state's mandate that certain subjects be taught. Cal. Educ. Code § 48222. The district court's novel analysis is a "dangerous misuse" of the government speech doctrine that the Supreme Court warned about in *Tam*, 582 U.S. at 235, and should be reversed.

B. The Public Perceives the Content of CMEs as Coming from Private Instructors

As alleged in the First Amended Complaint, the public perceives the content of CMEs as coming from private instructors, not the government. ER-041. Dr. Khatibi alleges that "during and after CMEs taught by [her], attendees treat her as the person responsible for the content discussed." ER-036. Attendees engage in conversation and debate with Dr. Khatibi about the content taught by her and even complete evaluations about her effectiveness and whether her presentation exhibited any bias. ER-036. Dr. Khatibi also alleges that "attendees are likely to attribute the content of CMEs taught by [her] as coming from her [and] not the Medical Board," because section 2190.1(d) requires her

to articulate her own "examples" of, or "strategies" to prevent, implicit bias. ER-037.

The district court, however, was "unpersuaded" by these allegations in the complaint. *See* ER-012. Instead, it credited Defendants' contrary argument that "physicians taking Plaintiffs' CMEs … are likely to perceive the course content as coming from the State, not private individuals." ER-012–013. While any lawyer who has ever given (or even attended) a CLE would disagree, on a motion to dismiss, it shouldn't matter. Plaintiffs are not required to persuade the district court of the truth of their factual assertions, nor is the lower court allowed to credit a defendant's contrary factual statements. *See Iqbal*, 556 U.S. at 678.

At least twice, the district court also erred in construing Plaintiffs' allegations *against* them. *See Cajune*, 105 F.4th at 1080–81 (district court must countenance reasonable inferences *in support* of plaintiffs' claims). First, Plaintiffs allege that physicians are unlikely to take CMEs offered by Plaintiffs unless the courses are eligible for CME credit. ER-037. To the district court, those allegations "lead to the inference … that physicians take Plaintiffs' CMEs because they know the content meets

State requirements and comes from the State." ER-013.[8] But just because individuals understand that a CME course meets state requirements, that does not lead to the inference that it *comes from* the state. Such an inference certainly cannot be assumed against Plaintiffs at this stage. Furthermore, the district court's inference makes the mistake that the Court warned about in *Tam*. The awarding of CME credit for courses taught by Plaintiffs is no more than the "government seal of approval" that the Court held was insufficient to turn private speech into government speech. 582 U.S. at 235. *See also Cajune*, 105 F.4th at 1081.

Second, the district court improperly rejected Plaintiffs' allegations that CME course attendees evaluate Plaintiffs, *see* ER-036, and that Plaintiffs must provide their own "examples" of, and "strategies" to avoid, implicit bias. ER-037; ER-014. It did so by making factual inferences contrary to the First Amended Complaint. ER-014 (Plaintiffs' allegations do "not alter the reasonable inference that CME curriculum … is

[8] In support of that inference, the district court cited Judge Fischer's prior dismissal order. *See* ER-013. But Judge Fischer expressly concluded that "it is not clear whether attendees are likely to attribute the content of CMEs to the instructor or to the state." ER-025. Following Judge Fischer's order, Plaintiffs alleged in the First Amended Complaint that attendees do not attribute CME content to the state. ER-036–037, 041.

'conveying some message on the government's behalf.'") (citing *Walker*, 576 U.S. at 212). Because the district court did not accept Plaintiffs' factual allegations as true or construe them "in the light most favorable to Plaintiffs," *Epstein*, 83 F.3d at 1140, the district court committed reversible error.

Irrespective of Plaintiffs' allegations, it is self-evident from California's CME regime that even the Legislature considers CMEs to be associated with course instructors. Physicians are required to take 50 hours of CME biennially. Cal. Code Regs. tit. 16, § 1336(a). Cal. Bus. & Prof. Code § 2190.1(a) identifies a wide array of nonexclusive topics that will be approved for credit so long as an individual course is first approved by certain *private* organizations. A few specific topics are also mandated. *See* §§ 2190.3 (geriatric medicine for certain providers); 2190.5 (pain management and treatment of terminally ill and dying patients); 2190.6 (opiate dependence). In addition to those mandated *topics*, section 2190.1(d)(1) imposes the discussion of implicit bias into each *course*. But just because there is a government-mandated discussion of an issue does not mean the public recognizes the content of that discussion—which is

approved and provided by private groups and physicians—as the *government's speech*.

It would be one thing if—similar to the mandated courses on geriatric medicine and pain management—all physicians were required to simply take a course on implicit bias.[9] All physicians would know that they must take a course on that topic, and instructors could voluntarily choose to teach courses on the topic. Instructors could also provide varying viewpoints on the issue. *See*, *e.g.*, Implicit Bias Training for Michigan Healthcare Professionals, presented by Do No Harm.[10] Section 2190.1(d), however, requires instructors of all courses—regardless of topic—to insert discussion of implicit bias into their courses. This indirect method leads physician-attendees to view the discussion on implicit bias as coming from the instructor. ER-036. Indeed, that's the whole point of the mandate.

This Court's school curriculum cases do not caution otherwise. The district court analogized that line of cases, finding them a helpful

[9] California attorneys, for example, must obtain two credits on implicit bias each MCLE cycle. https://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements.

[10] https://beacon360.content.online/xbcs/S2663/catalog/product.xhtml;jsessionid=654e3839cb2bd6653c9636ac796d?eid=56149.

comparison to Plaintiffs' teaching of CMEs. ER-013–014. But those cases are far afield from this case, where public entities or public officials are speaking. *Nampa Classical Academy v. Goesling*, 447 F. App'x 776, 778 (9th Cir. 2011), explains the school curricula line of cases succinctly. There, this Court held that because charter schools "are governmental entities, the curriculum presented in such a school is not the speech of teachers … but that of the [state] government." This Court so held "because the message is communicated by employees working at institutions that are state-funded, state-authorized, and extensively state-regulated." *Id*. The remaining cases cited by the district court follow a similar path. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (public school officials free to "exercise great[] control over" expressive activities of students that "may fairly be characterized as part of the school curriculum"); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1005 (9th Cir. 2000) (public high schools may decline to allow views that are "antagonistic and contrary" to the school's own to be expressed on school property to students by one of the school's teachers). None of the characteristics of the school curriculum cases are present here, where private individuals voluntarily teach CMEs to private

licensed physicians, under the auspices of private organizations responsible for accrediting the courses, and largely unsupervised by the government except for the broad standards and a few mandated inclusions.

In *Tam*, there was "no evidence that the public associates the contents of trademarks with [the government]." 582 U.S. at 238. The Court noted it was "unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means." *Id*. at 237. And in *Kotler*, the district court recognized that, "it strain[ed] believability to argue that viewers perceive the government as speaking through personalized vanity plates." 2019 WL 4635168, at *7. *See also Ogilvie*, 2020 WL 10963944, at *3–4.

If "[t]he public understands the difference" between specialty plate designs and custom vanity license plates, *Kotler*, 2019 WL 4635168, at *7, then so too does the public understand the difference between the government requiring private organizations to develop CMEs covering

certain issues to be taught by private instructors and, for example, the Medical Board itself creating and communicating information.[11]

C. The Government Does Not Control the Content of CMEs

California exercises little control over the content of CMEs. While the Medical Board is responsible for "adopt[ing] and administer[ing] standards" for CMEs, Cal. Bus. & Prof. Code § 2190, it has outsourced the implementation of standards to private organizations and instructors. *See* § 2190.1(g); Cal. Code Regs. tit. 16, § 1337(a). The 3,343 courses available on the American Medical Association's website,[12] for example, represent just a fraction of the courses that are eligible for CME credit. *See also* Cal. Bus. & Prof. Code § 2190.1(a) (educational activities that satisfy CME standards "may include, but are not limited to…"). It is inconceivable that the government exercises control over the content of

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[11] It's not hard to see the difference between the government speaking and private individuals. *Compare* California Department of Health, *CDPH Issues Statement on Omicron Variant* (Nov. 28, 2021), https://www.cdph.ca.gov/Programs/OPA/Pages/NR21-338.aspx *with* Sukhyun Ryu *et al*, *Association Between the Relaxation of Public Health and Social Measures and Transmission of the SARS-CoV-2 Omicron Variant in South Korea* (Aug. 2022), https://edhub.ama-assn.org/jn-learning/module/2795165?resultClick=1&bypassSolrId=J_2795165. The latter is available for CME credit; the former is not.

[12] https://edhub.ama-assn.org/by-topic.

thousands of courses it does not create, supervise, participate in, or even audit. Indeed, all CMEs approved by these private bodies are presumptively awarded CME credit. ER-033 (citing Cal. Code Regs. tit. 16, § 1337.5(b)).

The same goes for the implicit bias requirement. Section 2190.1(d)(3) fully outsourced the development of "standards" for implicit bias instruction to private "[a]ssociations that accredit [CME] courses." Should any standards require updating, the private associations are to do so "in conjunction with an advisory group established by the [private] association that has expertise in the understanding of implicit bias." § 2190.1(d)(3).

Nor is the content of CMEs taught by Plaintiffs controlled by the government. All courses taught and organized by Dr. Khatibi were approved by authorized CME providers—not the government—and other than the discussion required by section 2190.1(d), the content of each course "was created and compiled by her without any supervision, approval, control, or input by any government official." ER-036. The Medical Board has never audited *any* of her courses. ER-036.

Putting all that aside, the district court again made the mistake warned of in *Tam*, 582 U.S. at 235. That the Medical Board "alone has [] final authority" in determining "which courses are ultimately approved" for CME credit, ER-016, is just a "government seal of approval" that "is insufficient by itself to transform private speech into government speech." *Cajune*, 105 F.4th at 1081.

The lack of control over the content of CMEs stands in stark contrast to *Summum*, where the Court noted the history of municipalities using various methods to "exercise editorial control" over the monuments they chose to erect. 555 U.S. at 472. Editorial control is necessary because monuments displayed on public property are "meant to convey and have the effect of conveying a government message." *Id*. Likewise, in *Walker*, Texas law granted the government "sole control" over license plates, thus the government had to "approve every specialty plate design proposal before the design can appear on a Texas plate." 576 U.S. at 213. Unlike *Summum* and *Walker*, the Board does not "exercise editorial control" over, or even approve, CMEs.

Even though the governmental control was much greater in both *Shurtleff* and *Tam* than it is here, the Court in those cases held it was

insufficient to invoke the government speech doctrine. In *Shurtleff*, the City of Boston permitted private groups to display flags of their choosing on one flagpole outside of city hall. 596 U.S. at 248. The Court held that the display of private groups' flags on a city flagpole was not government speech because the city exerted no control over the messages conveyed by the flags. *Id*. at 256–57. Similarly, in *Tam*, so long as trademarks sought for registration met viewpoint-neutral requirements, registration of the mark by the Patent and Trademark Office was mandatory. 582 U.S. at 235. And in *Kotler*, while the government had to approve every proposed customized vanity license plate, it was "nonsensical" to conclude that government approval of hundreds of thousands of custom plates in California equated to the "direct control" contemplated under the Supreme Court's government speech precedents. 2019 WL 4635168, at *7. *See also Ogilvie*, 2020 WL 10963944, at *4 ("The fact that the government exerts regulatory control over speech cannot, on its own, transform that speech into government speech.").

Nor does the government exert sufficient control over the implicit bias requirement to convert content meant to satisfy just that requirement into government speech. Section 2190.1(d) states that all

courses must include "[e]xamples of how implicit bias affects perceptions and treatment decisions of physicians and surgeons, leading to disparities in health outcomes," or "[s]trategies to address how unintended biases in decisionmaking may contribute to health care disparities by shaping behavior and producing differences in medical treatment along lines of" various individual characteristics, or a combination of both. § 2190.1(e). Within those broad parameters, the content is left entirely to the discretion of instructors and private accrediting organizations. *See* § 2190.1(d)(3); ER-037.

III. TREATING CMEs AS GOVERNMENT SPEECH WOULD SIGNIFICANTLY UNDERMINE FIRST AMENDMENT PROTECTIONS

As the previous section demonstrates, under a straightforward application of the Supreme Court's and this Court's government speech precedents, CMEs are plainly not government speech. They are courses given by private individuals, in their private capacity, to doctors and other medical professionals to advance their professional competency. There is minimal government involvement in CME instruction. CMEs represent a broad spectrum of medical topics and perspectives, reflecting the diverse viewpoints of the private individuals who design and deliver

the courses. The government's role in requiring CMEs is regulatory, not expressive.

The district court's judgment that such private courses constitute speech by the government stretches the government speech doctrine beyond coherence. It would have significant detrimental effects on the application of the First Amendment. Most obviously, the vast scope of countless professional development courses—from CLEs given by judges and lawyers, to CMEs given by doctors and professors—would be transformed into government speech. Such a sweeping ruling ought to give any court pause. Equally problematic is the effect the district court's decision would have on bedrock First Amendment doctrines like compelled speech or government-employee speech. Decisions like *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 585 U.S. 755 (2018), and *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563 (1968), lose all salience in a world where general government regulation of a profession is sufficient to transform protected private speech into unprotected government speech.

A. Treating Continuing Education Courses as Government Speech Expands the Government Speech Doctrine Beyond Reason

The district court's characterization of CMEs as government speech fundamentally misinterprets the nature of these programs. CME requirements are mandated by the legislature and Medical Board to ensure that medical professionals remain knowledgeable about medical developments and maintain professional competency. These programs, however, are not created, funded, or directly controlled by the government. CMEs are developed and delivered by private individuals, educational institutions, and professional organizations. If CMEs are government speech simply because they are mandated by the state, then any mandatory educational program for professionals could be similarly classified.

Starting with CMEs directly, under the district court's decision the State of California is speaking on such wide-ranging topics as the efficacy of endoscopic endonasal surgical navigation, to the extent to which doctors ought to emphasize sexual orientation and gender identity in

cardiovascular care.[13] But in *Tam*, the Supreme Court thought absurd the idea that government registration of a federal trademark made the mark government speech. 582 U.S. at 236. Surely then, the mere involvement of government in the regulation of a profession is only more ridiculous. Just like the argument rejected in *Tam,* here California would be "babbling prodigiously and incoherently. It is saying many unseemly things. [] It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public." *See id.*

In law—and there's no reason for CLEs to be treated any differently than CMEs—lawyers and judges that give presentations for credit would be speaking on behalf of the government. But CLEs often have completely contradictory views. Are CLEs given by attorneys from the Alliance Defending Freedom[14] and CLEs given by attorneys from the American Civil Liberties Union[15] *both* espousing government views? Equally problematic would be if the government was choosing one group's CLEs

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[13] These are just two of thousands of courses available for CME credit in California that are offered by the American Medical Association. *See* https://edhub.ama-assn.org/by-topic.
[14] https://adflegal.org/training/legal-academy.
[15] https://www.aclu-ms.org/en/lgbtq-cultural-competency-cle.

over the other. Allowing the government to be the gatekeeper of the content of continuing education courses is a future that would make Orwell blush.

The expansion of the government speech doctrine to continuing education courses would allow significant government censorship of CMEs and other continuing education courses. If it's truly the government's speech, then it can say what ought to be and what ought not be spoken. It also would undoubtedly chill free speech as professionals would self-censor to avoid conflicts with government-imposed viewpoints. This Court should not countenance the perversion of such bedrock free speech rights.

B. Treating Continuing Education Courses as Government Speech Would Swallow the Compelled Speech Doctrine

The compelled speech doctrine, which stands as a counterbalance to the government speech doctrine, prohibits the government from forcing individuals or entities to speak or endorse particular messages. *See NIFLA*, 585 U.S. at 766. The doctrine is rooted in the principle that freedom of speech includes both the right to speak and the right not to speak. "If there is any fixed star in our constitutional constellation, it is

that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In *Rust v. Sullivan*, the Supreme Court rejected a First Amendment challenge to Title X regulations that prohibited projects that received government funding from engaging in abortion counseling. 500 U.S. 173, 200 (1991). In rejecting the challenge, the Court recognized that this is not a scenario—unlike California's CME regime—where the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold." *Id.* Accordingly, the government could restrict its own *subsidy* to the medical purposes it chose. *Id.*

A similar issue arose in *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013). There, the Court was addressing the constitutionality of a condition on federal funding that prohibited organizations combating HIV/AIDS from advocating for legalized prostitution. *Id.* at 208. The Court held that the condition violated the First Amendment because it compelled "a grant recipient to adopt a particular belief as a condition of funding." *Id.* at 218. It distinguished *Rust* on the grounds that the view being compelled was not part of the

funding program. *Id.* (the regulations go "beyond defining the limits of the federally funded program").[16]

Here, of course, the government is not subsidizing any speech; the implicit bias mandate is only regulatory. However, the implicit bias mandate requires doctors like Dr. Khatibi to adopt a particular view of a highly controversial subject. ER-034–037. It requires her to introduce that highly controversial subject in every course she gives, irrespective of its relevance to the subject matter. The mandate goes well beyond the regulatory purpose of CMEs and forces private individuals to adopt the government's message.

More to the point, if the government speech doctrine attaches to CMEs by virtue of the government's regulatory involvement in the medical profession, *NIFLA* makes no sense. At issue in *NIFLA* was a California regulation that required licensed pregnancy centers to post notices about low-cost abortions and provide pregnant women a phone

[16] *Alliance for Open Society* is important for an additional reason. In the Second Circuit, the government argued that the speech at issue was government speech, but at the Supreme Court the government *abandoned* that argument. *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 237 (2d Cir. 2011), *aff'd* 570 U.S. 205 (2013). The Second Circuit explained that if government speech applied to such instances, "the exception would swallow the rule." *Id.* at 238.

number to call. 585 U.S. at 761. The government even provided the precise text that the centers had to post. *Id.* at 763. The Supreme Court held this violated the First Amendment because, "California cannot co-opt the licensed facilities to deliver its message for it." *Id.* at 775. *Cf. Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 650–51 (1985) (mandated disclosures of "purely factual and uncontroversial information" in commercial advertising implicate an advertiser's First Amendment rights).

The same is true here. California cannot co-opt CMEs to deliver its message simply because it maintains regulatory control over the licensing of doctors. After all, it maintains that same licensing control over California pregnancy centers too. The First Amendment prohibits government from "forc[ing] individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" 585 U.S. at 780 (Kennedy, J., concurring) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

The list goes on. Indeed, there is nary a compelled speech decision by the Supreme Court that couldn't be recast as government speech if the decision below were to stand. For example, because the government

maintains tight regulatory control over public elementary schools, it could compel resuscitation of the Pledge of Allegiance. *But see Barnette*, 319 U.S. 624. Because the government maintains regulatory control over parades on public streets, it could compel parade organizers to include government messages. *But see Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). Because the government enforces non-discrimination in public accommodations it could require website designers to create websites contrary to their conscience. *But see 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). There is simply no daylight for a compelled speech doctrine under the ruling below.

C. Treating Continuing Education Courses as Government Speech Would Swallow the Government-Employee Speech Doctrine

The compelled speech doctrine is not the only First Amendment protection that would be swallowed by the ruling below. *Pickering* and other government-employee speech cases become irrelevant as well. If regulatory oversight of a profession suffices to allow government to force *private* citizens to express government messages with which they

disagree, then government employees could surely be required to do the same.

In *Pickering*, the Supreme Court set out a balancing test to determine when a government employee may speak openly on matters "related to scholarship or teaching." *Pickering*, 391 U.S. at 574; *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). Later in *Garcetti v. Ceballos*, the Court explained that government employees retain First Amendment rights when speaking in their private capacity on matters of public concern but not when speaking pursuant to their official duties. 547 U.S. at 424.

Undergirding both *Pickering* and *Garcetti* is that *government employees* enjoy robust First Amendment protections when they are not speaking pursuant to their government employment. But under the district court's reasoning here, *private citizens* lack First Amendment protections even if they are speaking on matters of public concern. As explained above, *see supra* Part III-A, this reasoning significantly expands the reach of the government speech doctrine for private employees.

Although Plaintiffs here are presenting CMEs as private citizens, the district court held that they are "speak[ing] for the State." ER-017. If the district court is correct that Plaintiffs "speak for the State," then they are engaging in public "speech related to scholarship or teaching," and as a result, the *Pickering* test is the appropriate framework for considering First Amendment challenges, *Demers*, 746 F.3d at 412. But the district court looked to inapplicable public school curriculum cases instead. ER-013–014. *Cf. Nampa Classical Academy*, 447 F. App'x at 778 ("this court has never explicitly held that a public school's curriculum is a form of governmental speech").

The district court's reasoning thus also completely eviscerates the protections for public employees. As it applies to government employees, any speech or educational content that a professional engages in due to a government mandate could be classified as government speech, regardless of whether the speech is related to their official duties. Such an interpretation would effectively strip public employees of First Amendment protections when discussing matters learned through mandatory professional development.

For example, if a local prosecutor attended a CLE on a topic completely unrelated to her job—say, how to draft a trust for a family member—and later discussed that issue publicly, under the district court's reasoning, that speech could be construed as government speech, subjecting it to government control and discipline under the *Garcetti* framework. This would lead to an untenable situation where the government could control and censor the speech of professionals, both inside and outside the scope of their official duties, simply by labeling it as government speech.

It's not hard to see from there how such reasoning would eviscerate the speech protections for government employees who speak in their private capacity. Federal and state court judges and justices who give CLEs at organizations like the American Bar Association[17] or the Federalist Society[18] could be subject to professional discipline for speaking contrary to the government's position.

Allowing the government to classify mandated professional education and related speech as government speech would give the

[17] https://www.americanbar.org/events-cle/mtg/web/445092563/.
[18] https://fedsoc.org/events/the-role-of-federal-agencies-and-state-courts-in-american-law-circa-2024.

government excessive control over what professionals can say, both within and beyond their official duties. The result would be an untenable situation where the boundaries between government-regulated speech and private, protected speech are blurred, making it difficult to preserve the fundamental First Amendment rights of individuals in their professional lives.

IV. PLAINTIFFS SUFFICIENTLY ALLEGE AN UNCONSTITUTIONAL CONDITION

Plaintiffs allege a "right to teach [CME] courses for credit free from the condition" to comply with the implicit bias requirement. ER-041. "Even though a person has no 'right' to a valuable governmental benefit," the unconstitutional conditions doctrine holds that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). That's true even if the individual doesn't have a right to the benefit in the first instance. *Id.* So long as a plaintiff alleges the denial of a benefit is based on the plaintiff's exercise of protected speech, she has sufficiently alleged a claim under the unconstitutional conditions doctrine. *Id.* at 598.

Here, Plaintiffs allege that their ability to teach CMEs for credit (i.e., the "benefit") is conditioned on their including discussion of implicit bias in their courses. ER-042. If, as discussed above, being compelled to include discussion of implicit bias is not immunized by the government speech doctrine, Plaintiffs have sufficiently alleged an unconstitutional condition.

The district court disagreed. It dismissed Plaintiffs' unconstitutional condition claim for two reasons: (1) it held that CMEs are government speech; and, (2) it held that "CME credits are not government benefits." ER-017. Neither reason is correct.[19]

Perry held that lack of a right to the benefit does not mean the government is allowed to *condition* the benefit in an unconstitutional manner. 408 U.S. at 596. Further, the district court's focus on CME credit misconstrues Plaintiffs' allegations. Plaintiffs do not seek to obtain or give CME credit. Rather, they wish to teach CMEs *for* credit. ER-036–037. They are prohibited from doing so unless they comply with the

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[19] Reversal of the district court's dismissal of Plaintiffs' compelled speech claim under the government speech doctrine would likewise reverse the dismissal of Plaintiffs' unconstitutional condition claim in so far as it relied on that holding.

implicit bias requirement. ER-036–037, 041–042. And Plaintiffs also allege that unless CME credit is awarded for courses taught by them, physicians will not attend their courses. ER-037; *see also Iqbal*, 556 U.S. at 678 (plaintiffs' factual allegations in the complaint must be accepted); *Perry*, 408 U.S. at 595 (professor alleged that he lost his ability to teach due to his public comments). Were this a case brought by a physician complaining about her right to be free from *taking* a CME course without the condition of the implicit bias requirement, then perhaps the district court's view that "CME credits are not government benefits" would apply. *See* ER-017. But that is not this case.

As in *Perry*, teaching CMEs is a benefit that cannot be denied due to Plaintiffs exercising their speech rights. That *Perry* concerned a penalty for speaking, whereas this case concerns a penalty for not speaking, does not warrant a different result. Plaintiffs have not yet had the opportunity to prove that the implicit bias requirement infringes on their free speech rights. But at this stage of the proceedings, Plaintiffs have sufficiently alleged they are being required to forego their First Amendment rights as a condition of receiving a governmental benefit.

CONCLUSION

The decision of the district court should be reversed.

DATED: August 23, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 24-3108

I am the attorney or self-represented party.

This brief contains 8,560 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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DATED: August 23, 2024.

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