CASE NO. 24-3108

IN THE 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
Case No. 2:23-cv-06195-MRA-E

BRIEF OF *AMICI CURIAE* YOUNG AMERICA'S FOUNDATION SUPPORTING PLAINTIFF-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(a), Young America's Foundation states that it is a nonprofit corporation organized under the laws of Tennessee with its principal place of business in Virginia. It has no parent company, subsidiaries, or affiliates, and does not issue shares to the public.

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INTEREST OF AMICUS[1]

Pursuant to FRAP 29(a)(4)(D), Young America's Foundation ("YAF" or "amicus") states that it is a 501(c)(3) nonprofit educational organization whose mission is to educate and inspire increasing numbers of young Americans with ideals of individual freedom, free enterprise, a strong national defense, and traditional values. One way that YAF fulfills its mission is through student-led YAF chapters on campuses of public high schools, colleges, and universities across the nation. Unfortunately, in these days of increasing political polarization, YAF chapters and members all too often face restraints on their exercise of their rights under the First Amendment, or are even banned by school administrators and student governments. Schools regularly attempt to coerce students in professing DEI principles and administrators, faculty, and even entire departments seek to trample expression that does not fall in line with DEI dogma. Accordingly, YAF takes a keen interest in free speech issues, such as those presented here. As members of YAF graduate and enter the workforce, YAF believes that, as a matter of policy and constitutional law, each individual should be able to practice his or her chosen profession without sacrificing their fundamental beliefs, and especially be free of government compulsion to speak or act in contravention to those beliefs.

1 Pursuant to FRAP 29(E), amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

CONSENT TO AMICUS BRIEF

Pursuant to FRAP 29(a)(2), YAF states that all parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly stated the rule that private speech is protected by the First Amendment, while government speech is not. Where speech is private, a court must "begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (internal cites omitted). That "right to refrain from speaking" is what is at stake today among private California medical professionals teaching "Continuing Medical Education" ("CME") to other private doctors. In *Matal v. Tam*, the Court offered a word of caution to courts interpreting the government speech doctrine:

> [W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

Matal v. Tam, 582 U.S. 218, 235 (2017).

The cautionary *Tam* "if" is exactly what happened here. The District Court found that CME courses are "government speech" simply because the State of California retains the ability in very narrow and limited circumstances to disapprove certain CME courses, notwithstanding that: private, non-government-employed doctors and other professionals are teaching the CME; the CME courses are not provided on or using any government-owned facilities; the State does not pay for the CME's or its faculties; the State does not require an outline or script of CME courses; with very narrow exceptions, such as the one at issue in this case, the CME course topics, outlines, opinions, judgments, and content are chosen and designed by the CME providers without State

oversight or input; and CME courses are provided to private physicians who pay the CME providers, not the State.[2]

DISCUSSION

I. The Supreme Court disfavors any type of compelled speech and requires a holistic analysis as a prerequisite to protection of for "government" speech.

Courts have applied the government speech doctrine in a variety of contexts: speech by government employees, license plate cases, trademarks, displays on government property, mandatory taxes or assessments that subsidize government messages, and, as here, true compelled speech claims.

In a true compelled speech claim, the connection between the individual speaker and government mandate is direct. The government says, "you must say X" and the speaker must comply or suffer a negative consequence (here, loss of accreditation for CME courses). This direct link makes this Court's duty to draw the correct line between government and private speech ever more important.

Twenty years ago, the Supreme Court remarked that "The government-speech doctrine is relatively new, and correspondingly imprecise." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005). The Court has added significantly to the government speech doctrine in recent years. Importantly, the Court has left intact the true compelled speech distinction. This distinction is determinative in this case. As the Court stated in *Kennedy*, one does not shed one's constitutional rights when one goes to work. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 508 (2022). Even

[2] *See, e.g.,* ER-040-041. While these facts are not pleaded in exactly the same way they are summarized here, they all can be reasonably inferred both from the facts alleged in the Amended Complaint and the overall structure of the complaint and CME laws at issue.

if the compelled speech distinction were not determinative, the Supreme Court and the Ninth Circuit have provided sufficient, concrete guidance to help this Court decide whether speech is government or private.

With this background, this Court is called to answer whether the speech by CME instructors is government speech, so that CME instructors may be compelled to speak on a topic on which they would otherwise remain silent. Because the court below dismissed the case on a Rule 12(b)(6) motion, review must be in the context of whether the amended complaint, "state[d] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This Court, reviewing *de novo,* "must accept as true all the factual allegations contained in [the] complaint," and give plaintiffs the, "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. The Supreme Court has never upheld a government mandate against a true compelled speech claim.

The Supreme Court has a particular disregard for compelled speech, and the Court's rule is simple and easy to apply here: "[T]he First Amendment does not leave it open to public authorities to compel [a person] to utter a message with which he does not agree." *Johanns*, 544 U.S. at 557 (quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943)). Thus, where compelled speech is at issue the Court does not ask whether the speech is private or not, but turns directly to the First Amendment analysis because the speech is *de facto* the individual's. The Supreme Court has conclusively invalidated schemes like the one at issue here, finding the First Amendment trumps an illusory or sham government-speech argument. Where a true compelled speech claim exits, that ends the inquiry.

In deciding *Johanns*, the Court cited its decisions in *Barnette*, *supra* and *Wooley, supra*. In both cases, the First Amendment protected the individual from compulsory speech. In *Barnette*, the Court "invalidated an outright compulsion of speech [where t]he State required every schoolchild to recite the Pledge of Allegiance while saluting the American flag, on pain of expulsion from the public school." *Johanns*, 544 U.S. at 557 (interpreting *Barnette*). In *Wooley,* the Court invalidated New Hampshire's attempt to compel car owners to "bear the State's motto, 'Live Free or Die,' on their cars' license plates" as "an impermissible compulsion of expression." *Johanns*, 544 U.S. at 557 (interpreting *Wooley*). The Court reasoned that the mandate "amounted to impermissible compelled expression" in support of "the State's ideological message." *Id.*

The Court in *Johanns* highlights the distinction between government speech a (there, a compelled subsidy claim, on which the government prevailed), and a true compelled speech claim. In that case, beef producers argued that "[c]ommunications cannot be 'government speech,' … if they are attributed to someone other than the government." *Id. at* 564. The Court expressly adopted this distinction and found the producers stated a legally cognizable compelled speech claim. The Court did not analyze the claim further, only because the record lacked evidence to support the attribution argument. The Court stated that evidence of attribution could "form the basis for an as-applied challenge." *Id.* at 565.

Johanns therefore shows that where a plaintiff has alleged some support for a compelled speech claim, a court must avoid lumping that claim in with any government-speech analysis and should view the allegations in the plaintiff's favor at the motion to dismiss stage. The Court suggested this analysis is fact-intensive and should be explored in the trial court. ("Respondents apparently presented no other evidence of attribution at trial, and the District Court made no factual findings on the point." *Id.)*

The Supreme Court recognizes that government compulsion of speech against one's beliefs "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Wooley,* 430 U.S. at 715. In other words, an individual's beliefs are off-limits to the government. States must be held to this rule in a nation that has deep ideological divides, including on the subject of implicit bias, because "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

III. The Government Speech Doctrine requires a fact-intensive analysis and is not easily susceptible to a 12(b)(6) Motion to Dismiss.

No prerequisite or intricate test is required for a true compelled speech claim. As argued above, the Court should invalidate any mandate that forces an individual to speak in contravention to the individual's beliefs. If a court is in doubt of whether speech is government speech, the court must examine this question under the correct standard of review and using factors and contexts that are based on the facts of the case or, here, as alleged or reasonably inferred.

A. This Court must view the claims through the Lense of a 12(b)(6) motion.

Had the District Court viewed the plaintiffs' allegation in the light most favorable to them, that court should have reached an opposite conclusion on the key question of the "likely" perception of CME attendees regarding whether courses are private versus government speech. Under a 12(b)(6) standard of review, those "likely" perceptions should have been credited to the plaintiffs. *See, e.g.,* ER-040-041, ¶¶71-73.

As *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), identified and then answered the question:

> [W]hen does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views? In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.

596 U.S. at 252. In dismissing on 12(b)(6), the District Court completely disregarded all of these factually intensive and nuanced considerations. Indeed, the Court concluded, as a matter of law and notwithstanding the allegations of the Amended Complaint that: "Accordingly, the Court finds that Plaintiffs are likely to be perceived as speaking for the State, not themselves, when discussing implicit bias in for-credit CME courses." ER-014 (emphasis added). Without a single witness or word of testimony, the Court determined – on its own opinion – what are the "likely perceptions" of CME attendees. The District Court did not cite any factual basis for this supposition, and the record is completely devoid of any such basis. In short, the Court did not engage in a "holistic inquiry." Rather, it erroneously substituted its own opinions in lieu of permitting discovery, introduction of evidence, and a trial.

The Supreme Court has allowed lower courts to apply "common sense" in reviewing the facts pleaded on a 12(b)(6) motion. *E.g. Ashcroft, supra*, 556 U.S. at 678. But the District Court's holding defies common sense even more than it defies the facts pleaded. The Court presumed, with no evidence, that a group of private doctors, attending a CME on "retinal tumors, glaucoma, and other ocular diseases," plus a small segment on "implicit bias" would somehow be "likely" to conclude that the CME was government speech, even though 95 percent of the course was authored

solely by a private presenter under zero government influence.[3] Only lawyers with intimate knowledge of the arcane details of California CME laws might be able to identify the portion of the course that was mandated by the state, not doctors or other medical professionals who would attend a CME.

As to the District Court's chosen analysis factors, it is unclear why the district court found the *Shurtleff* factors controlling. The Ninth Circuit has expressly adopted the *Johanns* factors in some cases,[4] and the claims in that case are more analogous here since *Johanns* contained a compelled speech claim. The District Court instead rigidly applied the *Shurtleff* factors, even though the facts in *Shurtleff* (private displays on government property) are not comparable to a true compelled speech claim, especially where the speech occurs on nongovernmental property. Under any set of factors, however, the Court should find that CME instruction is private speech beyond the reach of government mandates.

B. Factors helpful to the government-speech analysis

1. Whether the government or the individual is the literal speaker

Whether a government actor or a private individual is the literal speaker bears significantly on the nature of the speech at issue.[5] *Johanns* and *Wooley* both stand for the proposition that where the individual is the literal speaker, speech belongs to the individual and is beyond government

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[3] Moreover, under *Johanns, supra*, the speech is private unless "the government sets the overall message to be communicated and approves every word that is disseminated." 544 U.S. at 562. One small segment, even if it could be identified as originating from the state of California, does not convert a private CME to government speech. See further discussion at B.2., below.

[4] *See, e.g.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Vilsack*, 6 F.4th 983, 988 (9th Cir. 2021).

[5] *See Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 964 (2008) and *Brandborg v. Bull*, 276 Fed. Appx. 618, 619 (9th Cir. Mont. May 1, 2008) (adopting the Fourth Circuit's "literal speaker" factor. The Fourth Circuit determined in *Sons of Confederate Veterans v. Vehicles*, 288 F.3d 610, 621 (2002) that the "literal speaker" in a specialty license plate context was the individual and the individual bears the "ultimate responsibly" for the speech.)

compulsion. Extremely affirmative factors would need to exist for the government itself to be considered "a" or "the" literal speaker where facts show otherwise.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a federal program that provided funding for doctors to engage in family planning counseling, but not if the participants counseled in favor of abortion. Doctors who violate this proscription would be denied funding. The Court found that the government had initiated the fund and thus could erect parameters around its own initiative. The Court reasoned that the message was entirely the government's; in other words, the government itself was the speaker.

In *Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001),* the Court reached the opposite conclusion and held the government was not the speaker. There, the Court considered the constitutionality of a federal law that imposed restrictions on the arguments lawyers could make on behalf of indigent clients. If a grantee failed to meet these conditions, they would lose funding. The Court rejected the government's position, finding that the "program was designed to facilitate private speech, not to promote a governmental message." *Legal Services Corp*, 531 U.S. at 542. The Court found that, even when acting as part of the program, lawyers spoke on behalf of their clients in line with the goal of the program, which was to promote the assistance of indigent clients.[6]

These cases show that even in within a government program, "it does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 542 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515

[6] This case also bears on factor 5, below. The Court found the speech in *Legal Services Corp*. was private in spite of the fact that Congress had traditionally placed some restrictions on the program, including a prohibition on campaigning. *Id.* at 537.

U.S. 819 (1995)). If this rule applied in *Rust* and *Legal Servs. Corp.*, where the government was telling the plaintiffs not to say something, it applies even more forcefully here, to a true compelled speech claim.

Here, the government has not shown itself to be the literal speaker. CME instructors who may be licensed doctors speak on behalf of their profession, and themselves as professionals. The purpose of the CME requirement is to ensure that doctors are capable in areas relevant to their particular medical specialty and practice. The State merely has certain regulatory authority over the medical profession as a whole. That regulatory authority is limited by constitutional strictures, including the First Amendment. In this case, as in *Legal Services Corp*, the government does not obtain unlimited control of a profession by virtue of the fact that it regulates certain aspects of the profession, let alone unlimited control over a vendor to that profession.

2. Whether the government controls the message from beginning to end

An individual who creates, edits, and disseminates his message without government input has a conclusively strong argument for private speech. As reasoned above, an individual's speech is presumptively private. Even where the government "solicits assistance from nongovernmental sources in developing specific messages" the speech is private unless "the government sets the overall message to be communicated and approves every word that is disseminated." *Johanns*, 544 U.S. at 562. Only where "[t]he message set out … is from beginning to end the message established by the [] Government" does the speech become that of the government. *Id.* at 560. Here, the State neither sets the overall message, communicates every (or any) word to be disseminated, approves any word to be disseminated, or solicits assistance from nongovernmental sources in developing more specific messages. In short, the State does not develop anything. Instead, the medical profession itself develops education relevant to medical practitioners. California's detached and

intermittent review of a small subset of CME materials on the back end proves the State has no active role in the messaging.

California's degree of control is simply nothing like the control present in *Johanns*.[7] There, "the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department." *Id.* at 561. Even if California may be said to have final review, that fact alone would not tip this factor in the State's favor. The Court dismissed that argument in *Johanns* ("Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and participate in the open meetings at which proposals are developed." *Id.*), indicating that such a "limited role" would not convert private speech in government speech.

The speech in this case is more akin to the trademarks at issue in *Tam*. There, the government had authority to approve or deny trademark applications but did nothing to contribute to the message. CME courses in California, like federal trademarks, are never reviewed for content prior to dissemination. The State exercises no independent editorial control over the CME courses. They do not create or approve courses. Rather, they can disapprove courses on the back end if they receive a complaint about the course. This intervention is too far removed to equate to "control" over messaging.

[7] Neither is it like the control present in *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am., supra*, 6 F.4th 983 where the government maintained "pre-approval" authority over some messaging and "firmly established" the messaging disseminated through government-contracted third parties. *See also, Ariz. Life Coalition, Inc., supra*, 515 F.3d at 966 where the Ninth Circuit found the state maintained only "de minimus" control over the speech at issue because the message originated from and was substantially developed by nongovernmental entities, while meeting basic statutory guidelines.

The control factor also "controlled" in *Shurtleff*. There, the Court "look[ed] at the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent." *Shurtleff*, 596 U.S. at 256. Court found the answer to this question was "not at all. And that [wa]s the most salient feature of this case." *Id.* If California had wanted to create a program to espouse its own message, it "could easily have done more to make clear it wished to speak for itself," but it failed to do so. *Id.* at 257.

3. Whether the government is acting pursuant to a legitimate state role

When the government seeks to compel anything from the individual, it must do so pursuant to a legitimate government power. Any directive not authorized by the Constitution is tyranny and is not tolerated in American law.

In *Keller v. State Bar of Cal.,* 496 U.S. 1 (1990), the Court held that the State Bar of California could not compel members to support (through dues) speech with which they disagreed. There, the bar used dues to finance expressive activities such as ideological lobbying. The Court found this violated members' First Amendment rights because "such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services." *Keller*, 496 U.S. at 4. Thus, while attorneys could be compelled to join the bar as a condition of practicing law in California, they could not be compelled to support the bar's ideological campaigns. This was so in spite of the seemingly broad statutory authority granted to the state bar ("to aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Id.* at 15). The Court rejected the bar's attempt to justify ideological speech through this broad missive.

Keller is similar to the case here. The purpose for regulation of the practice of medicine is to ensure doctors are capable of providing safe medicine. Propagation of ideology[8] does not improve the quality of medical services. Nor does a broad statutory grant of authority to regulate a profession authorize the State to shove any particular ideology down practitioners' throats. The State may regulate the practice of medicine, but it may not compel ideological speech.[9] "Where here the line falls between those [regulatory] activities in which the officials and members of the [medical profession] are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other" the court must draw a firm line. *Id.*

The State has overstepped that line much more starkly here than it did in *Keller*. In *Keller*, the California bar sought to use member money to fund speech; here, the State is attempting to compel doctors to say things they do not want to say and which they believe is harmful. Because the State has no authority to compel ideological speech in any context, and because the Supreme Court has upheld that limitation even in a regulated profession, this factor weights in favor of a finding of private speech.

4. Whether a hearer would reasonably attribute the message to the speaker

Where a reasonable observer would assume a message came from an individual rather that the government is an important indicator that the speech is private. In invalidating a trademark

[8] We use the term "ideology" because the very existence of "implicit bias" and its presumed influence on the practice of medicine is "[c]ontroversial," lacking "consensus," and subject to "conflicting evidence." ER-034-035, ¶¶ 25-27.

[9] The Ninth Circuit has framed it this way: a government program has a central purpose, and speech that does not further that central purpose is unlikely to be government speech. *Ariz. Life Coalition, Inc., supra*, 515 F.3d at 964 (finding that specialty license plate messages had an expressive purpose for the individual apart from the government's purpose for vehicle registration purpose).

denial, the Court in *Tam* said it was "far-fetched to suggest that the content of a registered mark is government speech." 582 U.S. at 236. The Court reasoned that to call trademarks government speech would be for the government to regularly endorse commercial products, which is obviously not the intention behind federal trademark registration. Here, too, California does not endorse specific medical advice, nor is the intent behind regulation of the medical practice to impose ideology, but to ensure the safe practice of medicine. In practical terms, a consumer would never look at a Nike swoosh with an "®", and think that meant the government was attempting to tell him or her to "just do it." Nor would a doctor attend a CME because he wants to hear from the government rather than an expert medical presenter.

The State of California merely regulates the medical profession, it does not control it. Because a reasonable person would still attribute medical analysis to the medical professional conveying the analysis, this factor weighs in favor of a finding of private speech.

5. Whether the government has traditionally controlled the medium of expression

Where the government attempts to compel speech in a content in which it has not traditionally exercised control, that fact indicates the speech is private. For example, in *Summum*, the plaintiff wanted to erect a monument in a public park. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). The Court rejected the plaintiff's claims because the government had never opened the park up for private speech; thus, the government had totally retained the park for government messages only, and the First Amendment did not apply. The Court reasoned "[t]he placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." *Summum*, 555 U.S. at 460.

In *Shurtleff*, where a private group wanted to erect a flag, the Court reached the opposite conclusion, based on key factual distinctions. 596 U.S. at 254. The flags at issue were not government speech, even though governments traditionally use flags on government property to

communicate messages. The Court looked to the specific facts of Boston's flag program and reasoned that even though "flags on Boston's City Hall Plaza usually convey the city's messages" Boston had opened up the program to private messages and thus could not dictate content. *Id.* at 244. The tradition factor alone could not convert private speech into government speech.

Here, the District Court failed to consider the facts that the government does not control the location of CMEs and has not traditionally hosted these classes, nor has the government been the administrator of the medical profession in any sense. Thus, the location factor also weighs in favor of a finding of private speech.

6. The relationship between the speaker and the government

Where the speaker is acting as a private citizen (or private professional) and not as government employee, that fact weighs in favor of a finding of private speech. In the case of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), an employee/employer relationship dictated an outcome in the government's favor. There, the Court held that a government employee could be disciplined for deviating from government-approved messaging. "[T]he controlling factor is that Ceballos' expressions were made pursuant to his official duties." *Garcetti*, 547 U.S. at 413. To the extent *Garcetti* is relevant here, this Court must ask whether a CME instructor speaks as an agent of the state or as a citizen in teaching CMEs. "That consideration distinguishes this case from those in which the First Amendment provides protection against discipline." *Id*.

The Court built on *Garcetti* in *Kennedy*, holding that a high school football coach had engaged in private speech when he prayed on the field after games. *Kennedy*, 597 U.S. 507. The Court, looking to the "timing and circumstances" surrounding Coach Kennedy's prayers, reasoned that the "prayers did not 'ow[e their] existence' to Mr. Kennedy's responsibilities as a public employee." *Id.* at 509. Coach Kennedy's rights prevailed except when he was being paid by the government to convey the government's specific intended message.

Here, CME instructors are not state employees at all and the State does not dispatch any "official duties" to them. Participation as an instructor is entirely voluntary. Because medical education does not "[owe] its existence to a public employee's professional responsibilities," and because the Plaintiffs have alleged facts sufficient to establish that the "timing and circumstances" of CME courses are outside of any formal relationship with the State, *Garcetti* and *Kennedy* caution against a finding of government speech here.

C. K-12 Education cases are not on-point.

The District Court analogized this case to the K-12 context to support its holding. This was error. To the extent that education cases may be useful, CME courses are much more akin to the college setting, where academic freedom exists, than to the K-12 context.

In *Barnette*, the Court held that public school students could not be required to say the pledge of allegiance. 319 U.S. at 637. The Court reasoned that the state had no power to impose upon students a legal duty to salute the flag because public schools have no authority to impose "ideological discipline." *Id.* Thus, even in an environment that is almost completely controlled by the state, individuals maintain their status of private speakers unless, as expounded upon later, the government has properly invoked the factors that would change private speech into government speech. That case was later relied upon by the Court in *Wooley*, *supra*. Additionally, as stated above, even public K-12 employees remain free to practice their personal beliefs in the workplace.

In *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014), the Ninth Circuit asked "whether [*Garcetti's*] holding applied to speech related to scholarship or teaching. 746 F.3d at 411 ((internal quotes omitted). The *Demers* court held in the negative, finding that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values

previously articulated by the Supreme Court." *Demers*, 746 F.3d at 411. The Ninth Circuit (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)) stated that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Demers, 746 F.3d at 411. The commitment to freedom of thought is important in the medical profession as well as in purely academic setting.

CME instructors bear much more in common with college professors than with K-12 teachers. For one, college professors create their own curriculums, unlike K-12 teachers. Also, in the college context professors are generally free to express views that may conflict with those of a fellow professor, while K-12 teachers must generally toe the same line. Because of the independence enjoyed by CME instructors, they should be given at least as much latitude as college professors, especially since they are not employees of the state, as are college professors at state institutions. Recently, some states have attempted to establish in court that college curriculum is government speech.[10] If this has not been established, the District Court has certainly gone too far is claiming that CME curricula is government speech.

[10] Ryan Quinn, *Indiana Argues Professors Lack First Amendment Rights in Public Classrooms*, Inside Higher Ed (Aug 14, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/08/14/indiana-says-professors-lack-first-amendment-rights.; Sarah Brown, Public-University Curricula Are 'Government Speech,' Florida Says, The Chronicle of Higher Education (Sep 23, 2022), https://www.chronicle.com/article/public-university-curricula-are-government-speech-florida-says.

CONCLUSION

Where California speaks for itself, it may say whatever it wants about implicit bias. But to require CME instructors to even utter those words constitutes compelled private speech in violation of extensive controlling precedent. The Court should uphold plaintiff's First Amendment rights by finding that the speech at issue is private speech or at least that the amended complaint alleges sufficient facts to support such a finding at trial.

Dated: August 30, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): 24-3108

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I hereby certify that on August 30, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: August 30, 2024

/s/ Brooks E. Harlow
Counsel for *Amici Curiae*