INSTITUTE FOR JUSTICE
KEITH E. DIGGS*
PAUL V. AVELAR*
398 S. Mill Ave. #301
Tempe, AZ 85281
Tel.: (480) 557-8300
kdiggs@ij.org
pavelar@ij.org
**Admitted pro hac vice*

BENBROOK LAW GROUP, PC
BRADLEY A. BENBROOK (SBN 177786)
STEPHEN M. DUVERNAY (SBN 250957)
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
Tel.: (916) 447-4900
brad@benbrooklawgroup.com
steve@benbrooklawgroup.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST HORSESHOEING SCHOOL, INC., et al.,

Plaintiffs,

v.

DEAN GRAFILO, et al.,

Defendants.

No. 2:17–CV–02217–JAM–GGH

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Date: February 27, 2018
Time: 1:30 p.m.
Judge: The Honorable John A. Mendez

Teaching is speech—and Defendants here enforce a California law that prohibits Plaintiffs from teaching job skills to the audience most in need of those skills. California's "ability-to-benefit requirement," challenged here, restricts the teaching of "vocational" skills—here, horseshoeing—to fully grown adults who lack a high-school diploma or equivalent, requiring that such students first prove to the government's satisfaction that they are capable of understanding their teachers' instruction. When it comes to speech, this sort of paternalism has no place in the American legal landscape.

This Court must deny Defendants' motion to dismiss because Plaintiffs have alleged facts

sufficient to state a cognizable First Amendment claim. First, the ability-to-benefit requirement is subject to First Amendment scrutiny because it is triggered by the "vocational" content of Plaintiffs' curriculum. And second, Defendants bear an affirmative burden as the government party in a First Amendment case, which their speculation is insufficient to carry—especially on a Rule 12(b)(6) motion to dismiss.

SUMMARY OF CLAIM

Plaintiffs are the Pacific Coast Horseshoeing School (PCHS), its sole owner Bob Smith, and aspiring farrier Esteban Narez. Bob wants to teach Esteban how to shoe a horse at PCHS, and Esteban wants to learn. Compl. ¶¶ 5–7, 76, ECF No. 1. California does not restrict the practice of horseshoeing, but it does restrict the teaching of any "vocational" skill—including horseshoeing—in exchange for tuition. Unless Esteban, who lacks a high-school diploma or GED, can pass a government-mandated admissions test that has nothing to do with horseshoeing, Defendants will punish PCHS if Esteban enrolls at PCHS. *See* Compl. ¶¶ 5–15, 27–29, 34–46, 51, 61–65, 72–77.

SUMMARY OF DEFENDANTS' MOTION

Defendants are the two government officials in charge of enforcing the challenged law and are sued in their official capacity. They have moved to dismiss the complaint, arguing that the challenged law is a mere regulation of conduct to which the First Amendment does not apply. Defs.' Mot. Dismiss [MTD] at 4–8, ECF No. 15. In the alternative, they argue that the challenged law is at most a content-neutral, incidental burden on expressive conduct which survives intermediate scrutiny. MTD at 8–11.

LEGAL STANDARD

In deciding a motion to dismiss, this Court must credit all factual (but not legal) assertions made in the complaint, must draw all reasonable factual inferences in favor of the Plaintiffs, and must use those factual assertions and inferences to determine whether Plaintiffs are plausibly entitled to relief. Fed. R. Civ. P. 8(a), 12(b)(6); *Tracht Gut, LLC v. L.A. Cty. Treasurer & Tax Collector*, 836 F.3d 1146, 1150–51 (9th Cir. 2016); *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). Dismissal is proper only where there is a "lack of a cognizable legal theory or …

[an] absence of sufficient facts alleged under a cognizable legal theory." *Tracht Gut*, 836 F.3d at 1151.

ARGUMENT

Defendants' motion must be denied. Plaintiffs' complaint alleges that PCHS and Bob wish to teach a horseshoeing class and that Esteban wishes to take that class, but that all are prevented from doing so by the challenged law. Plaintiffs show in Part I that this horseshoeing class, as restricted by the ability-to-benefit requirement, is an exchange of speech protected by the First Amendment. In Part II, Plaintiffs show that *the government* must affirmatively justify a restriction on speech, no matter the variation of First Amendment scrutiny. It has not done so in its Rule 12(b)(6) motion. Accordingly, Plaintiffs have pled a cognizable legal theory and sufficient plausible facts in support of that theory.

I. The Ability-to-Benefit Requirement Is a Restriction on Speech, Not Conduct.

The complaint alleges that California law prohibits two of the Plaintiffs (PCHS and Bob Smith) from teaching the third Plaintiff (Esteban Narez) how to properly shoe a horse, and that this prohibition violates the First Amendment. Defendants have failed to show otherwise. First, Defendants' contention that they are regulating "conduct" rather than "speech" fails because the Supreme Court has squarely held that laws like one challenged here—laws that prohibit providing specialized training to particular people—are restrictions on *speech* and not conduct. Second, Defendants' contention, that this case involves either "expressive conduct" or "professional speech," fails because neither doctrine applies to the speech at issue in this case: teaching someone the best way to shoe a horse.

A. The Ability-to-Benefit Requirement Is Triggered by Speech.

Defendants base their entire argument on the idea that they are regulating "conduct" rather than "speech." But they do not address *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which is the Supreme Court's most recent and authoritative explanation of the distinction between regulations of speech and regulations of conduct. *Holder* controls this case, and shows that Defendants' motion must fail.

In *Holder*, plaintiffs challenged the constitutionality of a federal statute prohibiting the

provision of "material support" to State Department-designated "foreign terrorist organizations." *Id.* at 9–10. The statute defined "material support" to include, among other things, "training" and "expert advice or assistance." *Id.* at 14–15. The plaintiffs wanted to train and advise members of two such organizations, the PKK in Turkey and the LTTE in Sri Lanka, on how to pursue their objectives peacefully using international law and effective political advocacy. *Id.*

This "training" and "advice," the Court held, was speech, and the challenged statutes were thus subject to First Amendment review. The Court rejected the government's argument that the statute regulated conduct rather than speech. The Court emphasized the importance of analyzing *how* the generally applicable ban on "material support" applied to the plaintiffs, and concluded that it was "a content-based regulation of speech" because "the conduct triggering coverage under the statute"—training or providing expert advice—"consist[ed] of communicating a message." *Id.* at 26–28. Because the "material support" prohibition was activated by the fact that the plaintiffs' speech would "impart[] a specific skill or communicate[] advice derived from specialized knowledge" rather than imparting "general or unspecialized knowledge," the prohibition was a content-based restriction subject to strict scrutiny under the First Amendment. *Id.* at 27–28 (internal quotation marks omitted).

Holder thus stands for the proposition that First Amendment scrutiny is required when "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Here, the "conduct" which triggers the application of California's ability-to-benefit requirement is "teaching for a vocational purpose."[1] Compl. ¶ 37.

Plaintiffs showed in their complaint how the content of PCHS's curriculum triggers the application of the ability-to-benefit requirement. Because PCHS offers a "vocational"

[1] Teaching, of course, is speech. *See Holder*, 561 U.S. at 26–28; *Circle Schs. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004) ("By nature, [private] educational institutions are highly expressive organizations … ."); *Goulart v. Meadows*, 345 F.3d 239, 246–48 (4th Cir. 2003) (holding that "teaching a geography class and a fiber arts class" as part of a homeschooling curriculum was "pure speech"); *Cuesnongle v. Ramos* (*Cuesnongle I*), 713 F.2d 881, 884 (1st Cir. 1983) ("Teaching is speech."); *cf. Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that a Nebraska law banning the private teaching of foreign languages to students without an eighth-grade education violated the fundamental right to liberty under the Fourteenth Amendment). Defendants, in denying that the challenged law regulates teaching, effectively concede this.

"curriculum" to the public in exchange for tuition, California law defines PCHS as a "private postsecondary educational institution." Compl. ¶¶ 34–38 (citing Cal. Educ. Code §§ 94837, 94857, 94858). Because PCHS is a "private postsecondary educational institution," it and Bob are subject to the Private Postsecondary Act of 2009. Compl. ¶¶ 34–35 (citing Educ. §§ 94800 *et seq.*). Because PCHS and Bob are subject to the Act, they may not do business—i.e., teach horseshoeing—without Defendants' "approval to operate." Compl. ¶ 35 (citing Educ. § 94886). Defendants may not issue an approval to operate unless PCHS and Bob meet statutory and regulatory "minimum operating standards." Compl. ¶¶ 39–40 (citing Educ. § 94887). Those "minimum operating standards" include the ability-to-benefit requirement, which prohibits the "enrollment" of "ability-to-benefit student[s]" like Esteban before the student takes and passes an ability-to-benefit test. Compl. ¶¶ 41–43 (citing Educ. §§ 94811, 94904(a); and 5 Cal. Code Regs. § 71770(a)(1)).

Simply put, just as in *Holder*, the "trigger" for the prohibition on Esteban enrolling as Bob's student is that the content of the speech Bob provides is "vocational" in nature rather than "avocational or recreational." Compl. ¶¶ 93 (quoting Educ. §§ 94857, 94874(a)). Esteban could, consistent with California law, enroll today at PCHS—without passing a test—if Bob taught the game of horseshoes, or even if Bob scrubbed his instructional program of all career advice and professed to his students that horseshoeing was only a hobby. The reason Esteban may not enroll at PCHS without passing a test is that Bob teaches the marketable skill of professional horseshoeing.

It does Defendants no good to characterize the ability-to-benefit requirement as an "enrollment" restriction, as if "enrollment" were not required by law for PCHS and Bob to teach horseshoeing to Esteban. *See* MTD at 6. Again, the trigger for the regulation is not the act of "enrollment" but rather the particular content of the classes taught after Esteban enrolls. Moreover, the Supreme Court has repeatedly treated prohibitions on signing contracts to speak as abridgements of the right to speak in the first place. *E.g., United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 468–70 (1995) (rejecting prohibition on government employees receiving honoraria for speech); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*,

502 U.S. 105, 115 (1991) (applying strict scrutiny to strike down a law prohibiting criminals from profiting from works describing their crimes). By statute, "enrollment" is just a contract to teach. *See* Cal. Educ. Code § 94839 (" 'Enrollment' means the execution of an enrollment agreement."); *id.* § 94840 (" 'Enrollment agreement' means a written contract … concerning an educational program."), *id.* § 94837 (" 'Educational program' means a … course or module … that provides education, training, skills, [and/]or experience … ."). The fact that PCHS and Esteban want to enter into an agreement under which Esteban will pay to hear what Bob has to say has no impact on the First Amendment analysis whatsoever. *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *accord Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988).

Similarly, Defendants' assertion that the challenged provisions "do not limit what Plaintiffs may teach *once a student is properly enrolled*" utterly misses the point. *See* MTD at 5 (emphasis added). The gravamen of the complaint is not that Defendants have forbidden Plaintiffs from teaching horseshoeing to *anyone*. It is that Defendants have forbidden Plaintiffs from teaching horseshoeing to *Esteban* (or to others like him). Once again, the Supreme Court has repeatedly confronted laws that prohibited speaking only to some listeners (or prohibited selling speech to only some listeners) and it has consistently treated these as equivalent to any other restriction on speech. In *Brown v. Entertainment Merchants Ass'n*, for example, the Supreme Court confronted (and struck down) a restriction on selling violent video games to minors (but not adults). 564 U.S. 786, 794 (2011); *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572–73 (2011) (rejecting restriction on pharmacies selling prescriber-identifying information to pharmaceutical companies for marketing purposes when the same information could be sold to others). Just as California could not save its video-game law from First Amendment scrutiny by arguing that the merchants were still free to sell games to adults, it cannot avoid First Amendment scrutiny here by arguing that PCHS is still free to teach students of whom the State approves. PCHS wants to teach Esteban, and Esteban wants to learn: For purposes of the First Amendment, nothing else matters.

To be sure, the First Amendment does not immunize PCHS from all regulation simply because it is a school. Plaintiffs do not argue, for example, that PCHS's profits cannot be taxed. *Cf.* MTD at 4 (quoting *Cuesnongle v. Ramos* (*Cuesnongle II*), 835 F.2d 1486, 1501 (1st Cir. 1987)). Neither is California barred from imposing regulatory requirements triggered by PCHS's actual conduct. For example, in *Rumsfeld v. Forum for Academic & Institutional Rights* (*FAIR*), 547 U.S. 47 (2006), which Defendants cite throughout their motion, the Supreme Court upheld a federal law requiring postsecondary schools to accommodate military recruiters on campus on the same terms as other employers because the act of inviting or excluding such recruiters was conduct, not speech. *Id.* at 60. *FAIR* is different from the instant case, though, in at least two respects: First, the trigger for the military-recruitment requirement was a school's receipt of federal funds, not anything about a school's particular curriculum.[2] *Id.* at 55. Second, the Court held that allowing or excluding a professional recruiter from campus was conduct rather than speech, insofar as allowing or excluding a recruiter did not communicate a message that a reasonable observer would actually understand.[3] *Id.* at 64–65. The government may, and does, regulate many non-speech aspects of PCHS's educational operations without implicating the First Amendment, but it may not forbid PCHS from teaching particular students on the basis of the content of its curriculum.

Teaching horseshoeing communicates a message: how best to shoe a horse. It is that message that triggers application of the ability-to-benefit requirement, which restricts PCHS and Bob from teaching Esteban. Under *Holder*, that means that the First Amendment applies.

B. This Case Does Not Concern "Expressive Conduct" or "Professional Speech."

Defendants' motion also errs in contending that this case involves either "expressive conduct" or "professional speech." Neither doctrine applies here.

First, Plaintiffs have not alleged that they engage in any "expressive conduct." They have

[2] PCHS does not accept student loans, in part because doing so might trigger the *federal* ability-to-benefit requirement on which California's is modeled. California's law departs significantly from its federal counterpart in that it applies to ability-to-benefit students who would pay tuition out of their own savings. *See* Compl. ¶¶ 49–51, 53.

[3] By contrast, a student in one of Bob's classes would have no difficulty discerning Bob's message regarding the proper shoeing of a horse.

alleged that California's restriction on private postsecondary enrollment, as applied, burdens their actual speech. The expressive-conduct doctrine, born in *United States v. O'Brien*, 391 U.S. 367 (1968), deals with situations in which a person faces punishment for engaging in conduct which employs no words but might still be intended or understood to "convey a particularized message." *E.g.*, *Spence v. Washington*, 418 U.S. 405, 411 (1974) (peace sign superimposed on American flag). In *O'Brien*, the expressive conduct was the act of burning a draft card, by which the criminal defendant intended to protest the Vietnam War. *See* 391 U.S. at 369–70. Flag-burning is another classic example of expressive conduct. *See Texas v. Johnson*, 491 U.S. 397 (1989).

This would be an expressive-conduct case if California prohibited Bob from shoeing horses and Bob contended that he wanted to shoe a horse for the expressive purpose of demonstrating how that is best done. That, however, is not how the law applies. It is perfectly legal for Bob (or anyone else, including Esteban) to shoe a horse anytime he wants to. But it is illegal for Bob (or any other instructor at PCHS) to teach Esteban how to shoe a horse—regardless whether they accomplish this by physically demonstrating horseshoeing, by providing a classroom lecture on the topic, or by combining the two approaches (as Bob and PCHS do).

Similarly, this case does not fall within the Ninth Circuit's "professional speech" doctrine. Defendants rely on *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), for the idea that "teaching horseshoeing" is conduct, even if it is conduct performed through the mechanism of speech. MTD at 5–6. But *Pickup* stands for no such thing. *Pickup*, which upheld a law prohibiting mental health providers from practicing sexual orientation change efforts ("SOCE") on minor children, simply found that SOCE was a form of regulable medical "treatment" outside the scope of the First Amendment. *See* 740 F.3d at 1230.

By its own terms, *Pickup* does not apply here. In upholding the SOCE ban, the *Pickup* court distinguished *Holder* on the grounds that the SOCE ban, unlike *Holder*'s material-support ban, did not "restrain Plaintiffs from imparting information or disseminating opinions." *Id.* at 1230. This, in turn, distinguishes *Pickup* from this case. The ability-to-benefit requirement restrains PCHS and Bob from "imparting information" to Esteban about how to shoe a horse. No "treatment" is at issue here. *Cf. id.* PCHS and Bob seek only to convey information to Esteban

about horseshoeing, which, unlike medical treatment, California does not regulate at all. *See* Compl. ¶¶ 21, 84–87.

Moreover, the "professional-speech" doctrine articulated by *Pickup* simply does not apply here. "Underlying the *Pickup* opinion is the principle that professional speech is speech that occurs between professionals and their clients in the context of their professional relationship." *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016), *cert. granted sub nom. Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017). But, as other circuits have noted of this doctrine, "[a]ssuming that the professional speech doctrine is valid, its application should be limited." *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). The professional speech doctrine is designed to allow regulations of speech between doctors or psychoanalysts and their patients. Expanding its application to cover all speech that teaches useful skills would leave precious little scope for ordinary First Amendment doctrine, and nothing in the Ninth Circuit's cases suggests that the doctrine can be applied so far afield from its origins.[4] To the contrary, courts here and elsewhere consistently conclude that teaching is ordinary speech entitled to ordinary (and robust) First Amendment protection. *See* note 1 *supra* (collecting cases).

* * *

The Plaintiffs' complaint sets forth a cognizable legal claim and plausible facts sufficient to support that claim. Plaintiffs have alleged plausible facts showing that they wish to, but under California law cannot, teach and learn from each other how to shoe horses. And Plaintiffs' theory, that their teaching and learning is speech and that their speech is restricted by the challenged law, is cognizable. The Court must therefore find at this stage that California's regulation of Plaintiffs' teaching and learning is subject to First Amendment review.

///

[4] Plaintiffs concede that *Pickup* and *Harris* are binding authority upon this Court, but may argue at a later stage that they were wrongly decided. As other courts have noted in rejecting the Ninth Circuit's approach, "[t]here are serious doubts about whether *Pickup* was correctly decided." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc); *see King v. Governor*, 767 F.3d 216, 235–36 (3d Cir. 2014) (expressing doubts), *Pickup*, 740 F.3d at 1215–21 (O'Scannlain, J., dissenting from denial of rehearing en banc). In any event, Plaintiffs have explained above why *Pickup* and *Harris* are distinguishable from this case.

II. Under Any First Amendment Standard of Review, Defendants Cannot Meet Their Evidentiary Burden in a Motion to Dismiss.

Because Plaintiffs' complaint plausibly alleges a restriction on their speech rights, the government bears a real evidentiary burden of justifying the restriction. "This burden is not satisfied by mere speculation or conjecture … ." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). Although Plaintiffs maintain that California's ability-to-benefit law is a content-based regulation of speech and therefore merits strict scrutiny, Compl. ¶ 93; *e.g.*, *Brown*, 564 U.S. at 799, strict scrutiny need not apply in order for the Court to deny the instant motion.

Indeed, even under intermediate scrutiny applicable to content-neutral laws that incidentally restrict speech, the government bears a real evidentiary burden. *E.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion) ("[The government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."); *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011)) ("[I]n the First Amendment context … the burden shifts to the government to justify the restriction."). "California's burden under this test is 'heavy.' " *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018) (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996)).

It is rare that the government will meet a First Amendment burden on a motion to dismiss, where all factual allegations made in the complaint are to be accepted as true and construed in favor of the plaintiff. *E.g.*, *Tracht Gut*, 836 F.3d at 1150. Only one case cited by Defendants in Part II of their motion, in which they argue the law survives First Amendment scrutiny, was actually decided on a motion to dismiss. *Compare Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology* (*NAAP*), 228 F.3d 1043, 1046 (9th Cir. 2000) (affirming dismissal of First Amendment claim), *with Turner*, 512 U.S. at 626–27 (vacating summary judgment for government and remanding for factfinding); *O'Brien*, 391 U.S. at 370–71 (appeal from criminal conviction); *Pickup*, 740 F.3d at 1222 (consolidated appeal from preliminary injunctions); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010) (reversing summary judgment for government); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d

419, 425 (9th Cir. 2008) (affirming summary judgment for government after district court had construed motion to dismiss as motion for summary judgment); *Crawford v. Lungren*, 96 F.3d 380, 382–83, 385 (9th Cir. 1996) (affirming trial judgment for government—yet applying strict scrutiny).

The one case dealing with a motion to dismiss—*NAAP*—is inapplicable here. *NAAP*, which upheld California's licensure of psychologists against both First and Fourteenth Amendment challenges, purported to apply "First Amendment scrutiny" but did not quite say which standard it was using. *See* 228 F.3d at 1053–56. Under the "continuum" of professional speech that the Ninth Circuit later announced in *Pickup*, 740 F.3d at 1227–29, it is clear that the *NAAP* court treated the licensure scheme as a regulation of conduct. *See Pickup*, 740 F.3d at 1229, 1231 ("[U]nder *NAAP*, to the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical or mental health treatment."). *But see above* Part I.B & note 4. *NAAP*'s cursory analysis of content neutrality, 228 F.3d at 1055–56, was dictum,[5] meant to buttress the court's conclusion that regulations of psychoanalytical "treatment"—"the key component of psychoanalysis"—are "within the state's police power." *See id.* at 1054. After *Pickup*, we now know that "treatment" is conduct outside the scope of the First Amendment, *see* 740 F.3d at 1229–31, and when a challenged law regulates conduct, the government bears no burden. And as already shown, *above* Part I, the ability-to-benefit requirement must be analyzed as a regulation of speech.

Because the ability-to-benefit requirement is a regulation of speech, Defendants bear the burden under the First Amendment. *Doe*, 772 F.3d at 570. They must show that the ability-to-benefit requirement "furthers an important or substantial government interest" and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377; *see also United States v. Albertini*, 472 U.S. 675, 689 (1985). Again, "[t]his burden is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770.

[5] Moreover, this dictum is inconsistent with the later-decided *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015) (requiring a two-step analysis which the *NAAP* court did not perform).

The government interest tendered by Defendants is inherently speculative. In their own words, the ability-to-benefit requirement presumes that Esteban "*might not* benefit from [PCHS's] proposed course of instruction." MTD at 10 (emphasis added). Defendants recite legislative "concerns about the value of degrees and diplomas issued by private postsecondary schools," the "lack of protections for … students," and the need for "minimum standards of instructional quality and institutional stability" as reasons to uphold the law. MTD at 7–8, 10. But Defendants do not say, other than by way of speculation, how the ability-to-benefit law actually addresses these "concerns" as applied to the facts of this case. Nor do they say how or why less-burdensome regulations, such as the requirement that regulated institutions "maintain[] a withdrawal policy and provide[] refunds," Cal. Educ. Code § 94885(a)(4), are insufficient to address those "concerns."

Instead, Defendants attempt to meet their burden by attacking two of Plaintiffs' factual allegations—that "no educational prerequisites to admission to PCHS are necessary" and that Bob "takes great care not to charge students who are unable to benefit from PCHS's curriculum"—as "conclusory." MTD at 10 (quoting Compl. ¶¶ 52, 54). They are not. Plaintiffs pled numerous facts backing up these allegations: (1) horseshoeing and its instruction preexist modern educational norms by centuries, (2) horseshoeing is relatively simple, (3) California imposes no educational requirements for the actual practice of horseshoeing, and (4) Bob has decades of experience and success in teaching farriers (including many who could not write). *See* Compl. ¶¶ 16–32. These allegations must be taken as true. And Esteban—who knows himself better than the government does—is confident he can learn horseshoeing even though he lacks a high-school diploma. Compl. ¶ 72; *see Edenfield*, 507 U.S. at 767 ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."). If the government is to substitute its judgment of Esteban's learning ability for Esteban's own, it must provide convincing facts showing that the law is tailored to advance some government interest.

Indeed, it is worth noting that the heart of Defendants' justification for the law is that Esteban must be prohibited from enrolling at PCHS *for his own good* unless and until California is satisfied that he has the mental wherewithal to learn about horseshoes. But the Supreme Court

has repeatedly and emphatically rejected the idea that the government has the power to restrict speech in order to protect willing listeners from themselves. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794 (2011) ("No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed." (citations omitted)); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."), *quoted with approval in Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011).

The Court's rejection of paternalism in *Brown* and *44 Liquormart* applies with added force here. Those cases struck down, respectively, a ban on selling violent video games to minors and a ban on advertising (typically low) prices for alcohol. *Brown*, 564 U.S. at 805; *44 Liquormart*, 517 U.S. at 516. And Esteban is nowhere near as vulnerable as a child or an alcoholic. He is a fully grown adult of full legal capacity who wants to spend his own money to learn a skill that he is already legally entitled to practice. The First Amendment does not allow State officials to second-guess his decisions about whether he can benefit sufficiently from the education he seeks.

Simply put, Defendants' untested and self-serving assertions are not good enough to dismiss this First Amendment case before discovery. No matter which level of scrutiny applies "[w]hen the Government restricts speech, *the Government bears the burden* of proving the constitutionality of its actions." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). The government has not done so in its Rule 12(b)(6) motion, and that motion should be denied.

CONCLUSION

Defendants' motion to dismiss must be denied because Plaintiffs have presented a cognizable legal theory and have supported that theory with plausible facts. Under well-established First Amendment doctrine, that Plaintiffs' teaching horseshoeing is speech is a cognizable legal theory. And Plaintiffs have pled plausible facts showing that the California law

enforced by Defendants restricts Plaintiffs' ability to teach and learn horseshoeing. Defendants cannot carry, and have not carried, their First Amendment burden in their motion to dismiss. For these reasons, Defendants' motion to dismiss should be DENIED.

Respectfully submitted this 6th day of February, 2018.

INSTITUTE FOR JUSTICE

/s/ Keith E. Diggs
Keith E. Diggs (admitted *pro hac vice*)
Paul V. Avelar (admitted *pro hac vice*)
398 S. Mill Ave. #301
Tempe, AZ 85281
Tel.: (480) 557-8300
kdiggs@ij.org
pavelar@ij.org

BENBROOK LAW GROUP, PC
Bradley A. Benbrook (SBN 177786)
Stephen M. Duvernay (SBN 250957)
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
Tel.: (916) 447-4900
brad@benbrooklawgroup.com
steve@benbrooklawgroup.com

Attorneys for Plaintiffs