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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PACIFIC COAST HORSESHOEING SCHOOL, INC., et al., Plaintiffs, **v.** **GRAFILO, et al.,** Defendants.	2:17-cv-02217-JAM-GGH **REPLY IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT** Date: February 27, 2018 Time: 1:30 p.m. Courtroom: 6, 14th Floor Judge: The Honorable John A. Mendez Action Filed: October 23, 2017

Plaintiffs contend that the ability-to-benefit requirement—which requires California private postsecondary educational institutions to verify that prospective students can benefit from a course of instruction before enrollment—is a direct regulation of speech restricting Plaintiffs' ability to teach and learn horseshoeing. "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies," *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 n. 5 (1984), but Plaintiffs' claim has no support in Supreme Court or Ninth Circuit precedent. Plaintiffs also erroneously contend that Defendants have not met their burden on a motion to dismiss. Defendants have met their burden, and more, because even assuming the truth of Plaintiffs' plausible factual allegations and the applicability of intermediate scrutiny (for a regulation of expressive conduct), the ability-to-benefit requirement is sufficiently tailored to support an important government interest, as a matter of law.

I. THE ABILITY-TO-BENEFIT REQUIREMENT REGULATES NON-EXPRESSIVE CONDUCT

The premise of this First Amendment challenge is that enforcement of the ability-to-benefit requirement has some effect on Plaintiffs' ability to teach and learn horseshoeing in compliance with the California Education Code, which makes the requirement a direct regulation of speech. Plaintiffs rely exclusively on *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for the proposition that "laws that prohibit providing specialized training to particular people . . . are restrictions on *speech* and not conduct." Pls.' Opp. at 3. In *Holder*, the Supreme Court found the law at issue to be "related to expression," such that the law was subject to a "more demanding standard" than the *O'Brien* test. 561 U.S. at 28 (internal quotation marks and citation omitted).

However, any reliance on *Holder* is misplaced because the "material support" law in *Holder* directly and explicitly prohibited providing "training" or "expert advice or assistance" to foreign terrorist organizations. 561 U.S. at 14. In contrast, the ability-to-benefit requirement does not prohibit anyone from providing "training" or "expert advice or assistance." Rather, it regulates only non-expressive conduct, by requiring private postsecondary educational institutions to confirm that a prospective student is well-suited to take a proposed course of instruction before enrolling that student. Once properly enrolled, the ability-to-benefit

requirement places no restrictions or requirements upon the content of an instructor's speech. *See Kagan v. City of New Orleans, La.*, 753 F.3d 560, 562 (5th Cir. 2014) (rejecting comparison to *Holder* and finding that licensing requirements for tour guides have "no effect whatsoever on the content of what tour guides say. Those who have the license can speak as they please[.]").

Despite these key differences, Plaintiffs contend that the law in *Holder* and the ability-to-benefit requirement are essentially the same because the "conduct triggering coverage" is the content of the speaker's speech—in Plaintiffs' case, "teaching for a vocational purpose." Pls.' Opp. at 4. But this simply assumes that the requirement is a direct regulation of speech, even though the statute and regulation at issue make no mention of speech or training. It also ignores the fact that the "conduct triggering coverage" of the ability-to-benefit requirement is actually the "execut[ion] of an enrollment agreement," Cal. Educ. Code § 94904(a), and not one of the many factors set forth in the California Private Postsecondary Education Act of 2009 that may subject an institution to regulation under that Act, besides the vocational nature of the training provided.

Plaintiffs' approach would transform *every* law or regulation applicable to postsecondary educational institutions into direct regulations of speech. This cannot be the case, as Plaintiffs recognize when they acknowledge that a private postsecondary educational institution's profits may be taxed without violating the First Amendment. Pls.' Opp. at 7. Plaintiffs do not explain why some regulations affecting an educational institution's operations, such as tax laws, do *not* regulate speech even though failure to comply with those laws would impact Plaintiffs' ability to "teach horseshoeing" as much as or more than the ability-to-benefit requirement.

Nor have Plaintiffs cited any authority for the proposition that a law that expressly regulates conduct and makes no mention of speech or speech-related activities can be treated as a direct regulation of speech. The cases regarding "signing contracts to speak" (Pls.' Opp. at 5) do not support this theory, because those laws directly regulated speech, by placing restrictions on the making or writing of "an appearance, speech or article," *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 459-60 (1995), and "the reenactment of [a] crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind," *Simon & Schuster, Inc. v. Members of New York*

State Crime Victims Bd., 502 U.S. 105, 109 (1991). And despite Plaintiffs' assertions to the contrary, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), and *National Association for Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*") are directly relevant to whether the ability-to-benefit requirement is a direct regulation of speech. These cases both relied upon Supreme Court precedent (*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)), and stand for the generally applicable proposition that the *mere use of speech in performing conduct that is regulated or impacted by a law does not turn that law into a regulation of speech*. *See Pickup*, 740 F.3d at 1229; *NAAP*, 228 F.3d at 1053-54.

Plaintiffs have presented no legal authorities or plausible allegations of fact demonstrating that the ability-to-benefit requirement directly regulates speech, and they have expressly disclaimed reliance on a theory that the requirement regulates expressive conduct.[1] The requirement is thus subject to and more than satisfies rational basis review. Mot. to Dismiss at 7.

II. THE ABILITY-TO-BENEFIT REQUIREMENT SATISFIES THE *O'BRIEN* TEST AS A MATTER OF LAW

Although the ability-to-benefit requirement does not regulate speech or expressive conduct, the requirement nevertheless satisfies the *O'Brien* test applicable to content-neutral regulations of expressive conduct, as a matter of law. Courts regularly resolve First Amendment challenges at the motion to dismiss stage while applying intermediate scrutiny, as evidenced by numerous recent Ninth Circuit opinions affirming dismissals under these circumstances. *See, e.g.*, *San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, No. 15-17381, 2018 WL 774001, at *5 (9th Cir. Feb. 8, 2018) (affirming granting of motion for judgment on the pleadings, finding that ordinance requiring certain disclosures from landlords to tenants satisfied *Central Hudson* intermediate scrutiny test applicable to commercial speech); *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 460-61 (9th Cir. 2018) (affirming dismissal of First

[1] *See* Pls.' Opp. at 7-8. For different reasons, Defendants agree that the requirement does not regulate expressive conduct. *See* Mot. to Dismiss at 6-7; *Waugh v. Nevada State Bd. of Cosmetology*, 36 F. Supp. 3d 991, 1010 (D. Nev. 2014) (teaching makeup artistry found to be non-expressive conduct), *subsequently ordered to be vacated as moot by Waugh v. Nevada State Bd. of Cosmetology*, No. 14-16674, 2016 WL 8844242, at *1 (9th Cir. Jan. 27, 2016).

Amendment claim, finding that statute criminalizing prostitution satisfied *Central Hudson*); *Taub v. City and County of San Francisco* (9th Cir. 2017) 696 Fed.Appx. 181, 182 (affirming dismissal of First Amendment claim, finding public nudity ordinance to be a valid, content-neutral regulation under *O'Brien*); *Contest Promotions, LLC v. City and County of San Francisco* (9th Cir. 2017) 704 Fed.Appx. 665, 667-68 (affirming dismissal of First Amendment claim, finding that signage ordinance satisfied *Central Hudson*).

Other authorities also demonstrate that a First Amendment challenge may be resolved prior to summary judgment. In *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, (2006) ("*FAIR*"), which involved a preliminary injunction motion, the Supreme Court rejected the lower court's reasoning that the government "failed to produce evidence establishing that the Solomon Amendment was necessary and effective" and instead found (with no citation to an evidentiary record), "Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers." 547 U.S. at 67. The Supreme Court concluded that the law survived a First Amendment challenge. *Id*. at 70.

Similarly, the Ninth Circuit performed a "plenary review of the issues" in reviewing preliminary injunction motions in *Pickup, supra*, finding that the district courts' rulings "rest[ed] solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." 740 F.3d at 1222. The court concluded that the challenged law "survives the constitutional challenges presented here." *Id*. at 1236.

These authorities make clear that this Court may rule on this First Amendment challenge as a matter of law; even if the *O'Brien* test applies, the Court may resolve this case on a motion to dismiss. The important governmental interest is identified in the statute as preventing enrollment of students who "do not have the ability to benefit from the instruction," in the context of "concerns about the value of degrees and diplomas issued by private postsecondary schools, and the lack of protections for private postsecondary school students and consumers of those schools' services." Cal. Educ. Code §§ 94316(b) (1990), 94801(b). The requirement is clearly unrelated to the suppression of free expression. And, it promotes the government interest more effectively

than its absence, because it provides a way to confirm that a prospective student can benefit from the instruction, by passing either a pre-approved written test or a test tailored to the occupational training at issue.[2] Mot. to Dismiss at 9-11; Cal. Educ. Code § 94904(b).

These governmental interest determinations can be made on a motion to dismiss, as the Ninth Circuit has recently affirmed. *See, e.g.*, *San Francisco Apartment Ass'n*, 2018 WL 774001, at *5 (considering the fit between the legislature's ends and means under *Central Hudson*, and concluding that the ordinance is "sufficiently tailored"); *Erotic Serv. Provider Legal Educ. & Research Project*, 880 F.3d at 460-61 (finding based on "common sense" that "the State's substantial interest in limiting the commodification of sex is directly and materially advanced by" a prohibition on prostitution); *Taub*, 696 F. App'x at 183 (finding that public nudity ordinance "furthers San Francisco's important and substantial interests in protecting individuals 'who are unwillingly or unexpectedly exposed' to public nudity and preventing 'distractions, obstructions, and crowds that interfere with the safety and free flow of pedestrian and vehicular traffic'").

Even reading Plaintiffs' factual allegations in the most favorable light, Plaintiffs have alleged only that learning horseshoeing requires "physical strength, the right tools, comfort with horses, and practice," Compl. ¶20, *not* that the government interest in protecting students from paying thousands of dollars for a program for which they are ill-suited has no application in the context of "teaching horseshoeing." Plaintiffs also contend that Defendants must demonstrate why withdrawal and refund policies required by the Education Code are insufficient to address the Legislature's concerns. Pls.' Opp. at 12. But under *O'Brien*, these "proposed alternative methods . . . are beside the point," as "[t]hat is a judgment for [the Legislature], not the courts." *FAIR*, 547 U.S. at 67. "It suffices that the means chosen . . . add to the effectiveness of" the Legislature's purpose in enacting the ability-to-benefit requirement. *Id.*

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' opening brief, the Court should dismiss the Complaint for failure to state a claim.

[2] Plaintiffs' contention that a prospective student must prove his or her "mental wherewithal to learn about horseshoes" (Pls.' Opp. at 12) does not acknowledge this possibility.

Dated: February 20, 2018

Respectfully submitted,

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