Case No. 18-15840

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC COAST HORSESHOEING SCHOOL, INC.; BOB SMITH; and ESTEBAN NAREZ,
Plaintiffs-Appellants,

v.

DEAN GRAFILO, in his official capacity as Director of Consumer Affairs; and MICHAEL MARION, in his official capacity as Chief of the Bureau for Private and Postsecondary Education,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
The Honorable John A. Mendez, United States District Judge
Case No. 2:17-cv-02217-JAM-GGH

BRIEF OF APPELLANTS

Paul V. Avelar
Keith E. Diggs
INSTITUTE FOR JUSTICE
398 S. Mill Ave. #301
Tempe, AZ 85281
Tel.: (480) 557-8300
Fax: (480) 557-8305
pavelar@ij.org
kdiggs@ij.org

Bradley A. Benbrook
Stephen M. Duvernay
BENBROOK LAW GROUP, PC
400 Capitol Mall, Suite 2530
Sacramento, CA 95814
Tel.: (916) 447-4900
brad@benbrooklawgroup.com
steve@benbrooklawgroup.com

Counsel for Appellants

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Pacific Coast Horseshoeing School, Inc., has no parent corporation, and no publicly held company holds a 10 percent or greater ownership interest therein.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants filed this civil-rights action for declaratory and injunctive relief against Defendants-Appellees in their official capacities on October 23, 2017, in the United States District Court for the Eastern District of California. The district court had federal question jurisdiction under 28 U.S.C. § 1331 because Plaintiffs-Appellants' single cause of action arose under the First and Fourteenth Amendments to the U.S. Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Excerpts of Record ("ER") 18.

On motion of Defendants-Appellees, the district court (Judge John A. Mendez) dismissed the complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and entered final judgment in their favor. ER 3–16. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The district court's order and final judgment were entered on April 12, 2018. ER 3–16. Plaintiffs-Appellants filed their notice of appeal on May

8, 2018. ER 1–2. Plaintiffs-Appellants' appeal is timely under Fed. R. App. P. 4(a)(1)(A).

ISSUE PRESENTED FOR REVIEW

Is a law that makes it illegal to teach a particular topic to a particular student for compensation subject to First Amendment scrutiny?

This issue was raised by the Plaintiffs-Appellants' single claim. ER 26–28 (Compl. ¶¶ 88–101). The district court held that Plaintiffs-Appellants' complaint failed to state a First Amendment claim and dismissed their complaint. ER 3–16.

This Court reviews de novo the district court's grant of a 12(b)(6) motion. *E.g.*, *Ariz. Students Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). This Court therefore applies the same standard as the district court is to apply, and the grant of a motion to dismiss under Rule 12(b)(6) must be reversed if "the complaint 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its

face.' " *O'Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Appellants refer the Court to their concurrently-filed addendum setting forth the pertinent statutes, regulation, and constitutional provisions cited in their Argument below. *See* Cir. R. 28-2.7.

STATEMENT OF THE CASE

Plaintiffs-Appellants are a horseshoeing school, its owner, and an adult would-be student who wants to attend the school to learn how to shoe horses. Defendants-Appellees enforce a California law under which the student, because he lacks a high-school diploma or its equivalent, may not enroll at the school unless he passes a state-approved literacy–numeracy test. Plaintiffs-Appellants filed suit to enjoin enforcement of the law, allow the school to enroll the student and others like him, and vindicate their First Amendment rights to teach and learn. The court below dismissed the action for failure to state a claim. On appeal, Plaintiffs-Appellants ask this Court to vacate the judgment below, reverse the district court's decision, and remand the case for further proceedings.

I. STATEMENT OF FACTS.

Plaintiffs-Appellants challenge a law, Cal. Educ. Code § 94904(a), that prevents Plaintiff-Appellant Esteban Narez from enrolling in horseshoeing school without passing a literacy–numeracy test. The law applies because Esteban has neither a high-school diploma nor its equivalent: the same constraint that motivates him to learn horseshoeing in the first place. ER 19–20, 22, 25 (Compl. ¶¶ 25, 41–42, 75–77). This law (the "examination requirement") belongs to a comprehensive statutory scheme that regulates any private entity in California offering a for-charge "vocational" curriculum, here, Plaintiff-Appellant Pacific Coast Horseshoeing School, Inc. ("PCHS"). ER 21 (Compl. ¶¶ 34–36).

A. Plaintiff-Appellant Esteban Narez.

Esteban wants to become a farrier—a person who shoes horses. ER 19, 25 (Compl. ¶¶ 17, 72). He befriended a farrier through his work as a ranch hand in the Santa Cruz Mountains, and is impressed by the good pay and professional independence that farriers enjoy—rare among jobs that

don't require a high-school diploma, which Esteban doesn't have. ER 19–20, 24–25 (Compl. ¶¶ 23, 25, 63–65, 69–70, 72).

Years ago, a severe knee injury ended Esteban's high-school career a semester before he could graduate. ER 24 (Compl. ¶ 63). His mother, who worked multiple jobs to raise Esteban and his two sisters—and had been doing so, by herself, since Esteban was one year old—needed help paying the medical bills. ER 24 (Compl. ¶¶ 62, 64–65). Esteban, then entering adulthood, went to work out of financial necessity. ER 24 (Compl. ¶ 65). Except to recover from a knee surgery that he underwent after saving the money for it, Esteban has been working ever since. ER 24–25 (Compl. ¶ 66–69). He works seven days a week to support his family and would only consider leaving work—thus forgoing income—to advance the career of his choice. ER 25–26 (Compl. ¶¶ 78–79).

Esteban has chosen horseshoeing as his career, which is a millennium-old, hands-on trade that does not require a license in any state, including California. ER 19 (Compl. ¶¶ 18–19). No particular level of academic attainment is necessary to learn it. ER 19 (Compl. ¶ 20). Esteban

likes working with the farrier, and he wants to emulate the farrier's career. ER 25 (Compl. ¶¶ 70–72). Esteban's last job at a therapy barn sparked a passion for horses, and he has worked hard to establish himself in the equine world. ER 24–25 (Compl. ¶¶ 65–69). He believes in his ability to make a stable and satisfying career out of horseshoeing. ER 25 (Compl. ¶ 72). He applied to PCHS in spring 2017, which is when he learned that State law prohibits PCHS from enrolling him. ER 25 (Compl. ¶¶ 75–77).

B. Plaintiff-Appellants PCHS and Bob Smith.

PCHS is the only full-time horseshoeing school in California. ER 25 (Compl. ¶ 73). It charges $6,000 for its eight-week horseshoeing curriculum. ER 20 (Compl. ¶ 33). At PCHS, students attend classroom sessions, learn to use a forge and various tools, and perform hands-on practice shoeing horses. ER 20 (Compl. ¶¶ 28, 30, 33). PCHS does not accept student loans. ER 23 (Compl. ¶ 53). School policy provides a refund for all but $250 of tuition to any student who, during the first week of class, decides (or has a PCHS instructor decide) that the course is not in the student's best interest. ER 23 (Compl. ¶ 54).

Plaintiff-Appellant Bob Smith, the sole owner of PCHS, is an International Horseshoeing Hall of Fame inductee. ER 18, 20 (Compl. ¶¶ 6, 27). Since founding PCHS in 1991, he has taught students from all walks of life, typically in groups of 12 to 14 students who can either be hobbyists or aspiring professional farriers. ER 20 (Compl. ¶¶ 26, 32). Bob typically conducts written examinations at PCHS, but has in the past graduated functionally illiterate students based on oral examinations alone. ER 20 (Compl. ¶ 31). Because no particular level of academic attainment is necessary to learn horseshoeing, Bob is willing to admit and teach Esteban. ER 19, 25 (Compl. ¶¶ 20, 76).

C. PCHS Is Subject to the Act Because It Teaches a "Vocational" Skill.

The Private Postsecondary Education Act of 2009 (the "Act"), Cal. Educ. Code §§ 94800 *et seq.*, regulates every "private postsecondary educational institution" in California. ER 21 (Compl. ¶¶ 34–35); *see* Educ. §§ 94800 *et seq.* (the Act); *id.* § 94858 (defining "private postsecondary educational institution"); *id.* § 94886 ("[A] person shall not open, conduct, or do business as a private postsecondary educational institution in this

state without obtaining an approval to operate . . . ."). PCHS is a private postsecondary educational institution because it is (1) a private entity with a physical presence in California that (2) offers "postsecondary education" to the public in exchange for (3) tuition. ER 21 (Compl. ¶¶ 36, 38); *see* Educ. § 94858 (definition); *see also id.* § 94844 (defining "institutional charges," i.e., tuition); *id.* § 94857 (defining "postsecondary education"). Defendants-Appellees Dean Grafilo and Michael Marion share ultimate responsibility in their official capacities for enforcing the Act. ER 18–19 (Compl. ¶¶ 10–14); *see* Educ. § 94876(a) (vesting powers and duties under the Act).

The Act regulates PCHS's operations because the school teaches a "vocational" skill. "Postsecondary education," to which the Act applies, is defined as any "curriculum . . . designed primarily for students who . . . are beyond the compulsory age of secondary education, including programs whose purpose is academic, *vocational*, or continuing professional education." Educ. § 94857 (emphasis added); ER 21 (Compl. ¶¶ 36–37).

Institutions whose curricula are "solely avocational or recreational," by contrast, are exempt[1] from the Act. *Id.* § 94874(a).

PCHS may not offer its vocational curriculum to the public except as provided by the Act. The Act imposes "minimum operating standards" on each regulated institution, prohibits the operation of an institution without the Bureau's "approval to operate," and provides that such approval to operate shall not be granted unless the institution satisfies the Bureau that it will meet the minimum operating standards. Educ. §§ 94885, 94886, 94887; *see also id.* § 94843 (" 'Institution' means any private postsecondary educational institution . . . ."); ER 21 (Compl. ¶¶ 34–40).

D. The Act Requires PCHS to "Enroll" Esteban in Order to Teach Him How to Shoe Horses.

A provision in the Act (the "enrollment requirement") requires Plaintiffs-Appellants to execute an enrollment agreement before Esteban may hire PCHS to teach him how to shoe horses. "A student shall enroll solely by means of executing an enrollment agreement." Cal. Educ. Code

[1] Other exemptions exist, but none apply to PCHS. ER 21 (Compl. ¶ 38); *see* Educ. § 94874.

§ 94902(a). Under the Act, an "enrollment agreement" is "a written contract between a student and an institution concerning an educational program." *Id.* § 94840. A student may not waive the enrollment requirement. *Id.* § 94903. Unless PCHS enrolls Esteban, it may not teach him.

E. The Examination Requirement Forbids PCHS from Enrolling Esteban Unless He Passes a Literacy–Numeracy Test.

The Act's minimum operating standards forbid PCHS from enrolling Esteban unless he passes a literacy–numeracy test. State law classifies any student without a high-school diploma or its equivalent, such as Esteban, as an "ability-to-benefit student." Educ. § 94811. The examination requirement provides that, "before an ability-to-benefit student may execute an enrollment agreement" with a regulated institution in California, the student must pass one of five independently administered and governmentally approved examinations. Educ. § 94904(a); ER 22 (Compl. ¶¶ 42, 44). All five examinations test literacy, and four test numeracy. ER 22 (Compl. ¶ 44). None of them test aptitude for horseshoeing. ER 22 (Compl. ¶ 46).

The examination requirement is modeled after a federal law that evaluates only whether to *subsidize*—not whether to *allow*—a student's education. The federal "ability to benefit" statute conditions federal financial assistance for higher education—Pell Grants, work-study, student loans, and the like—on the student having demonstrated his "ability to benefit" from the education or training for which the federal funds are provided. ER 23 (Compl. ¶ 49); *see* 20 U.S.C. § 1091(d)(1). Federal law does not, however, constrain ability-to-benefit students from using their own money to pay for education. ER 23 (Compl. ¶ 50). California law does. ER 23 (Compl. ¶ 51).

F. The State Enforces the Examination Requirement, Preventing Esteban from Enrolling at PCHS.

Plaintiffs-Appellants object to, but are constrained by, the examination requirement. Before the events that led to this lawsuit, PCHS had never required an entrance examination or any other educational prerequisite for admission. ER 23 (Compl. ¶ 52). Bob believes it serves no purpose to do so. *Id.* Esteban works seven days a week to make ends meet, and does not want to forgo income by studying for a test that will not

advance his skills or qualifications in shoeing horses. ER 25–26 (Compl. ¶¶ 78–79).

In 2016, the California Bureau for Private Postsecondary Education (the "Bureau") contacted PCHS to arrange an inspection, PCHS's first since the Act took effect. ER 23 (Compl. ¶¶ 52, 55). During the inspection process, the Bureau informed PCHS that the school's admissions standards, which required no entrance examination for ability-to-benefit students, failed to comply with the Act's examination requirement. ER 23 (Compl. ¶ 56); *see* Educ. § 94904(a).

In July of that year, Bob asked a Bureau regulator to recognize PCHS's longstanding policy, of refunding tuition in the first week to students whom the student or a PCHS instructor determines is unable to benefit from PCHS's horseshoeing curriculum, as an alternative to the Act's examination requirement. ER 23–24 (Compl. ¶ 57). The Act allows the Bureau to approve alternative examinations; the Bureau has never done so. ER 22 (Compl. ¶ 45); *see* Educ. § 94904(b)–(c). In PCHS's case, the regulator

refused Bob's request.[2] ER 23–24 (Compl. ¶ 57). In February 2017, the Bureau issued PCHS a Notice to Comply reiterating that PCHS would have to require ability-to-benefit students to pass a literacy–numeracy test before enrolling. ER 24 (Compl. ¶ 58). PCHS changed its admissions policy in order to comply, and began turning away applicants who lacked a high-school diploma or equivalent. ER 24–25 (Compl. ¶¶ 59–60, 75).

Esteban applied to PCHS in the spring of 2017. Because he has no high-school diploma or equivalent and has not passed any of the required literacy–numeracy tests, PCHS may not enroll him. Because PCHS may not enroll Esteban, it may not teach him how to shoe horses. ER 25–26 (Compl. ¶¶ 75–77, 84). But for Defendants-Appellees' enforcement of the Act, PCHS would have taught Esteban how to shoe horses. If it were lawful, PCHS would teach horseshoeing to any student who wished to enroll (as Esteban

[2] In its order, the district court found in a footnote that Plaintiffs-Appellants did not allege that PCHS "availed itself of the option to propose a different examination" under Educ. § 94904(b). ER 12. Plaintiffs-Appellants dispute this finding, *see* ER 23–24 (Compl. ¶ 57), but it is not relevant to the issue on appeal.

still does), regardless of the student's educational attainment. ER 26 (Compl. ¶¶ 81, 84–87).

II. PROCEDURAL HISTORY.

On October 23, 2017, Plaintiffs-Appellants PCHS, Bob, and Esteban filed suit against Defendants-Appellees Grafilo and Marion (collectively, the "State") in their official capacities. *See* ER 17–29. Their complaint alleged that the Act's examination requirement, in restricting PCHS and Bob from teaching Esteban how to shoe horses, abridges their First Amendment freedom of speech: PCHS's and Bob's right to teach, and Esteban's right to learn. ER 26–27 (Compl. ¶¶ 89–90); *see* U.S. Const. amends. I, XIV. The complaint sought declaratory and injunctive relief against enforcement of the examination requirement—the main statutory provision and an implementing regulation—as applied to PCHS and Bob teaching horseshoeing to ability-to-benefit students like Esteban. ER 28–29 (Compl., Prayer ¶¶ A–E); *see* Cal. Educ. Code § 94904(a) (statute); 5 Cal. Code Regs. § 71770(a)(1) (regulation).

The State moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted the State's motion and entered a final judgment dismissing the case with prejudice on April 12, 2018. ER 3–16. The district court found that the examination requirement prevented Plaintiffs-Appellants from executing an enrollment agreement, but not from teaching and learning. ER 12. Based on that finding, the district court held that the State's conditions on enrollment regulated conduct rather than speech, ER 9–13, and applied rational-basis review[3] to uphold the examination requirement against the Plaintiffs-Appellants' challenge. ER 13–16. Plaintiffs-Appellants appeal from the district court's order and judgment. ER 1–16.

SUMMARY OF ARGUMENT

Teaching is speech. The First Amendment therefore governs this case, in which California law prohibits Bob and PCHS from teaching a job skill to Esteban. California's "examination requirement," challenged here,

[3] Plaintiffs-Appellants did not bring a due-process claim and concede that if the First Amendment does not protect their teaching and learning, the order and judgment below were correctly entered.

restricts the teaching of "vocational" skills (horseshoeing) to adults (Esteban) who lack a high-school diploma or equivalent. These are the students who need job skills the most, but the examination requirement mandates that such students prove to the government's satisfaction that they are capable of learning them. When it comes to speech, this sort of paternalism has no place in the American legal landscape.

This Court must reverse the district court's ruling that Plaintiffs-Appellants' complaint fails to state a cause of action under the First Amendment. The district court found that the examination requirement does not restrict speech because it "only" restricts the execution of an enrollment agreement. The district court also found that the examination requirement is not content-based because PCHS would not be subject to regulation if it were not "private, operating in California, [or] charging tuition." ER 11. But an enrollment agreement is nothing more than a contract for speech, which is protected as speech. And by statute, the examination requirement would not apply to Plaintiffs-Appellants' teaching and learning but for the "vocational" content of PCHS's

curriculum. The examination requirement therefore implicates the First Amendment. Because the First Amendment applies, Defendants-Appellees bear an affirmative burden of proof in this litigation which speculation is insufficient to carry—especially on a Rule 12(b)(6) motion to dismiss.

ARGUMENT

California law makes it illegal for Bob and PCHS to teach Esteban how to shoe horses. Teaching and learning are protected by the First Amendment. But the district court, contrary to Supreme Court precedent that requires it to analyze the law's "practical operation," found that the law prohibits only "enrollment" and not teaching or learning. This was error.

In Part I, the Plaintiffs-Appellants show that teaching a job skill is speech protected by the First Amendment. Part II demonstrates that the Act restricts Plaintiffs-Appellants' teaching and learning, and that the Act moreover restricts Plaintiffs-Appellants' teaching and learning based on the content being taught. Finally, Part III shows that pleading-stage

resolution of this case was inappropriate given the government's burden of proof in First Amendment cases.

I. TEACHING A JOB SKILL IS SPEECH PROTECTED BY THE FIRST AMENDMENT.

Teaching a job skill is speech. But the district court recognized only that "teaching *involves* speech" and found the First Amendment inapplicable to California's restriction on teaching job skills. ER 13 (emphasis added). The district court analyzed the State's restriction on teaching and learning as a regulation of conduct. ER 13–16. It therefore bears repeating that the teaching and learning involved in this case are themselves pure speech protected by the First Amendment.

Training and providing advice to others—i.e., teaching—is speech protected by the First Amendment. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court held that a federal statute prohibiting the provision of "material support" to State Department-designated "foreign terrorist organizations" was subject to First Amendment scrutiny because it was triggered by *speech* that "imparts a specific skill or communicates advice derived from specialized knowledge." *Id*. at 27 (internal quotation

marks omitted); *see also Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2374 (2018) (citing, with approval, *Holder*'s application of strict scrutiny to restrictions on providing specialized advice about international law).

Every circuit court to confront the issue has held that restrictions on teaching and learning implicate First Amendment rights. The best example is *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003), in which the Fourth Circuit held that teaching geography and fiber arts to homeschoolers was "pure speech." *Id.* at 247. The plaintiffs in *Goulart* were two homeschooling mothers who were denied the use of a public community center to teach their classes. *Id.* at 241. The district court characterized their geography and fiber-arts teaching as, at best, expressive conduct—meaning the homeschoolers would bear the burden of establishing that their teaching was sufficiently "expressive" to qualify for First Amendment protection. *Id.* at 247. But in reversing the district court, the Fourth Circuit recognized that teaching those classes was "pure speech" such that the homeschoolers did

not need to "affirmatively prove the uniquely expressive nature" of their teaching before asserting a First Amendment claim. *Id.* at 247–48.

Two other circuits have also recognized that teaching is speech. The First Circuit said so—"[t]eaching is speech"—in finding "a zone of First Amendment protection for the educational process itself, which . . . must include not only students and teachers, but their host institutions as well." *Cuesnongle v. Ramos* (*I*), 713 F.2d 881, 884 (1st Cir. 1983). And in holding that a state may not compel private schools to lead their students in a daily recitation of the Pledge of Allegiance, the Third Circuit has noted that "[private] educational institutions are highly expressive organizations" entitled to First Amendment protection. *Circle Sch. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004).

If "instructing children on the topics of geography and fiber arts is a form of speech protected under the First Amendment" (and it is), then instructing adults on the topic of horseshoeing must be too. *See Goulart*, 345 F.3d at 248. While this Court has never had occasion to rule that private instruction is protected speech, *Holder* and the rulings from this Court's

sister circuits demonstrate that it must. *See also Meyer v. Nebraska*, 262 U.S. 390, 397, 400 (1923) (holding that a state law prohibiting "any private . . . school" from teaching foreign languages to students who had not passed the eighth grade violated due process); *Bartels v. Iowa*, 262 U.S. 404 (1923) (same).

None of this is to argue that the First Amendment bars "nearly every regulation of postsecondary education," as the order below fears. ER 13. As a private postsecondary educational institution, PCHS can be "properly subject to numerous administrative regulatory schemes"—taxation being an easy example—"which do not implicate First Amendment concerns." *Cuesnongle v. Ramos* (*II*), 835 F.2d 1486, 1501 (1st Cir. 1987). But its core activity—teaching horseshoeing—is "pure speech." *Goulart*, 345 F.3d at 247.

Accordingly, any State restriction on Plaintiffs-Appellants' "pure speech"—their teaching and learning—must be subject to First Amendment scrutiny. The district court refused to find that the First Amendment had any application here. This was error.

II. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE FIRST AMENDMENT.

State law restricts Plaintiffs-Appellants from teaching and learning horseshoeing, which is speech protected by the First Amendment. The district court erred in holding that the First Amendment does not apply to this restriction on speech.

The order below makes two assertions in support of its erroneous conclusion. The first is that the execution of an enrollment agreement, which the district court recognized that Plaintiffs-Appellants "cannot do" because of the examination requirement, is different than teaching horseshoeing. ER 12. The second assertion is that the "vocational" purpose of PCHS's curriculum, which brings it within the Act's statutory scope, does not "trigger" coverage under *Holder* because the Act does not apply "unless the school is also private, operating in California, and charging tuition." ER 11. The district court drew on these two assertions to characterize the examination requirement as an "incidental burden[] on speech caused by the regulation of commerce" not subject to First

Amendment review. ER 13 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566–67 (2011)). The district court's two assertions are incorrect.

Section II.A shows that the examination requirement, by restricting the execution of an enrollment agreement, restricts Plaintiffs-Appellants' teaching and learning. Section II.B explains why the examination requirement is a content-based burden that requires First Amendment scrutiny.

A. The District Court Was Wrong that the Examination Requirement Restricts "Only" the Execution of an Enrollment Agreement.

The district court found that the "only thing" the examination requirement prohibits here is the "execut[ion of] an enrollment agreement." ER 12. This interpretation ignores the "practical operation" of the Act, which is to burden Plaintiffs-Appellants' speech. *See Sorrell*, 564 U.S. at 567. Section II.A.1 establishes that the enrollment agreement Plaintiffs-Appellants are barred from executing is a contract for speech. Section II.A.2 shows that the U.S. Supreme Court has routinely treated prohibitions on selling speech as burdens on the speech itself. Section II.A.3 then demonstrates why the authorities relied on by the district court do not

support its erroneous conclusion that the examination requirement regulates "conduct" rather than "speech."

1. An Enrollment Agreement Is a Contract for Speech.

An enrollment agreement is a contract for speech. Under the Act, an enrollment agreement's reason for being is to serve as a contract to teach a job skill. *See* Cal. Educ. Code § 94840. And as shown above in Part I, teaching a job skill is pure speech. *Holder*, 561 U.S. at 27–28; *Goulart*, 345 F.3d at 247. It is not accurate to say, as the district court did, that the examination requirement restricts "only" the execution of an enrollment agreement. By restricting the execution of an enrollment agreement, the examination requirement restricts the execution of a contract for speech.

The district court's order wrongly characterizes the examination requirement as an "incidental burden[] on speech caused by the regulation of commerce." ER 13 (citing *Sorrell*, 564 U.S. at 566–67). Under the First Amendment, however, a law imposes more than an incidental burden when the "commerce" that it regulates is a contract for speech. Under

Sorrell itself, this means the examination requirement is a direct—not incidental—burden on speech.

In *Sorrell*, the Court struck down a Vermont law that prohibited the sale, disclosure, or use by pharmacies of "prescriber-identifiable information"—valuable, federally required data about the drugs that a given doctor prescribes—for marketing purposes. *See id.* at 557–59, 580. Yet the same law allowed the same information to be "sold or given away for purposes other than marketing," including to "private or academic researchers." *Id.* at 562–63. "[I]nsurers, researchers, journalists, the State itself, and others [could] use the information"; in other words, "pharmacies [could] share prescriber-identifying information with anyone for any reason save one: They [could] not allow the information to be used for marketing." *Id.* at 572.

Vermont argued that banning the sale of information for marketing purposes was "a mere commercial regulation," which—if true—would make it permissible for the law to "impos[e] incidental burdens on speech." *Id.* at 567–68. As the Court recognized, the presumptive validity of

content-neutral regulations of conduct explains "why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, why an ordinance against outdoor fires might prohibit burning a flag, and why antitrust laws can prohibit agreements in restraint of trade." *Id.* at 567 (internal quotation marks omitted) (citing *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 62 (2006); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992); and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)); *see also NIFLA*, 138 S. Ct. at 2373 (explaining that torts for professional malpractice and informed-consent requirements for abortions are permissible conduct regulations even if they incidentally burden speech). But there is a unifying theme to such laws: race-based hiring, outdoor fires, consolidating a monopoly, committing malpractice, and performing abortions do not constitute "speech" under any reasonable definition of that term. A different analysis applies when the activity being regulated is—as it was in *Sorrell*, and as it is here—"the creation and dissemination of information," which is "speech within the meaning of the First Amendment." *Id.* at 570. That speech is being sold does not strip it of First

Amendment protection. After all, "a great deal of vital expression" is protected under the First Amendment even if it "results from an economic motive." *Id.* at 567 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 410–11 (2001); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

In *Sorrell*, Vermont's restriction on the sale of information was held to be a direct regulation of speech. As in *Sorrell*, the State's examination requirement does not just restrict the execution of a contract; it restricts the execution of a contract *for the sale of speech*. That makes the examination requirement very much like the data-sale ban that was struck down in *Sorrell*, and unlike the "incidental burdens" identified in that case's dicta.

Like the data-sale ban in *Sorrell*, the "practical operation" of the examination requirement here is to burden speech. *Id.* at 567. That means that the First Amendment applies. The district court was wrong to disregard the "practical operation" of restricting Plaintiffs-Appellants from executing an enrollment agreement: restricting Plaintiffs-Appellants from doing so restricts them from teaching and learning. The district court thus

erred in failing to recognize that the examination requirement restricts protected expression.

2. Restricting the Execution of a Contract for Speech Burdens the Speech Itself.

The Supreme Court has repeatedly and rightly held that restrictions on the sale of speech are to be treated as burdens on the speech itself. The case law is replete with such examples. In *Sorrell*, Vermont argued that First Amendment scrutiny was "unwarranted . . . because sales, transfer, and use of prescriber-identifying information are conduct, not speech." 564 U.S. at 570. Not so, said the Court: restricting the sale of information "is a content-based rule akin to a ban on the sale of cookbooks, laboratory results, or train schedules." *Id.*

A "prohibition on compensation [for speech] unquestionably imposes a significant burden on expressive activity" and is therefore subject to First Amendment review. *United States v. Nat'l Treas. Emps. Union* (*NTEU*), 513 U.S. 454, 468 (1995). In *NTEU*, the Court struck down a federal law that "broadly prohibit[ed] federal employees from accepting any compensation for making speeches or writing articles." *Id.* at 457. The ban was intended

to prevent high-level government officials from "supplementing their official compensation by accepting . . . 'honoraria' for meeting with interest groups with desire to influence their votes," *id.* at 457–58, yet it applied to virtually all federal employees,[4] not just "the relatively small group of lawmakers whose past receipt of honoraria motivated its enactment." *Id.* at 469. The Court held that prohibiting speakers from being paid to speak "imposes the kind of burden that abridges speech under the First Amendment," and proceeded to apply First Amendment scrutiny. *Id.* at 470–77.

Plaintiffs-Appellants here are just like the speakers in *Sorrell* and *NTEU*. Bob, PCHS, and Esteban wish to buy and sell information about horseshoeing. The First Amendment would not allow the State to require a written contract for Esteban to pay PCHS for one of Bob's horseshoeing

[4] *NTEU* is not distinguishable as considering speech by government employees. The Court's seminal case on that subject, *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), did not apply because "the vast majority of the speech at issue . . . d[id] not involve the subject matter of Government employment and t[ook] place outside the workplace." *NTEU*, 513 U.S. at 470.

books and then condition that contract on Esteban's ability to pass a literacy–numeracy test. Yet here, California requires a written contract for Esteban to hire Bob and PCHS to teach him in a classroom, and it conditions that contract on Esteban's ability to pass such a test. Because the examination requirement prohibits PCHS from being paid to speak to Esteban[5] about horseshoeing, the First Amendment applies. *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment

[5] Likewise, the examination requirement "also imposes a significant burden on [Esteban's] right to . . . hear what [PCHS] would otherwise . . . s[ay]." *NTEU*, 513 U.S. at 470 (citing *Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976)). Esteban's First Amendment claim stands or falls (and it should stand) together with those of PCHS and Bob.

protection is not diminished merely because the . . . speech is sold rather than given away."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062–63 (9th Cir. 2010) (same); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (same). It was error for the district court to hold that a restriction on charging tuition for speech does not implicate the First Amendment.

3. Neither *FAIR* Nor *Pickup* Apply Here.

In support of its finding that the examination requirement regulates conduct and not speech, the district court relied primarily on *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Neither case applies here; additionally, *Pickup* is no longer good law.

FAIR concerns expressive conduct, which is not at issue here. In *FAIR*, a coalition of university plaintiffs claimed that a condition on federal funding, which required them to "afford equal access to military recruiters" at on-campus recruiting events, inhibited universities from expressing their opposition to the military's service-eligibility requirements. *FAIR*, 547 U.S. at 52, 60. But as the Court unanimously

recognized, the statute at issue in *FAIR* "neither limit[ed] what law schools may say nor require[d] them to say anything" at all. *FAIR*, 547 U.S. at 60. *FAIR* would apply if State law prohibited PCHS from shoeing horses—a regulation of conduct—and PCHS claimed a First Amendment right to shoe horses as a way of expressing to Esteban the best way of doing so. But the examination requirement does not operate that way. Under State law, any of the Plaintiffs-Appellants may legally shoe horses; their complaint is that the examination requirement makes it illegal to *speak to each other* about shoeing horses. Accordingly, *FAIR* does not apply here.

Pickup, the other authority on which the district court relied, is no longer good law. *See Pickup*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by NIFLA*, 138 S. Ct. at 2371–72. In *Pickup*, this Court upheld, as a regulation of conduct, a California law that prohibited mental health providers from practicing sexual orientation change efforts ("SOCE") on minors. In doing so, *Pickup* announced a "continuum" of First Amendment scrutiny in which "First Amendment protection of a professional's speech is somewhat diminished." 740 F.3d at 1228. But in *NIFLA*, the U.S. Supreme Court

disapproved *Pickup* for recognizing "a category called 'professional speech' " that the "Court's precedents do not recognize." 138 S. Ct. at 2372. There was, the Court held, no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375. Although *NIFLA* leaves room for regulations of "professional conduct" that "incidentally involve[] speech," those regulations cannot avoid First Amendment scrutiny if they "turn[] on the fact that professionals [a]re speaking." *Id.* at 2372. And the examination requirement does just that. *See below* Section II.B.

* * *

Teaching a job skill constitutes pure speech, and when the student hires the teacher, it is still speech. The examination requirement burdens speech because it prevents Plaintiffs-Appellants from executing a contract to provide and receive speech. The State may not avoid First Amendment scrutiny by interposing its enrollment requirement between Plaintiffs-Appellants' speech and the State's examination requirement, calling the required execution of the enrollment agreement "conduct," and

then arguing that the enrollment agreement is all that the examination requirement regulates. *NIFLA*, *Sorrell*, and *NTEU* preclude that kind of maneuver. The district court erred in giving that maneuver credit.

B. The District Court Was Wrong That the Act "Is Not Triggered by Vocational Teaching."

The district court further erred in failing to recognize that the Act applies to Esteban, Bob, and PCHS because of the content of their teaching and learning. The Supreme Court has reiterated that content-based speech restrictions—which trigger strict scrutiny under the First Amendment—can appear in at least two forms: laws that are content-based on their face, and laws that cannot be justified without reference to the content of the regulated speech. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015). Both forms apply here. In Section II.B.1, Plaintiffs-Appellants show that the Act's scope provisions, which discriminate between "vocational" and "avocational" teaching in triggering the application of the examination requirement, are content-based on their face. Section II.B.2 demonstrates that the examination requirement itself cannot be justified without reference to the content of PCHS's curriculum.

1. The Act's Scope Provisions Are Content-Based on Their Face.

PCHS is subject to the Act because its curriculum is "vocational"; if its curriculum were "solely avocational or recreational," it would be exempt. *Compare* Cal. Educ. Code § 94857 *with id.* § 94874(a). The district court found that this content-based distinction was obviated by the fact that the Act does not apply "unless the school is also private, operating in California, and charging tuition." ER 11. But *all* content-based laws apply only to a subset of would-be speakers (including, as here, speakers who operate in the jurisdiction where the law applies). The Supreme Court has expressly held that such speaker-based distinctions do not affect the analysis of whether a law creates a content-based restriction on speech, and the district court's contrary conclusion was error.

The overarching rule here is simple: "Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed* or the idea or message expressed." *Reed*, 135 S. Ct. at 2227 (emphasis added). This is so whether a law makes obvious distinctions by defining speech by its subject matter or whether it draws distinctions that

"are more subtle, defining regulated speech by its function or purpose" (such as, in this case, the purpose of vocational rather than recreational instruction). *Id.*; *accord Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (invalidating ordinance whose "operative distinction [wa]s the message on a picket sign"). Content-based regulations are subject to strict scrutiny under the First Amendment, regardless of whether characterized as "burdens" or "bans." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000), *quoted with approval in Sorrell*, 564 U.S. at 566; *see Reed*, 135 S. Ct. at 2227.

A content-based speech restriction is subject to First Amendment scrutiny even when housed within a statutory scheme that "*generally* functions as a regulation of conduct." *Holder*, 561 U.S. at 27. In *Holder*, the Court found that the federal prohibition on "material support" to terrorist groups, which "most often does not take the form of speech at all," nonetheless regulated the humanitarian plaintiffs' training and advice on the basis of its content. *Id.* at 14–15, 26–27. That was because the statutory definition of "material support" included speech that "imparts a 'specific

skill' or communicates advice derived from 'specialized knowledge,' " but exempted speech that "imparts only general or unspecialized knowledge." *Id.* at 27. The court accordingly applied strict scrutiny[6] because "as applied to [the] plaintiffs[,] the conduct triggering coverage under the statute consist[ed] of communicating a message." *Id.* at 28.

Here, the Act's scope provisions are content-based on their face. The Act would not apply to Plaintiffs-Appellants' teaching and learning if they proposed to teach and learn something other than a job skill. That means, as in *Reed*, that the examination requirement "applies to [Plaintiffs-Appellants'] speech because of the topic discussed." *Reed*, 135 S. Ct. at 2227. *On their face*, the Act's scope provisions "defin[e] regulated [teaching] by its . . . purpose." *Id.* at 2227; *see* Educ. § 94857 (including within the Act's scope "programs whose *purpose* is . . . vocational" (emphasis added)). PCHS may charge anybody tuition in order to teach the recreational game of horseshoes, but it may not do the same in order to teach the vocational skill

[6] In *Holder*, the material-support ban survived strict scrutiny because it was narrowly tailored to the compelling government interest of "combating terrorism." 561 U.S. at 28–33, 39.

of horseshoeing. Because the message communicated by PCHS's curriculum determines whether the examination requirement applies to Plaintiffs-Appellants' proposed teaching and learning, the examination requirement is a content-based restriction on Plaintiffs-Appellants' speech.

This analysis is not changed by the fact that the Act only applies to speakers who also engage in certain conduct, like charging tuition or being in California. *Cf.* ER 11 (noting that PCHS would not be subject to the Act if it were not located in California, operating privately, or charging tuition). Every content-based speech restriction has nonspeech elements in the background, and they do not inoculate content-based distinctions from First Amendment review.[7] *See, e.g.*, *Sorrell*, 564 U.S. at 558–59 (invalidating content-based statute that applied only to speakers who were pharmacies, health insurers or similar entities); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (holding judicial canon content-based despite the fact that it applied only to speakers who were judges); *Holder*, 561 U.S. at 8–10 & n.1

[7] These nonspeech elements can be characterized as speaker-based distinctions which, as *Reed* and other cases make clear, "do[] not . . . render [a content-based] distinction content neutral." *Reed*, 135 S. Ct. at 2230.

(holding statute content-based despite the fact that it only applied to speakers whose audience consisted of designated terrorist groups); *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) (same, speakers who were corporations). It makes no more sense to say the Act functions as a regulation of PCHS's conduct of charging tuition than it would to say that the canon in *Williams-Yulee* functioned as a regulation of the conduct of being a judge. Simply put, PCHS would be free to be a private school that charged tuition in California *so long as* it communicated a different message when it did so. That makes the Act, as applied to PCHS, a content-based restriction on speech.

This does not mean, as the district court feared, that every regulation of private education will be unconstitutional. *Cf.* ER 13. Nothing prevents California from regulating schools without reference to the content of their speech;[8] nothing prevents California from regulating fraudulent or misleading commercial speech, *e.g.*, Cal. Educ. Code § 94897(i); and

[8] As noted below in Section II.B.2, however, the specific examination requirement imposed here would trigger heightened First Amendment scrutiny even if it were found in a facially content-neutral statute.

nothing prevents California from attempting to justify content-based distinctions among schools if it believes those distinctions to be important. But California cannot do what it does here, which is tell PCHS that it may teach Esteban one subject but not another, without being subject to First Amendment scrutiny. The district court's contrary holding was error.

2. The Examination Requirement Cannot Be Justified Without Reference to the Content of PCHS's Curriculum.

Even if the Act's scope provisions did not discriminate on their face between vocational and avocational curricula, the examination requirement would still be content-based because it cannot be justified "without reference to the content of the regulated speech." *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429–31 (1993) (holding that a prohibition on newsracks distributing commercial publications, but not newspapers, could not be justified without reference to commercial publications' content). This is so regardless of whether the government is motivated by viewpoint discrimination or by other speech-centric motives. *See Reed*, 135 S. Ct. at 2230 ("[A] speech regulation targeted at specific

subject matter is content based even if it does not discriminate against viewpoints within that subject matter."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary . . . ."); *Discovery Network*, 507 U.S. at 429 (requiring "no evidence that the [government] has acted with animus toward the ideas contained within [speech]" in order to find a restriction content-based); *Simon & Schuster*, 502 U.S. at 117 (rejecting argument that "the First Amendment [applies] only when the legislature intends to suppress certain ideas").

The examination requirement is content-based under this standard because it is explicitly intended to verify whether ability-to-benefit students can understand the content of what they want an institution to teach them. Cal. Educ. Code § 94904(a) (requiring that passing scores be calculated to "demonstrat[e] that the student may benefit from the education and training being offered"); *id.* § 94904(b) (contemplating alternative examinations "that pertain to the intended occupational training"); 5 Cal. Code Regs. § 71770(a) ("An institution shall not admit any

student who is obviously unqualified or who does not appear to have a reasonable prospect of completing the program."). The State cannot plausibly assert (and has not plausibly asserted) any nonspeech justification for the examination requirement. California does not deem Esteban generally incapable of entering into contracts out of concern for his capacity to make bargains. California only deems Esteban incapable of entering into contracts for education, because it doubts his capacity to learn particular skills. The district court in this case not only held that California can impose such a restriction; it held that it can do so without being subject to any First Amendment scrutiny whatsoever. That was error, and the decision below should be reversed.

* * *

The examination requirement restricts Plaintiffs-Appellants' pure speech, and it makes it illegal to teach job skills to students like Esteban who need them most. It is content-based on the face of the Act's scope provisions, and it is also content-based because it cannot be justified without reference to the State's judgment regarding Esteban's ability to

understand the content of PCHS's curriculum. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas . . . deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. The examination requirement contravenes this principle. This Court must therefore reverse the order below and direct the district court to apply First Amendment review.

III. THE STATE CANNOT MEET ITS FIRST AMENDMENT BURDEN AT THE PLEADING STAGE HERE.

The First Amendment requires the State to carry an affirmative evidentiary burden that will ordinarily not be met at the pleading stage. As shown in Section III.A, the State has the burden under any level of First Amendment scrutiny to justify the examination requirement, as applied here, using real evidence. Section III.B demonstrates that the district court's Rule 12(b)(6) dismissal improperly excuses the State from meeting this burden.

A. The State Has an Affirmative Evidentiary Burden Under the First Amendment.

Because this case is on appeal from a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the question at this stage is *not* whether the examination requirement *violates* the First Amendment. It is only *whether the First Amendment applies*. And while the Supreme Court has enumerated an array of standards of scrutiny under the First Amendment, every such standard has this in common: it is the government—not the speaker—who bears the burden of meeting that standard. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entm't Grp.*, 529 U.S. at 816.

The government bears an affirmative burden even under intermediate scrutiny, the most deferential First Amendment standard there is. To be sure, the examination requirement should not be subject to intermediate scrutiny because it is a content-based restriction on speech. *See above* Section II.B. But even if intermediate scrutiny applied, the State would still have to carry a "heavy" burden. *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)); *see, e.g.*, *Turner Broad. Sys.*, 512 U.S. at 664 (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."); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("This burden is not satisfied by mere speculation or conjecture . . . ."); *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."). Of course, the government also bears the burden under strict scrutiny. *E.g.*, *Reed*, 135 S. Ct. at 2231 (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

B. Rule 12(b)(6) Dismissal Is Inappropriate in This Case.

The court below rejected Plaintiffs-Appellants' argument that courts should not ordinarily resolve plausible First Amendment claims at the pleading stage. ER 9. But Plaintiffs-Appellants' complaint alleged facts showing that the examination requirement restricts Plaintiffs-Appellants' ability to teach and learn from each other. ER 20–26 (Compl. ¶¶ 29, 34–51,

56–60, 72–77, 80–87). They alleged that the literacy–numeracy test the State wants Esteban to take has nothing to do with his chosen career in horseshoeing. ER 22, 26 (Compl. ¶¶ 46, 79). Plaintiffs-Appellants further pled that the examination requirement is insufficiently tailored and burdens more of their speech than is necessary to serve any State interest. ER 27–28 (Compl. ¶¶ 95–98). This is more than adequate to state a First Amendment claim, which ends the inquiry on a Rule 12(b)(6) motion. If the State takes issue with Plaintiffs-Appellants' allegations, the First Amendment requires the State to rebut them using evidentiary support.

It is true, as the district court pointed out, that this Court has sometimes found early resolution of First Amendment claims appropriate. ER 9 (citing *S.F. Apartment Ass'n v. City & Cty. of San Francisco*, 881 F.3d 1169 (9th Cir. 2018), and *Taub v. City & Cty. of San Francisco*, 696 F. App'x 181, 184 (9th Cir. 2017)). But 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.*, *O'Brien v. Welty*, 818 F.3d at 933 (citing *Iqbal*, 556 U.S. at

678). Cases like *San Francisco Apartment Ass'n* and *Taub* are the exception, not the rule.

San Francisco Apartment Ass'n is not analogous to this case, and may not be good law. There, the plaintiff brought a host of state and federal constitutional claims against a series of provisions in the San Francisco Administrative Code that, among other things, required landlords to provide tenants with a short pair of "purely factual" disclosures regarding tenants' legal rights before a landlord could engage a tenant in lease buyout negotiations. 881 F.3d at 1173–78. This Court upheld the requirements under *Central Hudson* scrutiny—but also under its then-recent decision in *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017), which was vacated by the U.S. Supreme Court. 138 S. Ct. 2708 (2018). *San Francisco Apartment Ass'n* might control if Plaintiffs-Appellants were challenging the Act's disclosure requirements. But it is not analogous to Plaintiffs-Appellants' challenge to the examination requirement. Unlike in *San Francisco Apartment Ass'n*, the examination requirement operates to prevent Plaintiffs-Appellants' speech. *See above* Section II.A.

Taub is even farther afield from this case. In *Taub*, this Court upheld the enforcement of San Francisco's public-nudity ordinance as applied to a pair of "body freedom advocates" who argued that the ordinance restrained them from engaging in expressive conduct. 696 F. App'x at 182. Unlike this case—where Plaintiffs-Appellants allege that the examination requirement restricts their speech, not their expressive conduct—the Supreme Court has already affirmed the constitutionality of public-nudity ordinances under the First Amendment. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (plurality opinion). It therefore required little analysis for this Court to dismiss a case brought on essentially identical facts. *Taub*, 696 F. App'x at 182–83. Unlike in *Taub*, both the Supreme Court and this Court's sister circuits have recognized that the activity Plaintiffs-Appellants propose to undertake is protected by the First Amendment. *Holder*, 561 U.S. at 26–28; *Goulart*, 345 F.3d at 247. The State must therefore be held to its First Amendment burden here. The district court's order failed to do so.

CONCLUSION

The Supreme Court has 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*, 517 U.S. at 503 (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*, 564 U.S. at 577. That is what the State seeks to do with its examination requirement. Benign though the State's motives may be, the First Amendment requires scrutiny of this kind of "speech-adjacent paternalism." *Cf.* ER 15.

The district court erred in deciding that the examination requirement is not subject to First Amendment scrutiny. Plaintiffs-Appellants therefore

ask this Court to VACATE the judgment below, REVERSE the district court's order, and REMAND the case for further proceedings.

No other cases in this Court are related to this case. *See* Cir. R. 28-2.6.

Dated: August 8, 2018

Respectfully submitted,

INSTITUTE FOR JUSTICE

By: s/ Keith E. Diggs
Paul V. Avelar
Keith E. Diggs
INSTITUTE FOR JUSTICE
398 S. Mill Ave. #301
Tempe, AZ 85281
(480) 557-8300

Bradley A. Benbrook
Stephen M. Duvernay
BENBROOK LAW GROUP, PC
400 Capitol Mall, Suite 2530
Sacramento, CA 95814
Tel.: (916) 447-4900

Counsel for Appellants

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