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

REPLY BRIEF OF APPELLANTS

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[*] Except for the following, all applicable statutes, etc., are contained in the brief or addendum of Appellants and/or Appellees: 26 U.S.C. § 1366; Cal. Rev. & Tax. Code §§ 23101, 23151(a), 23153(d)(1), 23800, 23802(b)(1), and 23802.5; and the U.S. Department of Education Borrower Defense Regulations, 81 Fed. Reg. 75,926. *See* Cir. R. 28-2.7.

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REPLY

The issue presented in this case is whether the First Amendment applies to a law that prohibits an adult from spending his own money to learn a vocational skill. As demonstrated at length in Appellants' opening brief, it does.

The State's arguments to the contrary miss the mark. First, the State's arguments simply ignore the central fact in this case: that the examination requirements challenged here apply to the Appellants, Pacific Coast Horseshoeing School, Inc. (PCHS), Bob Smith, and Esteban Narez, because (and only because) of the particular content of their speech. Second, the State's failure to reckon with this core fact leads it to falsely assert that accepting Appellants' argument would mean the First Amendment would bar *any* regulation of businesses that engage in educational speech. And finally, the State misunderstands the allocation of burdens of proof in First Amendment cases.

I. THE EXAMINATION REQUIREMENT ONLY APPLIES BECAUSE OF THE CONTENT OF APPELLANTS' SPEECH.

At bottom, the State's argument is that this case raises no First Amendment issues at all. *Cf.* Answering Br. 20 (complaining that "Appellants are . . . attempting to convert the [examination] requirement into a regulation of expressive activity"). But this is backwards: Appellants are not arguing that they should be *exempt from* the examination requirement because they engage in protected speech. Instead, the examination requirement *only applies to Appellants in the first place* because they are engaged in speech on particular topics (specifically, vocational topics instead of recreational ones).

The parties largely agree on how the Act works. Opening Br. 7–11; Answering Br. 4–8. State law makes it illegal to teach Esteban how to shoe horses in exchange for tuition unless he first executes an enrollment agreement. *See* Cal. Educ. Code § 94902. And because Esteban is an ability-to-benefit student, he cannot execute such an agreement without first passing an ability-to-benefit examination. *Id.* § 94904(a), 5 Cal. Code Regs. § 71770(a)(1). If Esteban has not passed this examination (and he has

not), it is illegal for PCHS to enroll him or teach him. And this examination requirement applies because of the subject matter Appellants propose to teach and learn—a "vocational," as opposed to "avocational," skill. Educ. §§ 94818, 94857, 94858, 94874(a).

Where the parties differ is over the legal implications of this statutory structure. On the State's account, this is simply a regulation of *conduct*—of the act of entering into an enrollment agreement in the first place. This is incorrect for two independent reasons: The examination requirement is content-based because it is *triggered by speech*, and the examination requirement is content-based because (as demonstrated by the State's own brief) it cannot be justified without reference to the content of the speech being regulated.

A. The Examination Requirement Is Triggered by Appellants' Speech.

First, the State's argument is simply contrary to binding Supreme Court precedent. The question for the Court is not, as the State would have it, whether the regulated activity involves some conduct. *All* activities, after all, involve some conduct. The question, as expressly articulated by the

Supreme Court, is whether "as applied to [the Appellants], the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). And here, the answer to that question is obvious: Esteban is not prohibited from enrolling in educational programs *generally*. He is free to pay tuition to learn how to throw horseshoes or how to swim or how to dance. He is prohibited from enrolling with PCHS, however, because PCHS wants to teach him how to shoe horses—a vocational skill that can help him better his life. That is a restriction triggered by speech: Appellants want to teach and learn from each other, and "whether they may do so" under State law "depends on what they [teach]." *Id.* at 27; *see* Opening Br. 18–21, 34–40.[1]

The State tries to distinguish *Holder* by saying the examination requirement "places no restrictions . . . upon the content of an instructor's speech"—but only "[o]nce a student is properly enrolled." Answering Br.

[1] The State's brief casts the examination requirement as "a content-neutral regulation based on subject matter," Answering Br. 13, but "a speech regulation targeted at specific subject matter is content based." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015); *see also* Answering Br. 2, 37–38 (conceding that the Act targets certain "subject matter").

29. But the government in *Holder* could just as accurately have said that the law there placed no restriction on the content of a person's speech—as long as he was not speaking to a designated terrorist group. The question, as framed by the Supreme Court, is whether the law applies to someone who is saying one thing, but would *not* apply to a similarly situated person saying something different. If that is true—and it is undeniably true here—then the law is functioning as a restriction on speech, no matter what the State chooses to call it. *Holder*, 561 U.S. at 27; *cf. Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing) ("The Supreme Court's implication in [*Holder*] is clear: legislatures cannot nullify the First Amendment's protections for speech by playing this [speech/conduct] labeling game.").[2]

Similarly, the State is wrong that the examination requirement imposes only "downstream effect[s]" on speech. *See* Answering Br. 20–23.

[2] *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003), holds that teaching is "pure speech." *Id.* at 247; *see* Opening Br. 19–20. The State's only answer to this is to discourage the Court from considering whether teaching is speech. *See* Answering Br. 27 n.5.

It directly prevents PCHS from selling its speech to Esteban. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), holds that a restriction on the sale of information "imposes more than an incidental burden on protected expression." *Id.* at 567. Because *Sorrell* looks to the Act's "practical operation," the State cannot deem its examination requirement an incidental burden by claiming that it only affects "enrollment" when "enrollment" is legally required before PCHS can teach Esteban how to shoe horses. *Id*. at 567; *see* Opening Br. 33. Together, the examination and enrollment requirements impair Appellants' legal right to speak, and they do so because the content PCHS teaches is "vocational." That is not an incidental burden.[3] *Sorrell* therefore requires First Amendment review here.

[3] Contrary to the State's argument, restrictions "triggered by or . . . involving the sale of speech" are subject to First Amendment review. *Compare* Opening Br. 28–31 (discussing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995), and others), *with* Answering Br. 30–31 (denying that the examination requirement, like the restrictions struck down in those cases, "directly target[s] speech").

Rather than engaging with the plain text of *Holder* or *Sorrell*, the State's brief instead focuses largely on explaining why these sorts of restrictions on vocational education are a good idea. *See* Answering Br. 14–19. This, again, is backwards: The proper inquiry requires courts to ask "whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Reed*, 135 S. Ct. at 2228.

B. The Examination Requirement Cannot Be Justified Without Reference to the Content of Appellants' Speech.

The State's arguments about its benevolent purposes are also counterproductive here because they underscore the content-based nature of the challenged requirement. Even facially content-neutral laws must 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)). And the State's justifications for its law are laser-focused on the vocational content of PCHS's speech.[4] The State asserts "the prospect of

[4] Appellants made this argument—that the law is content-based because it cannot be justified without reference to the regulated speech—in their opening brief. Opening Br. 40–42. Strikingly, the State's brief does not address it. Instead, it simply attempts to justify the law by reference to the

being able to earn a living and pursue a career" makes people like Esteban vulnerable to making bad decisions about their education. Answering Br. 15–16; *see also id.* at 29 (arguing that the examination requirement is meant "to confirm that a prospective student is well-suited to take a proposed course of instruction before enrolling"). In other words, the State is preventing Esteban from enrolling in PCHS's course *because* it is vocational training—because it will teach him useful things, and the State does not want Esteban to over-eagerly enroll in a program it believes he is not smart enough to benefit from. Even if the State is justified in preventing Esteban from obtaining this kind of education for his own good, it is—by its own terms—doing so specifically because of the kind of education Esteban seeks.

The State's failure to grapple with this argument also fatally undermines its contention that the examination requirement should be understood as (at most) a content-neutral restriction on speech, which

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content of Appellants' speech without addressing the legal significance of such justifications in any way.

hinges on *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). Answering Br. 38–40. But *McCullen* only further supports Appellants here. The *McCullen* Court struck down a Massachusetts buffer-zone law that made it illegal to knowingly stand within 35 feet of an abortion clinic during its business hours. *See McCullen*, 134 S. Ct. at 2525–26. The Court held the law content-neutral not only because it was content-neutral on its face, *id.* at 2531, but *also* because it addressed problems—"public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways"—that would "arise irrespective of any listener's reactions" to speech. *Id.* at 2531–32. In other words, the law in *McCullen* was "justified without reference to . . . content." *Id.* at 2529 (quoting *Ward*, 491 U.S. at 791).[5]

Again—as explained in Appellants' opening brief and as *confirmed* by the State's brief—the only justification for the examination requirement is

[5] Significantly, the law in *McCullen* failed intermediate scrutiny because the government failed to meet its evidentiary burden. *Id.* at 2537–41. As discussed below, the State cannot meet any evidentiary burden (whether under strict or intermediate scrutiny) in the context of this 12(b)(6) motion. *See below* Section III.C.

the State's concern that people like Esteban might not be smart enough to understand the content of their would-be instructors' speech. *Compare* Opening Br. at 41–42 (explaining that the law can only be justified by reference to content) *with* Answering Br. at 29 (justifying the law by reference to content). As such, the examination requirement "cannot be justified without reference to the content of the regulated speech" and is therefore a content-based restriction on speech. *Reed*, 135 S. Ct. at 2227.

II. THE EXAMINATION REQUIREMENT IS UNLIKE OTHER LAWS THAT APPLY TO EDUCATIONAL SPEAKERS.

The State's failure to grapple with the content-based nature of the requirement at issue in this case leads it to focus on an endless parade of horribles, arguing that if *this* law is subject to First Amendment review, then "*every* law or regulation applicable to postsecondary educational institutions" will be too. Answering Br. 23. This is incorrect. The State can—and does—regulate schools that sell educational speech without running afoul of the First Amendment. What the State cannot do without triggering First Amendment scrutiny is what it has done here: regulate

schools that sell educational speech based on the content of what the schools teach.

The State's brief invokes a wide variety of different regulations imposed on schools, but all of the State's examples are distinct from the law at issue here in ways that make them clearly constitutional: First, the State may condition a subsidy on a student's ability to benefit. Second, the State may enforce any generally applicable business regulation against an educational institution. Third, the State may regulate an educational institution's non-expressive conduct. Fourth, the State may, subject to intermediate scrutiny, regulate an educational institution's commercial solicitations. Fifth, the State may regulate the legal effect of an educational program.

A. The State May Condition a Subsidy on a Student's Ability to Benefit.

The State relies heavily on cases upholding governmental decisions to refrain from *subsidizing* educational speech. *See* Answering Br. 22–23, 33, 44 (citing *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879 (9th Cir. 2018)). And, to be sure, the State is free to subsidize or not subsidize educational

speech as it chooses. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."). But the Appellants in this case do not seek any subsidy for their speech: PCHS accepts no state or federal student loans. ER 23 (Compl. ¶ 53). Instead, their complaint is that the State's ability-to-benefit law *prohibits them* from engaging in speech.

This distinction between subsidy and prohibition explains why the federal government's ability-to-benefit standard does not raise the same First Amendment concerns that California's does. As explained in Appellants' opening brief, the federal government imposes an ability-to-benefit standard only in determining whether a student will be eligible for subsidized loans to attend a school—that is, federal law "evaluates only whether to *subsidize*—not whether to *allow*—a student's education." Opening Br. 11; *accord* Answering Br. 7 n.2; ER 23 (Compl. ¶¶ 49–51). *Compare* 20 U.S.C. § 1091(d)(1) *with* Cal. Educ. Code § 94904(a). Because the State's examination requirement goes further and actually prohibits

Esteban from spending his own money on his (vocational) education without State approval, it triggers heightened First Amendment scrutiny.

B. Educational Institutions Must Comply with Generally Applicable Tax and Business Regulations.

The State's brief also asserts that Appellants' theory would threaten generally applicable tax and business regulations given that "failure to comply with such laws would impact PCHS's ability to 'teach horseshoeing.'" Answering Br. 25. But nothing in Appellants' argument calls into question generally applicable laws.

The First Amendment constrains the State's taxation power only when the State "singles out" speech or speakers protected by the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (special tax on paper and ink used by newspapers unconstitutional); *see Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (content-based sales-tax exemption for religious, professional, trade, and sports journals unconstitutional); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936) (special tax on newspaper circulation unconstitutional); *cf. Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (upholding a generally

applicable sales tax as applied to cable service providers). The same is true for other business regulations. *E.g.*, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (distinguishing *Minneapolis Star* in holding public-health nuisance-abatement law enforceable against bookstore); *Interpipe*, 898 F.3d at 895–96 (distinguishing *Minneapolis Star* in holding prevailing-wage law enforceable against government contractors seeking wage credit for contributions to industry advancement fund). The test thus remains whether, "as applied to plaintiffs[,] the conduct triggering coverage under the statute consists of communicating a message." *Holder*, 561 U.S. at 28, *cited in Interpipe*, 898 F.3d at 895.

Here, the State imposes a tax on PCHS, as an 'S' corporation "doing business" in California, in an amount equal to the greater of 1½ percent of its net income or the $800 minimum franchise tax, "for the privilege of exercising [PCHS's] corporate franchises within th[e] state."[6] Cal. Rev. & Tax. Code §§ 23101 ("doing business"), 23151(a) (tax on net income),

[6] As an 'S' corporation, PCHS's net income then passes through to Bob, who is taxed as if that income were his own. *See* 26 U.S.C. § 1366; Cal. Rev. & Tax. Code §§ 23800, 23802.5.

23153(d)(1) (minimum franchise tax), 23802(b)(1) (applicability to 'S' corporations). The tax does not turn on the content of PCHS's speech. It is a tax on "doing business," not on speaking about a particular topic, and PCHS's "doing business" may be taxed and regulated as such without implicating the First Amendment. *See Cuesnongle v. Ramos*, 835 F.2d 1486, 1501 (1st Cir. 1987). But the Court's analysis of the examination requirement has to be different because the examination requirement itself is different; unlike generally applicable tax laws, the examination requirement only applies to PCHS because of the subject matter PCHS teaches.

C. The State May Regulate a School's Non-Expressive Conduct.

The State further argues that Appellants' argument runs afoul of cases upholding restrictions on expressive conduct like *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006).[7] This is

[7] Appellants have never argued that horseshoeing is expressive conduct. Opening Br. 31, 48; *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 n.2 (2017) (crediting plaintiffs' disclaimer of expressive conduct doctrine).

incorrect: The only thing this case has in common with *FAIR* is that an educational institution is invoking the First Amendment. The similarities end there.

The plaintiffs in *FAIR* challenged the Solomon Amendment, which required universities (on pain of losing federal funding) to admit the military to campus recruiting events on equal footing with other recruiters. *See* 547 U.S. at 55. The Solomon Amendment applied to all institutions of higher learning, regardless of what they taught. *Id.* The Supreme Court rejected the university plaintiffs' First Amendment claims, concluding that denying recruiters access to campus was non-expressive conduct and that the plaintiffs' assertion that they wanted to engage in such conduct for expressive purposes (to protest the military's policies) did not require heightened First Amendment scrutiny. *Id.* at 65–66.

That analysis is inapplicable here. Where the law in *FAIR* applied to all higher-education institutions (no matter what they taught), the law here applies only to schools that teach particular topics. Where the law in *FAIR* "neither limit[ed] what . . . schools may say nor require[d] them to say

anything," *id.* at 60, the law here prevents PCHS from teaching Esteban how to shoe a horse.

FAIR would control here if California law made it illegal for PCHS owner Bob Smith to shoe a horse and Smith argued that he was entitled to First Amendment protection because he wanted to shoe horses for an expressive purpose—whether to teach Esteban how to do it properly or as a political protest. *Cf. id.* at 66 (discussing hypothetical First Amendment plaintiff who "express[es] his disapproval of the Internal Revenue Service by refusing to pay his income taxes"). But this case presents the opposite scenario: It is perfectly legal for Bob (or, indeed, for Esteban) to shoe a horse; the only thing that is unlawful is Esteban paying Bob to show him how to do so.

D. The State May Reasonably Regulate a School's Commercial Solicitations.

The State's brief also frequently invokes its interest in regulating vocational schools' "solicitation." Answering Br. 2, 14, 20, 31–32. But this, too, is a red herring: The State's power to regulate "solicitation" is neither presented nor affected by this case.

Solicitation restrictions are subject to intermediate First Amendment scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), *cited in* Opening Br. 47, Answering Br. 45–46. *Central Hudson* announced the constitutional standard for "commercial speech," the defining feature of which is that it "propos[es] a commercial transaction." *Cent. Hudson*, 447 U.S. at 562; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). Because the First Amendment does not protect fraud,[8] the *Central Hudson* doctrine requires "[a]t the outset" that the solicitation "must concern lawful activity and not be misleading." *Cent. Hudson*, 447 U.S. at 566. If the solicitation clears that threshold, *Central Hudson* scrutiny then requires a substantial government interest, relation, and fit. *See id.* The consumer-protection cases cited by the State all involve laws for which *Central Hudson* scrutiny would be appropriate in a First Amendment challenge. *See United States v. Stephens Inst.*, 901 F.3d 1124,

[8] Fraud, historically, is a special category of speech that has never been protected by the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion); *id.* at 747 (Alito, J., dissenting); *United States v. Stevens*, 559 U.S. 460, 468 (2010).

1129 (9th Cir. 2018) (False Claims Act); *People v. Heald Coll., LLC*, No. CGC13534793, 2016 WL 1130744, at *1 (Cal. Super. Ct. Mar. 23, 2016) (Unfair Competition Law, Fair Advertising Law, Corporate Securities Law); Complaint ¶ 10, *People v. Ashford Univ., LLC*, No. RG17883963, 2017 WL 5903538 (Cal. Super. Ct. filed Nov. 29, 2017) (Unfair Competition Law, Fair Advertising Law); *see also United States ex rel. Bergman v. Abbott Labs.*, 995 F. Supp. 2d 357, 375–76 (E.D. Pa. 2014) (denying pharmaceutical company's Rule 12(b)(6) motion to dismiss a False Claims Act qui tam suit because relator had plausibly alleged that company's commercial speech "included false and misleading statements"); *cf. Bauer v. DeVos*, 325 F. Supp. 3d. 74, 79 (D.D.C. 2018) (suit to compel implementation of U.S. Department of Education Borrower Defense Regulations, 81 Fed. Reg. 75,926 (Nov. 1, 2016)).

Whatever the ultimate merits of governmental restrictions on commercial solicitations by educational institutions, those merits are not presented here. The examination requirement does not restrict Appellants'

solicitations. It restricts their teaching and learning. It must be analyzed as such.

E. The State May Establish an Educational Program's Legal Effect.

Finally, the State relies on analogies to regulations that control the *legal effect* of an educational program rather than restricting the ability to lawfully teach someone about a particular topic. Answering Br. 23–24 (citing *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1021 (2018), and *Ohio Ass'n of Indep. Schs.* (*OAIS*) *v. Goff*, 92 F.3d 419 (6th Cir. 1996)). Such laws—regulations that, for example, control whether a particular program counts toward a student's compulsory education or toward the educational hours necessary to obtain an occupational license[9]—are not burdens triggered by the content of speech; they are instead regulations of the legal effect the educational program has on its students.

[9] California does not require an occupational license to shoe a horse. ER 19 (Compl. ¶ 21).

This is why, for example, the State's reliance on *OAIS* is misplaced: That case involves only the State's unquestioned power to regulate private *primary and secondary* schools—that is, schools that award high-school diplomas and satisfy a state's compulsory-education requirements for minors. *See OAIS*, 92 F.3d 419. In *OAIS*, the Sixth Circuit affirmed that a standardized-testing requirement, as applied to private schools, "in no way restricts [them] from teaching any particular subjects" and does not implicate the First Amendment. *OAIS*, 92 F.3d at 424. There, the standardized tests were made "a prerequisite to receiving a [high school] diploma." *Id.* at 421. And the Sixth Circuit recognized that the State has a legitimate interest in regulating the conditions under which a high-school diploma may be awarded. *Id.* at 423–24.

Moreover, *OAIS* does not stand for the proposition that regulations of private education are without constitutional moment: To the contrary, the Sixth Circuit "acknowledge[d] that in some situations, state-imposed testing requirements could be so intrusive . . . [as to] displace private schools' discretion to fashion their own educational programs and focus on

subjects deemed to be of particular importance." *Id.* at 424. Among these are situations involving the "constitutional right to send . . . children to private schools and . . . to select private schools that offer specialized instruction." *Id.* at 422–23 (citing *Runyon v. McCrary*, 427 U.S. 160 (1976) (upholding federal prohibition on racial discrimination by private schools); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down compulsory-attendance law as applied to Amish students beyond the eighth grade), *limited by Emp't Div. v. Smith*, 494 U.S. 872, 881 & n.1 (1990); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down compulsory-attendance law requiring attendance at public schools); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down prohibition on teaching foreign language to students who have not completed the eighth grade)). Here, the State's examination requirement interferes with the constitutional right of Esteban, an adult, to learn any subject he wants.

In *Illinois Bible Colleges*, the Seventh Circuit rejected a group of religious colleges' argument that the First Amendment afforded them "the right to issue bachelor's, master's, and doctorate degrees" with "absolutely

no oversight." 870 F.3d at 642. There was no allegation, as there is here, that the challenged statutes were content-based on their face. *Cf.* ER 27 (Compl. ¶ 93); *above* Part I. Instead, the religious colleges alleged that the government's regulators might "appl[y] a 'content-based' regulation of their speech based on [their] 'religious principles' or 'religious teachings' " *if* the colleges were to apply for accreditation—a hypothetical claim the Seventh Circuit declined to adjudicate. *Ill. Bible Colls.*, 870 F.3d at 642. Like *OAIS*, the Seventh Circuit's opinion in *Illinois Bible Colleges* (at most) stands for the proposition that a state can regulate who can award specific degrees; it does not stand for the proposition that states can (without any First Amendment scrutiny at all) forbid private citizens from teaching willing students about particular topics.

Simply put, neither of these cases control here because the examination requirement regulates whether Esteban can be taught, not what kind of credential he should receive after he is taught. And, as federal courts have routinely acknowledged, laws that forbid teaching people things violate the Constitution. *Cf.* Opening Br. 21.

III. THE STATE'S BRIEF MISUNDERSTANDS THE BURDENS IN A FIRST AMENDMENT CASE.

Finally, the State is incorrect to assert that it can meet its First Amendment burden of proof in the context of a Rule 12(b)(6) motion. *See* Answering Br. 41–54 & n.12. There are two different burdens of proof at issue here: Appellants had the initial burden to plausibly allege that the examination requirement restricts protected speech—which, as discussed in Part A below, they have done. As discussed in Part B, under *any* level of First Amendment scrutiny, this shifts the burden of proof to the State to justify these burdens on speech. And, as discussed in Part C, taking the allegations of the complaint as true, the State cannot carry this burden of proof in the context of a Rule 12(b)(6) motion.

A. The Complaint Plausibly Alleges a Restriction on Protected Speech.

The Rule 12(b)(6) plausibility standard exists to prevent fishing expeditions in civil discovery, not to excuse the State from justifying speech restrictions under the First Amendment. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), require that a

complaint's factual allegations must "[]cross the line from conceivable to plausible" in order to avoid Rule 12(b)(6) dismissal. *Twombly*, 550 U.S. at 558, 570; *see Iqbal*, 556 U.S. at 670, 684 (extending *Twombly* standard to "all civil actions").

Here, the State flatly asserts that the allegations in the complaint fail to meet the pleading standards of *Iqbal*, Answering Br. 43 n.12, but it does not identify any factual allegations in the complaint which "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. To the contrary, Appellants factual allegations are entirely plausible—and, indeed, the State's brief seems to agree with essentially all of them, disputing only their legal implications. *See* Answering Br. 20, 23, 26–27, 30–31, 41 n.10. There can be no serious dispute that the examination requirement, as alleged, "makes it illegal to teach a particular topic to a particular student for compensation." Opening Br. 2.

The real question then is not whether "there are well-pleaded factual allegations" but "whether they plausibly give rise to an entitlement to relief." *See Iqbal*, 556 U.S. at 679 (describing *Twombly*'s "two-pronged"

approach). Here, that means the Court should ask whether "a law that makes it illegal to teach a particular topic to a particular student for compensation"—the examination requirement, on whose operation the parties agree—is "subject to First Amendment scrutiny." Opening Br. 2. And, as explained above, it is. *See above* Part I.

B. The State Therefore Has an Affirmative Evidentiary Burden.

Because speech is a fundamental right, the government has the burden of proving that speech regulations are constitutional; speakers are not required to prove speech regulations unconstitutional. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000); Opening Br. 44–45. Once a speaker sets forth a plausible speech restriction, the First Amendment shifts the burden to the government to justify it. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011).

The State's brief shows no understanding of this presumption of unconstitutionality. It fails to mention it, but for three cursory recitations to

Appellants' argument.[10] *See* Answering Br. 42, 46, 47 n.13. Bizarrely, the State faults *Appellants* for not alleging in more detail that the examination requirement "does not serve an important state interest" and "fails to guard against the . . . enrollment of students who cannot benefit from . . . 'teaching horseshoeing.'" *Id.* at 51 (citing *Iqbal*, 556 U.S. at 678). But Appellants only had to plead a speech restriction; the First Amendment does not require them to negate the State's justifications in their complaint.[11] *Compare Iqbal*, 556 U.S. at 677–79, *with Playboy Entm't Grp.*, 529 U.S. at 816. The State is arguing, against all "judicial experience and common sense," that *Iqbal* reversed the burden of proof in First Amendment cases. *See Iqbal*, 556 U.S. at 679. It did not.

Under any standard of First Amendment review, the State has an affirmative evidentiary burden once a speech restriction has been pled. *See*

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[10] The State also cites eight cases in which the Supreme Court or this Court decided a First Amendment claim "before summary judgment." Answering Br. 44–47. *But see below* Section III.C (addressing cases).

[11] Moreover, Appellants pled that the examination requirement "substantially advances no compelling or important government interest" as applied to them. *See* ER 27–28 (Compl. ¶ 95–98).

Opening Br. at 44–45 (collecting cases).[12] This burden cannot be carried by conclusory assertions or legislative findings of fact. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664–68 (1994) (plurality opinion) (explaining that the government's burden cannot be met by legislative findings of fact but require judicial factfinding); *Edenfield v. Fane*, 507 U.S. 761, 771–73 (1993) (rejecting the Florida Board of Accountancy's self-serving conclusory affidavit as invalid for First Amendment purposes). As explained below, this evidentiary burden cannot be met in the context of the State's Rule 12(b)(6) motion here.

C. The State Cannot Carry Its Burden on a Rule 12(b)(6) Motion.

Rule 12(b)(6) restricts the Court's factual analysis here to the allegations in the complaint, which must be accepted as true. *E.g.*, *Lacey v. Maricopa Cty.*, 693 F.3d 896, 907 (9th Cir. 2012) (en banc) (citing *Iqbal*, 556

[12] The State oddly asserts that Appellants have "waived" their arguments under intermediate scrutiny by not presenting them in their opening brief. Answering Br. 41 & n.11. As noted above, the opening brief specifically discusses the "heavy" burden the State would face under intermediate scrutiny and explains that it cannot meet such a burden in the context of a Rule 12(b)(6) motion. Opening Br. at 44–45.

U.S. at 678). But the State's brief makes no effort to demonstrate that the facts alleged in the complaint allow it to carry its First Amendment burden here. It speculates that perhaps because PCHS's curriculum includes basic "business advice," then "basic literacy and numeracy skills *may be* required" to understand it. Answering Br. 53 n.14 (emphasis added) (citing ER 20 (Compl. ¶ 30)). This is speculative on its face. Otherwise, the State's analysis rests entirely on legislative findings outside of the complaint (and which, as explained above, cannot be sufficient to carry their burden in any event).[13]

Instead of explaining why the factual allegations in the complaint in *this* case allow it to carry its burden, the State points to other appellate cases in which First Amendment complaints were dismissed. Answering

[13] Amici, supporting the State, offer an extended discussion of possible justifications for the examination requirement, which centers around concerns about student loans and debt. *See generally* Br. Amici Curiae Hous. & Econ. Rights Advocates, et al. These concerns might be justification for the *federal* examination requirement (which controls whether students are eligible for loans), but they have nothing to do with the challenged application of the State's law, which prohibits Esteban from enrolling at PCHS even though he wants to use his own money and even though PCHS does not accept student loans. ER 23 (Compl. ¶ 53).

Br. at 44–47. And, indeed, First Amendment cases are sometimes dismissed on the pleadings. Sometimes they are dismissed because the complaint fails to state a claim that requires First Amendment scrutiny at all. *See Interpipe*, 898 F.3d at 891–92 (finding no First Amendment right to state subsidy of speech); *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir. 2018) (finding no First Amendment right to solicit illegal prostitution); *cf. FAIR*, 547 U.S. at 60 (holding at preliminary-injunction stage that the challenged regulation restricted only conduct). Sometimes they are dismissed because they are premised on a legal theory that is foreclosed by on-point precedent. *Contest Promotions, LLC v. City & Cty. of San Francisco*, 704 F. App'x 665, 668 (9th Cir. 2017) (finding challenge to commercial signage ordinance foreclosed by Supreme Court precedent); *Taub v. City & Cty. of San Francisco*, 696 F. App'x 181, 182 (9th Cir. 2017) (finding challenge to public-nudity ordinance foreclosed by Supreme Court precedent). Sometimes they are dismissed because the complaint fails to plead an essential element of the claim. *O'Brien v. Welty*, 818 F.3d 920, 931 (9th Cir. 2016) (finding complaint failed to allege the speech at issue took

place in a traditional public forum).[14] And sometimes they are dismissed because the allegations of the complaint make clear that the government will be able to meet its burden. *S.F. Apt. Ass'n v. City & Cty. of San Francisco*, 881 F.3d 1169, 1177–78 (9th Cir. 2018) (affirming dismissal where complaint made clear that the statute's requirements of minimal, truthful factual disclosures would pass muster under *Central Hudson*).

In sum, the State's argument is that sometimes courts dismiss complaints that allege First Amendment violations. And so they do. But what the State needs to show is that *this* complaint should have been dismissed. And that the State cannot do: The complaint states a cognizable First Amendment claim supported with specific allegations showing that

[14] The State's brief also cites this Court's decision in *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014), characterizing it as "[s]imilar[]." Answering Br. 45. That case arose in the context of a preliminary-injunction appeal rather than a motion to dismiss, and it, like *FAIR*, turned entirely on whether the law at issue burdened conduct or speech, not whether the government could carry its First Amendment burden. 740 F.3d at 1229. Even if *Pickup*'s discussion of the difference between regulations of professional conduct and professional speech remains good law after *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (abrogating *Pickup*), it provides no support for the notion that the State can carry its First Amendment burden here.

the State cannot justify the burdens it is imposing on Appellants' speech. ER 20–26 (Compl. ¶¶ 29, 34–51, 56–60, 72–87, 95–98). That is enough to avoid dismissal under Rule 12(b)(6). *See, e.g.*, *Tracht Gut, LLC v. L.A. Cty. Treasurer & Tax Collector*, 836 F.3d 1146, 1151 (9th Cir. 2016) (noting that Rule 12(b)(6) dismissal requires either a "lack of a cognizable legal theory" or "absence of sufficient facts alleged" in support of such a theory). The ruling below should therefore be reversed.

CONCLUSION

The legal analysis at this early stage is simple. Because the examination requirement makes it illegal for Appellants Bob Smith and PCHS to teach horseshoeing to Appellant Esteban Narez for compensation based on the content of what PCHS teaches, the examination requirement is subject to First Amendment scrutiny, which imposes evidentiary burdens on the government that it cannot meet on a challenge to the pleadings. *See* Opening Br. 2. Appellants therefore ask this Court to VACATE the judgment below, REVERSE the district court's order, and REMAND the case for further proceedings.

Dated: October 30, 2018.

Respectfully submitted,

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