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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

AZADEH KHATIBI, M.D., *et al.*,

Plaintiffs,

v.

RANDY W. HAWKINS, in his official capacity as President of the Medical Board of California, *et al.*,

Defendants.

2:23-cv-06195-MRA-E

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: March 11, 2024
Time: 1:30 p.m.
Courtroom: 7D
Judge: The Honorable Monica Ramirez Almadani
Trial Date: February 25, 2025
Action Filed: August 1, 2023

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INTRODUCTION

Plaintiffs have again failed to state any violation of their First Amendment rights. State-mandated curriculum requirements for continuing medical education courses necessary for state licensure constitutes government speech because when physicians like Plaintiffs choose to teach continuing medical education courses for credit, they "speak for the state," as this Court has already held. ECF No. 25 at 8. Thus, the State's requirement that continuing medical education courses include discussion of implicit bias as part of their curriculum does not implicate Plaintiffs' free speech rights.

Plaintiffs argue—apparently based on a misunderstanding of the government speech doctrine—that the doctrine does not apply to the instant case. There is no legal support, and Plaintiffs cite none, for the proposition that the government speech doctrine is limited to cases where the government is concerned about speech that might be attributed *to it*, as Plaintiffs assert. To the contrary, the government speech doctrine has often been applied to cases where private individuals disagree with speech content they are required to deliver. *See, e.g.*, *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1243 (9th Cir. 2023) (government speech doctrine applied in case brought by volunteer against councilperson). Nor is there any danger of misuse of the government speech doctrine by applying it here. Contrary to Plaintiffs' assertion that applying the government speech doctrine here (as this Court has already done) would lead to a "misuse" of that doctrine, it would be a misuse of the First Amendment to say that private physicians like Plaintiffs—who have a choice in whether they teach continuing medical education courses—can decide whether certain topics should be included in the training of physicians who provide medical services to the public. If Plaintiffs do not want to train students on implicit bias because it conflicts with their own personal views, they are not required to teach continuing medical education courses at all.

Similarly unpersuasive is Plaintiffs' argument that school curriculum cases, where courts have applied the government speech doctrine, are inapposite. Just like curriculum presented by teachers at charter schools constitutes government speech because it is "communicated by employees working at institutions that are state-funded, state-authorized, and extensively state-regulated" (*Nampa Classical Academy v. Goesling*, 447 Fed. Appx. 776, 778 (9th Cir. 2011)), so does curriculum delivered by instructors of continuing medical education courses, who teach courses that are authorized by the State and delivered to professionals to maintain their State-issued license to practice in a heavily State-regulated profession, constitute government speech. Plaintiffs cite to no authority that requires a different conclusion. They instead rely on cases dealing with vanity license plates, trademarks, flag raisings, and notice requirements to argue that the instant case does not meet the requirements for government speech. But those cases are nothing like the instant matter, which deals with the curriculum for courses that physicians are required to take to maintain their State-issued license.

Even if the speech at issue were private speech—which it is not—Plaintiffs have not established a compelled speech claim: they allege no new facts to support their conclusory allegation that discussion of implicit bias in the courses they teach would be readily associated with them personally, a requirement for any compelled speech claim. And Plaintiffs fail to identify in either their amended complaint or in their opposition any right or benefit—other than the ability to teach continuing medical education courses for credit, which they acknowledge is not a right—of which they are deprived because of any unconstitutional condition.

As discussed in Defendants' motion, Plaintiffs' amended complaint raises no materially new factual allegations and contains the same deficiencies that previously warranted dismissal. And Plaintiffs' opposition raises no material arguments to rebut that the speech at issue constitutes government speech not

subject to First Amendment protection. Accordingly, the Court should again dismiss the complaint, but with prejudice.

ARGUMENT

I. PLAINTIFFS HAVE NOT STATED A COMPELLED SPEECH CLAIM

A. Plaintiffs Have Not Shown That Continuing Medical Education Course Curriculum Is Not Government Speech

As Plaintiffs acknowledge, courts consider three factors in determining whether speech constitutes government speech: (1) whether the government has historically used the medium to speak to the public; (2) whether the message is closely identified in the public mind with the State; and (3) the degree of control the State maintains over the messages conveyed. *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 210-13 (2015). As Defendants argued in their motion (ECF No. 29-1 at 10-17), these factors weigh in favor of finding that the content of continuing medical education courses constitutes government speech.

The crux of Plaintiffs' opposition is that the government speech doctrine does not apply here because it is limited to instances where the government is concerned with speech that might be attributed to it. As discussed in Section I.B., *infra*, Plaintiffs' narrow view of the government speech doctrine has no support in the law and is contrary to analogous cases where courts have applied the doctrine.

Plaintiffs further argue that even if the doctrine applied to cases involving private individuals' speech, it would not apply here. Plaintiffs rely on *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022), *Matal v. Tam*, 582 U.S. 218 (2017), *Kotler v. Webb*, No. 19-2682-GW-SKx, 2019 WL 4635168, at *6-7 (C.D. Cal. Aug. 29, 2019), and *Ogilvie v. Gordon*, No. 20-cv-01707-JST, 2020 WL 10963944, at *3 (N.D. Cal. July 8, 2020) for their argument that the speech at issue here does not constitute government speech. None of these cases are analogous to the instant case. In *Shurtleff,* the Supreme Court held that Boston's flag-raising program,

which allows private groups to use one of the three flag poles on the plaza in front of city hall to fly a flag of their choosing during events sponsored by these groups, did not express government speech. The Court's decision was based on the fact that, unlike here, Boston neither actively controlled the flag raisings nor shaped the messages the flags sent. 596 U.S. at 256.

In *Tam*, the Supreme Court considered whether federal registration of trademarks converted the marks to government speech. The Court found that trademarks had "not traditionally been used to convey" government messages (582 U.S. at 238) because a trademark is a unique expression of a design, symbol, or word intended to represent a particular company or product. Not so here, where there is a long history of using continuing medical education courses to convey government messages. *See* ECF No. 25 at 9 ("But if [Plaintiffs] want California to award state-created credits to participants in their courses, they must teach courses that address the content the legislature has decided is essential for medical practitioners to study. And they must communicate the information that the legislature requires medical practitioners to have."). In *Kotler*, the court rejected a claim that custom vanity license plates constituted government speech because there was no history of the state using customized registration number configurations to express government messages, and viewers were unlikely to perceive the government was speaking through personalized vanity plates. 2019 WL 4635168, at *6-7. For the same reason, the court rejected the government speech claim in *Ogilvie*. 2020 WL 10963944, at *3 ("[T]he State has not historically used the alphanumeric combinations on license plates to communicate messages to the public.").

Plaintiffs argue that the State has "almost no control over the content of CME's." ECF No. 30 at 12:19.[1] But as explained in Defendants' motion (ECF No.

[1] Plaintiffs insist that the implicit bias requirement "alters" the content of their speech. ECF No. 30 at 5:26-27. By Plaintiffs' own admission then, the

29-1 at 13-17), there can be no dispute that the Legislature, at a minimum, "shapes" the content of continuing medical education courses. *See Shurtleff*, 596 U.S. at 252. In contrast to *Shurtleff, Tam, Kotler, and Ogilvie*, by determining what standards a medical practitioner must comply with in order to have and maintain a medical license, and by setting forth specific requirements to do so, the State here clearly has more control over the content of continuing medical education courses than Boston had over private groups' flags on a city flagpole, or the Patent and Trademark Office over registered trademarks, or California over the content of vanity license plates. And Plaintiffs have alleged no facts to support their allegation that physicians taking continuing medical education courses to maintain their State-issued medical licenses would attribute the content of those courses to any person or entity other than the State. *See* ECF No. 25 at 6 ("Common sense therefore suggests that attendees know CME courses are approved for credits required by the Medical Board of California in order for doctors to maintain their licenses – in other words, the state.").

Nor do Plaintiffs dispute that instructors are able to communicate to students that the content of continuing medical education courses is not their own but mandated by the State. Instead, they cite to *National Institute of Family and Life Advocates v. Becerra (NIFLA)*, 138 S.Ct. 2361 (2018) in contending that any disavowal by Plaintiffs would be insufficient because "[n]othing in the mandated notices at issue in *NIFLA* prevented objecting clinics from making clear to patients their disagreement with the notices, but the Court still applied strict scrutiny to the compelled speech." ECF No. 30 at 6:26-7:10. As noted *infra*, *NIFLA* is inapposite because it dealt with general notice requirements, not curriculum requirements for medical practitioners to maintain their licenses.[2] Moreover, the Court noted the

Legislature controls the content of continuing medical education courses.

[2] Plaintiffs assert that Defendants do not contest that implicit bias trainings are controversial. ECF No. 30 at 1:2-4. Not so. As the law makes clear, an

clinics' ability to express their disagreement with the notice in the context of whether the notice altered the plaintiffs' speech, not whether the speech would be associated with them. *NIFLA*, 138 S. Ct. at 2371.

B. The Government Speech Doctrine Applies to the Instant Case

Contrary to Plaintiffs' unsupported contention, the government speech doctrine is not limited to the "distinct context" where "the government is concerned about speech that might be attributed *to it*." ECF No. 30 at 1:22, 15:9-11 (emphasis in original). Indeed, *Lathus* is but one example of a case where a private individual was concerned that speech might be attributed to her. 56 F.4th 1238, 1243 (government speech doctrine applied in case brought by volunteer against councilperson). *See also Johanns v. Livestock Mktg. Ass'n*, 125 S.Ct. 2055 (2005) (government speech doctrine applied in case brought by associations and individuals challenging government's beef advertising program); *Cajune v. Indep. Sch. Dist. 194*, No. CV 22-2135 (JWB/ECW), 2023 WL 5348833, at *1 (D. Minn. Aug. 21, 2023) (parents' and taxpayers' challenge to school board's display of "Black Lives Matter" posters rejected on the basis that display constitutes government speech); *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45 (D.D.C. 2006) (dismissing First Amendment challenge brought by avocado importers, finding that advertisements and promotional campaigns funded through government assessments on avocados constitute government speech not subject to First Amendment challenge).

Similarly unavailing is Plaintiffs' argument that the court should ignore the long line of factually analogous school curricular cases because they are "fact-bound to the public school context." ECF No. 30 at 15, fn. 9. These cases, in which the Supreme Court and the Ninth Circuit have held that curriculum-related materials are not protected speech, are directly on point. *Hazelwood Sch. Dist. v.*

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understanding of implicit bias is vital because it "affects perceptions and treatment decisions" by healthcare professionals, which can lead to disparities in healthcare. § 2190.1(e).

Kuhlmeier, 484 U.S. 260, 271 (1988); *Nampa Classical Academy v. Goesling*, 447 Fed. Appx. 776, 778 (9th Cir. 2011); *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). Indeed, as Plaintiffs point out, the court in *Nampa* held that curriculum presented by teachers at charter schools was not the speech of teachers "'because the message is communicated by employees working at institutions that are state-funded, state-authorized, and extensively state-regulated.'" ECF No. 30 at 16:7-9 (quoting *Nampa*, 447 Fed. Appx. at 778). Similarly here, instructors of continuing medical education courses teach courses that are authorized by the State and delivered to professionals to maintain their State-issued license to practice in a heavily State-regulated profession.[3]

Plaintiffs make the remarkable assertion that the school curricular cases would only apply if this were a case about "physicians complaining about being required to take a course on implicit bias, or of instructors being prevented from teaching certain CME topics or material" because "those cases would be attempts to change required curriculum." ECF No. 30 at 18:22-19:2. Plaintiffs apparently agree then that school curricular cases apply to cases involving a change in curriculum. That is exactly the case here: Section 2190.1 requires that the curriculum of continuing medical education courses be changed to include discussion of implicit bias. The fact that private instructors like Plaintiffs teach the continuing medical education curriculum set by the Legislature and Medical Board does not change the governmental nature of the speech. *Walker,* 576 U.S. at 217 ("The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message."); *see also Burwell v. Portland School District No. 1J*, No. 3:19-cv-00385-JR, 2019 WL 9441663, *5 (D. Or. Mar. 23, 2010) ("Simply because the government uses a third party for speech does not remove the

[3] For these reasons, the instant case is readily distinguishable from disclosure or notice cases like *NIFLA*, 138 S.Ct. 2361 (2018) and *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 650–51 (1985).

speech from the realm of government speech."). And although instructors may exercise some discretion in how they teach continuing medical education courses, this does not change the principal function of the Legislature or the Medical Board in setting curriculum standards for, and overseeing, these courses.[4] Plaintiffs have asserted no new allegations or arguments to disturb this Court's prior conclusion that "CME instructors speak for the state while teaching courses because they have been delegated the power to bestow credits created and required by the state for the practice of medicine." ECF No. 25 at 8. Thus, the government speech doctrine applies here just as it has in cases dealing with public school curriculum.

C. Even If the Government Speech Doctrine Did Not Apply, Plaintiffs Have Not Stated a Compelled Speech Claim

As discussed in Defendants' motion (ECF No. 29-1 at 18), a plaintiff bringing a compelled speech claim must allege, among things, that the speech at issue is readily associated with the plaintiff. Plaintiffs cite *Green v. Miss United States of America, LLC*, 52 F.4th 773, 791 (9th Cir. 2022) and *NIFLA* for the argument that the correct standard for a compelled speech claim is whether the alleged compulsion "alters the content" of the plaintiff's speech and that Plaintiffs need not allege that the speech at issue is "readily associated" with them. ECF No. 30 at 4:14-18. This is an inaccurate representation of those cases. The Ninth Circuit in *Green* did not set forth the standard for compelled speech cases; while the court found that the compulsion at issue (inclusion in the Miss United States of America pageant of a contestant who did not meet the pageant's eligibility requirements) had the effect of altering the pageant's speech (52 F.4th at 791), nowhere did it suggest that a plaintiff need not allege that the compelled speech is readily associated with

[4] While private associations may accredit continuing medical education courses, these associations are responsible for developing standards for compliance with the State's content requirements, including the implicit bias requirements. Cal. Bus. & Prof. Code § 2190.1(d)(3). And the courses must ultimately be approved by the Medical Board of California for continuing education credit. Cal. Code Regs. tit. 16, § 1337. Thus, the Board has not "outsourced implementation of standards to private organizations and instructors." ECF No. 30 at 12:20-23.

them. Similarly, while the Court in *NIFLA* found that the notice requirement at issue altered the content of the plaintiffs' speech (138 S.Ct. at 2371), it did not in any way suggest that association of the speech with the plaintiffs was not required. In any event, *NIFLA* does not apply here because it dealt with a notice requirement, not a State-required and State-shaped course curriculum.[5] *Lathus*, on the other hand, is on point; Plaintiffs fail to distinguish it from the instant matter. The Ninth Circuit expressly addressed the plaintiff's compelled speech claim, noting, "The central 'constitutional issue' in compelled speech cases is whether the 'State forced one speaker to host another speaker's speech.'" *Id.* at 1243 (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, —— U.S. ——, 140 S. Ct. 2082, 2088 (2020).) Plaintiffs' assertions that *Lathus* is not a compelled speech case or that another standard applies notwithstanding that case, therefore, are plainly wrong.

Plaintiffs' allegations that students contribute the content of continuing medical education courses to them (ECF No. 30 at 6:12-19) is but a legal conclusion couched as a factual allegation. Moreover, Plaintiffs do not allege that Section 2190.1 requires them to endorse the subject of implicit bias or that it prevents them from presenting their own messages on the topic. And nothing prevents Plaintiffs from communicating to their course attendees that the topic of implicit bias should not be associated with them and that they are only covering it because the law requires them to.

II. PLAINTIFFS HAVE NOT STATED A CONDITIONED SPEECH CLAIM

Plaintiffs contend that "[s]o long as a plaintiff alleges the denial of a benefit is based on the plaintiff's exercise of protected speech, she or he has sufficiently alleged a claim under the unconstitutional conditions doctrine." ECF No. 30 at

[5] Nor does *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995), *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974), or *Wooley v. Maynard*, 430 U.S. 705, 715–17 (1977) support Plaintiffs' contention, as the Supreme Court in these cases did not consider the appropriate standard for compelled speech cases, and ready association with the plaintiffs was likely presumed.

19:18-21. Yet Plaintiffs do not identify any benefit that they are denied based on their exercise of protected speech. As this Court has already found, "[t]he power to give continuing medical education credits is not a pre-existing right on which compelled speech is conditioned." ECF No. 25 at 8. Plaintiffs do not contest this, acknowledging that the power to give continuing medical education credits "is retained by the state and delegated to the Board." ECF No. 30 at 20:10-11. Given their failure to identify any right or benefit on which the alleged compelled speech is conditioned, Plaintiffs fail to state an unconstitutional condition claim.

CONCLUSION

For these reasons and the reasons set forth in Defendants' moving papers, the court should dismiss the complaint without leave to amend.

Dated: February 27, 2024

Respectfully Submitted,

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