Case No. 24-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AZADEH KHATIBI, *et al.*,

Plaintiffs – Appellants,

v.

RANDY HAWKINS, *et al.*,

Defendants – Appellees.

Appeal from the United States District Court for the
Central District of California (Almadani, J.)
2:23-cv-06195-MRA-E

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Amicus Association of American Physicians and Surgeons ("AAPS") is a nonprofit corporation having its principal place of business in Tucson, Arizona. It is not a wholly owned subsidiary of any corporation. It does not have any stock and thus no corporate or publicly held entity owns more than 10% of its stock.

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Founded in 1943, the *Amicus curiae* Association of American Physicians and Surgeons ("AAPS") is a non-profit corporation having members in California. The mission of AAPS is to defend the practice of private and ethical medicine, and the U.S. Supreme Court has made use of *amicus* briefs submitted by AAPS in multiple high-profile cases. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). Federal appellate courts have found amicus briefs by AAPS to be helpful, as when the U.S. Court of Appeals for the Third Circuit cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). State courts have also received and addressed *amicus* briefs by AAPS. *See Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (2016) (discussing an *amicus* brief which was filed by AAPS).

AAPS has a particularly strong interest in this case because one of its original plaintiffs, the since-deceased Plaintiff Marilyn Singleton, M.D., J.D., was a past-president of AAPS. *See Khatibi v. Hawkins*, No. 24-3108, 2025 U.S. App. LEXIS

[1] All of the parties have consented, through their counsel, to the filing of this brief by *Amicus* AAPS. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: no counsel for a party authored this brief in any respect; and no party, party's counsel, person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

18544, at *4 n.2 (9th Cir. July 25, 2025) ("Dr. Marilyn Singleton, who was originally another plaintiff in this case[, …] passed away after the notice of appeal was filed ….”). Dr. Singleton was a phenomenal educator, physician, attorney, and podcaster, who attained the pinnacle of both the medical and legal fields. As an African American longtime resident of California, Dr. Singleton strongly opposed this California speech mandate and alerted us to this case. Dr. Singleton's untimely passing during this litigation was mourned in both the medical and legal professions. She leaves us with a record of inspiration and achievement that will inspire many students and practitioners in these professions for years into the future.

As a provider of CME-accredited conferences and seminars to physicians, including in California, AAPS will be affected by the resolution of this petition for rehearing, and AAPS has direct and vital interests in the issues presented here.

SUMMARY OF ARGUMENT

The panel decision has the effect of turning professors and other teachers into political pawns, by requiring them to teach a particular ideology even if they disagree with it and even if it is irrelevant to the subject matter. The panel's ruling that private courses taught by Continuing Medical Education (CME) instructors to learned professionals do not deserve First Amendment protection is an alarming setback to academic freedom. Attracting and encouraging excellence in higher-level education necessitates allowing instructors to teach candidly, without manipulation and control

by government. Denying First Amendment rights to professors at, for example, the University of California and Stanford University, by declaring their CME-accredited courses to be "government speech," is a setback to both the First Amendment and all of higher education. Rehearing en banc is warranted, to apply the First Amendment to invalidate Cal. Bus. & Prof. Code § 2190.1(d)(1) & (e).

The alarming new precedent established by the panel – that CME coursework is purely government speech and thus can be controlled by the government with absolutely no regard for First Amendment rights – opens the door to federal control of higher education. If California can condition CME credit on the inclusion of political content, then the federal government can do likewise with respect to CME and other university content. What is good for the goose is good for the gander. Analogous to the redistricting tit-for-tat between "red" and "blue" states that is currently spiraling out of control, the federal government and red states could begin requiring or prohibiting ideological content of their own. If coursework is government speech as the panel decision held, then the ongoing ideological struggle between red states (and the current federal government) and blue states over Diversity, Equity, and Inclusion (DEI) could worsen to undermine higher education.

The panel's reasoning for opening this nightmarish Pandora's Box is based on its repeated disparaging references to alleged "quacks" of long ago, who have never been representative of the hard-working medical profession and certainly are not

today. *See Khatibi v. Hawkins*, 2025 U.S. App. LEXIS 18544, at *43 (grounding its conclusion on "quacks and pretenders and from the mistakes of incapable practitioners" of more than a century ago, while quoting a 1904 decision affirming imprisonment for practicing without a medical license). Mandating that DEI be included in every CME course for credit in California has nothing to do with combatting quackery. The panel's citation in its conclusion to the landmark decision of *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), is entirely misplaced: that shining precedent invaliding a requirement to salute the flag stands against forcing CME instructors to teach what they do not believe in, or do not think is relevant to the subject matter of their courses.

The importance of this case cannot be overstated. Freedom of speech in higher education should not be allowed to become the latest casualty of a broader political struggle. History teaches that totalitarian foreign regimes have clamped down with tight controls on their higher education, but the United States was born out of the embrace of freedom, intellectual and otherwise, and a rejection of the totalitarian mindset. Learned, highly credentialed instructors of skilled professionals must not be forced to teach something with which they disagree. The First Amendment stands against this form of tyranny, and en banc review of this important matter is essential.

ARGUMENT

The First Amendment should protect professional-level instructors from being compelled to teach against their beliefs. Educators with this high degree of training must not be forced to become puppets by being compelled to espouse a government viewpoint sometimes contrary to their own consciences. Not even during the troubled period of the Cold War in the 1950s in California, when loyalty oaths were imposed by California and enforced against its state university professors, was anyone actually compelled to teach something with which he or she disagreed. Yet under the panel decision, California can compel speech by instructors as to political ideology. The panel never reconciled its holding with the protections of academic freedom as no such reconciliation is possible. En banc rehearing is necessary to restore academic freedom, as argued in Point I below.

The slippery slope of government controlling what is said by teachers in higher education is a dire one for a free society. The reasoning of the panel decision does not have a stopping point with respect to any other profession, or graduate education at large. College education, which is already being subjected to new federal influence, is not safe under the panel decision from government control as to the content of coursework, and tyranny can result as discussed below in Point II.

Finally, the fear of states retaliating against each other, as expressed by Chief Justice John Roberts last year, is already occurring in the recent redistricting warfare

among the states. The panel's decision throws fuel on this fire, by inviting states to impose political content requirements on education. It is best to put this fire out sooner rather than later, with a rehearing en banc now, as California will be unable to prevent retaliation by other states with new CME and potentially even content-based licensure requirements of their own. Point III urges application of First Amendment standards that have traditionally fostered national unity.

I. Rehearing Should Be Granted to Restore Academic Freedom.

The First Amendment fully protects academic freedom, as repeatedly held by the U.S. Supreme Court. Yet the panel decision undermines this protection, by declaring that the government can coerce speech by instructors in CME classes provided to highly skilled physicians. The panel has given government – which by implication includes the federal government – *carte blanche* to compel educators' speech.

Justice William Brennan was unwavering in defense of academic freedom, and he wrote on behalf of the U.S. Supreme Court:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). Justice Brennan emphasized that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." 385 U.S. at 603 (inner quotations omitted).

While the *Keyishian* decision struck down a state law requiring university instructors to certify that they were not members of the Communist Party, the reasoning of the Court's decision makes clear that instructors in higher education are protected by the First Amendment. This should include professors and others who teach CME courses.

Former California governor and then Chief Justice Earl Warren explained while writing for a plurality of the Supreme Court:

> We believe that there ***unquestionably*** was an invasion of petitioner's liberties in the areas of academic freedom and political expression – ***areas in which government should be extremely reticent to tread***.
>
> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. … Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 249-50 (1957) (emphasis added).

Less than a decade after Chief Justice Warren's decision, the Supreme Court rendered another ringing endorsement of the robustness of academic freedom:

> Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.

Baggett v. Bullitt, 377 U.S. 360, 366 n.5 (1964).

This Court should take judicial notice of the overlap between universities and CME programs, such as the Stanford Center for Continuing Medical Education which describes itself as "[a] global leader in the promotion of lifelong learning among professionals in healthcare."[2] Stanford represents that it has 125,415 physicians in connection with its program. Likewise, there is a UCSF Office of Continuing Medical Education (CME) at the prestigious University of California at San Francisco medical school, which "offers educational opportunities for physicians, advanced practice professionals, pharmacists, dentists, and allied health care professionals to improve their practices through a comprehensive selection of continuing education activities."[3]

[2] https://med.stanford.edu/cme.html (viewed Aug. 16, 2025).
[3] https://meded.ucsf.edu/continuing-education (viewed Aug. 16, 2025).

The scope of academic freedom is not limited to tenured college professors. "If the speech of a nontenured professor is compelled by a university administrator, then the professor is not without redress for this violation of her constitutional rights." *Parate v. Isibor*, 868 F.2d 821, 828 (6th Cir. 1989). Plaintiff-Appellant Azadeh Khatibi, M.D., is an ophthalmologist in Los Angeles having training and scholarly work comparable to that of university professors, and her teaching should be protected by academic freedom similar to the protection traditionally extended to them.

Even if instructors do not have a constitutional right to teach CME courses, they do have a right not to be excluded from teaching these courses based on political disagreements. DEI is predominantly a political issue, and mandating speech about it is akin to mandating that a professional include in his presentation praise for a political party or a political movement.

Yet the panel decision allows for no limits on what the government could mandate in the future in CME and other presentations, because the panel decision has categorized this as "government speech" such that no First Amendment protections apply. The slippery slope embraced by the panel would allow government to require, as part of this supposedly government speech, effusive praise for government itself, federal or state. By the end of the dystopian novel *1984*, the

protagonist Winston Smith loved Big Brother in overcoming his initial resistance. George Orwell, *1984* Part III, Chapter 6 (1949).

Professors and other professionals at comparable levels of scholarship teach continuing education courses, in both medicine and law. Compelling them to teach material in which they do not believe, or even vehemently disagree, is an affront to academic freedom contrary to longstanding precedents in this important field.

II. Educational Indoctrination by Government Is Contrary to a Democratic Society.

History has tragic examples of the mistake of allowing a government to mandate ideology in education. For example, the *Holocaust Encyclopedia* explains that:

> Education in the Third Reich served to indoctrinate students with the National Socialist world view. Nazi scholars and educators glorified Nordic and other "Aryan" races, while labeling Jews and other so-called inferior peoples as parasitic "bastard races" incapable of creating culture or civilization.

"Indoctrinating Youth," *Holocaust Encyclopedia*, The United States Holocaust Memorial Museum.[4] A current example of a similar speech mandate is a law that became effective last year in the People's Republic of China, which now requires teaching patriotism:

> The law's focus on instilling patriotism by incorporating the Party's ideologies into the curriculum raises concerns about the independence of

[4] https://encyclopedia.ushmm.org/content/en/article/indoctrinating-youth (viewed Aug. 16, 2025).

> educational institutions and their ability to foster critical thinking. It's seen as part of a broader effort to assert control over the education system, limiting outside influences and shaping young minds to align with the Party's agenda.

"China's new patriotic education law: The law is being viewed as an attempt to solidify the Party's version of history and limit critical thinking" (Oct. 27, 2023).[5]

The panel decision opens the door to this or similar government-mandated indoctrination in the United States. No one is objecting here to California granting accreditation to specific courses that teach implicit bias, but to the requirement that *every* CME course contain certain ideological material, contrary to the beliefs and views of some instructors and regardless of irrelevancy to the subject matter.

The First Amendment prohibits government from becoming a puppeteer that can force citizens to repeat, teach, or be taught, an ideology or point-of-view. If government is allowed to compel politically motivated speech by educators – as the panel decision allows – then this would severely erode First Amendment rights.

The panel decision conflicts with a Supreme Court precedent on the related issue of impermissible government-compelled speech. An ostensibly reasonable requirement of a government program to combat HIV/AIDS included a condition that "no funds may be used by an organization 'that does not have a policy explicitly opposing prostitution and sex trafficking.'" *Agency for Int'l Dev. v. All. for Open*

[5] https://www.deccanherald.com/world/explained-chinas-new-patriotic-education-law-2743573 (viewed Aug. 16, 2025).

Soc'y Int'l, Inc., 570 U.S. 205, 208 (2013) (quoting 22 U.S.C. § 7631(f)). Like the issue of California compelling the teaching of implicit bias in all CME courses, the federal government's requirement that recipient organizations explicitly oppose prostitution and sex trafficking seems uncontroversial and a salutary position to require.

Yet the U.S. Supreme Court struck down this requirement under the First Amendment. As with the teaching of a CME course, "if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev.*, 570 U.S. at 214. But that option does not salvage a condition on participation when there is a requirement "that funding recipients adopt—as their own—the Government's view on an issue of public concern," such that the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)). Where, as here, the government "[r]equirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program," then it violates the First Amendment. *Agency for Int'l Dev.*, 570 U.S. at 221. The panel decision declined to apply this Supreme Court precedent based on its finding that CME courses are government speech, and "CMEs eligible for credit are therefore immune

from the strictures of the Free Speech Clause." *Khatibi*, 2025 U.S. App. LEXIS 18544, at *42. But the government itself does not practice medicine, and therefore continuing medical education courses cannot be government speech. En banc review of this issue is warranted.

III. Rehearing En Banc Is Further Justified to Reverse the National Disunity Engendered by the Panel Decision, at a Time When States Are Already Retaliating Against Each Other.

By upholding California's DEI mandate for CME instruction, the panel decision worsens a conflict between California and other states, such as Florida, which generally reject including DEI in education curriculum. Medical education has until now had uniformity nationwide, such that physicians commonly attend medical school in one state, complete their residency in another, and then practice in a third state. By compelling California instructors to include politically motivated content in all CME courses to obtain California credit, the nationwide unity of medical education is fractured. This heightens the importance of en banc review of this matter now, before other states and the current federal government respond in kind.

Chief Justice John Roberts has expressed profound concern about a tit-for-tat battle erupting among the States. After the Colorado Supreme Court excluded Trump from its ballot, Chief Justice Roberts expressed grave concern at oral argument on appeal that Republican-dominated states would retaliate if this were allowed. *Trump*

v. Anderson (Sup. Ct. No. 23-719, Feb. 8, 2024, Tr. 84:9-14) (Chief Justice Roberts: "Counsel, what do you do with the … plain consequences of your position? … [S]urely, there will be disqualification proceedings on the other side, and some of those will succeed.").[6]

Chief Justice Roberts then assigned to himself the writing of the majority opinion, where he emphasized:

> The "patchwork" that would likely result from state enforcement [of ballot access for federal offices] would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits*, 514 U. S., at 822 …. But in a Presidential election "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, the votes not allowed to be cast—"for the various candidates in other States." *Anderson*, 460 U. S., at 795 …. An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times. ***The disruption would be all the more acute***—and could nullify the votes of millions and change the election result—if Section 3 enforcement were attempted after the Nation has voted. ***Nothing in the Constitution requires that we endure such chaos***—arriving at any time or different times, up to and perhaps beyond the Inauguration.

Trump v. Anderson, 601 U.S. 100, 116-17 (2024) (emphasis added, additional string citations omitted). Chief Justice Roberts pointedly and unusually added, "All nine Members of the Court agree with that result." *Id.*

[6] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-719_2jf3.pdf (viewed Aug. 16, 2025).

Recently a redistricting war among the states has begun, quickly engulfing as many as ten states in this chaotic process. Jesse Bedayn, "What states are doing in the battle over congressional maps as Texas pursues plan Trump sought," *Associated Press* (Aug. 15, 2025)[7] (explaining that a total of ten red and blue states are considering redistricting now in retaliation against each other). Turning CME into another political football, when the expert instructors should be allowed to teach medicine as they think best, invites further inter-state conflict and warrants en banc review before this spins out of control to the detriment of the medical profession, patients, and national unity.

CONCLUSION

For the foregoing reasons and those set forth by Plaintiffs-Appellants, *Amicus* AAPS respectfully requests that the petition for rehearing en banc be granted.

Dated: August 18, 2025

Respectfully submitted,

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[7] https://apnews.com/article/redistricting-texas-california-congressional-map-trump-4e82c473c2290753861599192542 5167 (viewed Aug. 16, 2025).

Counsel for Amicus Curiae Association of American Physicians and Surgeons

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using Times New Roman 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and Ninth Circuit Rule 32-1 because it contains a total of 3,482 words, excluding material not counted under Rule 32(f).

Dated: August 18, 2025

/s/ Andrew L. Schlafly
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