No. 24-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AZADEH KHATIBI, *et al.*,
Plaintiffs-Appellants,

v.

KRISTINA LAWSON, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE MEDICAL BOARD OF CALIFORNIA, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:23-cv-06195-MRA (Ex)
The Honorable Mónica Ramírez Almadani

RESPONSE TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANYA M. BINSACCA
Supervising Deputy Attorney General
KRISTIN A. LISKA
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3916
Fax: (415) 703-5480
Kristin.Liska@doj.ca.gov
Attorneys for Defendants-Appellees

September 23, 2025

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INTRODUCTION

Since 1980, California has required licensed physicians to participate in continuing medical education. From the beginning, California has controlled the content of continuing medical education courses that qualify for credit. Since 2019, California has required accredited continuing medical education courses to include a discussion of implicit bias. Plaintiffs contend that this requirement violates the First Amendment.

The panel correctly held that California's continuing medical education courses constitute government speech. It applied the Supreme Court's well-established, holistic government-speech test to the specific factual situation it confronted, taking account of the relevant regulatory scheme and history. And it issued a narrow, fact-bound decision that concludes only that California-accredited continuing medical education courses are government speech without opining on whether other continuing education courses—medical or otherwise—are similarly government speech. That decision complies with Supreme Court precedent, does not conflict with the decisions of other circuit courts, and does not merit rehearing.

BRIEF STATEMENT OF THE CASE

Since at least 1980, California has required licensed physicians to complete continuing medical education (CME) courses to maintain their license to practice medicine. Op. 16-17. Today, accredited CME courses "must '(1) have a scientific

or clinical component with a direct bearing on the quality of cost effective provision of patient care, community or public health, or preventative medicine, (2) concern quality assurance or improvement, risk management, health facility standards, or the legal aspects of clinical medicine, (3) concern bioethics or professional ethics, (4) are designed to improve the patient-physician relationship and quality of physician-patient communication,' or otherwise 'serve to maintain, develop, or increase the knowledge, skills, and professional performance that a physician and surgeon uses to provide care, or to improve the quality of care provided to patients.'" *Id.* at 6-7 (quoting Cal. Bus. & Prof. Code § 2190.1(a)). Physicians are required to complete at least 50 hours of approved CME every two years. *Id.* at 7.

The Medical Board of California is responsible for administering the CME requirement. Op. 7. "Only programs the Board deems 'acceptable' are approved for CME credit." *Id*. Such courses must "meet the express criteria of section 2190.1 and accompanying regulations." *Id*. These criteria include "requirements for CME faculty qualification, course rationale, course contents, course methodology, and even what must be on evaluation forms." *Id.* at 21 (citing Cal. Code Regs. tit. 16, § 1337.5). For instance, "[a]ll accredited CMEs must . . . address cultural and linguistic competence." *Id.* at 28 (citing Cal. Bus. & Pro. Code, § 2190.1(c)). And "[t]he Legislature has also designated geriatric care as a

mandatory CME topic for specific licenses," as well as "CMEs for pain management, treatment of terminally ill patients, and drug dependency." *Id.* at 30 (citing Cal. Bus. & Prof. Code §§ 2190.3, 2190.5). The Board has preapproved certain programs run by professional organizations such as the California Medical Association for CME credit. *Id.* at 7. The Board "does 'not give prior approval to individual courses or programs,'" and it "'will randomly audit courses or programs submitted for credit in addition to any course or program for which a complaint is received.'" *Id.* at 7-8 (quoting Cal. Code Regs. tit. 16, § 1337.5(b)); *see also id*. at 31. "[T]he Board may audit any course and deem it ineligible for credit." *Id.* at 33.

In 2019, the California Legislature enacted Assembly Bill 241 (AB 241), which provided that course attendees could receive credit toward California's CME requirement only if the CME course included a discussion of implicit bias. Op. 8; *see* Cal. Bus. & Prof. Code § 2190.1(d)(1). The Legislature enacted AB 241 out of concern that implicit bias—"meaning the attitudes or internalized stereotypes that affect our perceptions, actions, and decisions in an unconscious manner"—"contributes to health disparities" between patients of different races, ethnicities, gender identities, sexual orientations, ages, or disabilities. Op. 8-9 (quoting 2019 Cal. Stat. ch. 417 (AB 241), § 1).

Plaintiff Dr. Khatibi is a California-licensed ophthalmologist who has organized and instructed California-accredited CMEs, while plaintiff Do No Harm is a nonprofit comprised of healthcare professionals with at least one member who teaches California-accredited CMEs. Op. 9. Both plaintiffs brought suit against California state officials, contending that the implicit-bias requirement for California-accredited CMEs violated their First Amendment rights. *Id.* at 9-10. The lower court dismissed the case, holding that California-accredited CME courses constitute government speech. *Id*. at 10.

The panel affirmed in a ruling that it emphasized was "narrow." Op. 6. Rather than reaching broader conclusions about the nature of continuing education courses generally, the panel held that "when California—from beginning to end—dictates, controls, and approves the provider, form, purpose, and content of CMEs, it is in fact the State that 'speaks' or expresses its view." *Id*. In reaching this holding, the panel applied the Supreme Court's well-established, three-factor test for determining when speech constitutes government speech. *E.g.*, *id*. at 12 (discussing factors laid out in *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022)). The panel explained that "the Supreme Court is clear that the test to determine government speech is a 'holistic' one." *Id.* at 15 (quoting *Shurtleff*, 596 U.S. at 252). Such analysis "'is not mechanical; it is driven by a case's context rather than the rote application of rigid factors.'" *Id*. (quoting *Shurtleff*, 596 U.S. at

252). And the panel grounded its analysis in the specific history and regulatory scheme governing California-accredited CMEs, concluding that such courses constitute government speech. *See, e.g.*, *id.* at 16-17 (discussing history); *id.* at 26-31 (detailing regulatory scheme).

ARGUMENT

Plaintiffs disagree with the panel's application of the Supreme Court's well-established government-speech test to the particular facts of this case. But that is not a proper ground for en banc review. *See* Fed. R. App. P. 40(b)(2). And none of plaintiffs' arguments for rehearing is persuasive. Contrary to plaintiffs' claims, the panel decision does not conflict with either Supreme Court precedent or the rulings of other circuits. And the panel's careful, "narrow" decision does not present any questions of exceptional importance requiring further intervention from this Court.

I. THE PANEL CORRECTLY APPLIED SETTLED SUPREME COURT PRECEDENT ON GOVERNMENT SPEECH

Plaintiffs first contend that rehearing is necessary because the panel's holding "cannot be reconciled with controlling decisions of the United States Supreme Court." Pet. 6. Not so. The panel's decision acknowledged and applied the Supreme Court's long-settled test for determining when particular speech amounts to government speech. And its application of this multi-factor test to the specific

regulatory framework of California-accredited CMEs falls well within the bounds of government speech described in the Supreme Court cases that plaintiffs cite.

To start, the panel decision correctly identified the test for government speech laid out by the Supreme Court, recognizing that courts "'conduct a holistic inquiry to determine whether the government intends to speak for itself or to regulate private expression.'" Op. 12 (quoting *Shurtleff*, 596 U.S. at 252). "Among the factors to consider in this analysis are 'the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.'" *Id.* (quoting *Shurtleff*, 596 U.S. at 252). And the panel acknowledged that "[t]he 'boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program.'" *Id.* (quoting *Shurtleff*, 596 U.S. at 252). It also specifically noted that courts "'must exercise great caution before extending [the] government-speech precedents.'" *Id.* at 11-12 (quoting *Matal v. Tam*, 582 U.S. 218, 235 (2017)); *see also id.* at 15 ("Applying these principles with 'great caution,' we consider whether, under circumstances specific to California, CMEs eligible for Board credit constitute government speech.").

The panel then correctly applied the Supreme Court's three-factor government-speech test to the particular facts of this case. It first considered the

history of the expression at issue, concluding that this factor "weigh[ed] decisively in favor of the State" since the State has "specifically adopted, updated, and enforced CME standards for almost half a century" as part of its long regulation of medical practitioners and their qualifications. Op. 18. It next turned to the public perception of the speaker. *Id.* at 24. It recognized that "[b]oth sides' arguments have some merit" given "Dr. Khatibi's own allegations," though it concluded that "on balance, this factor tilts in California's favor." *Id.* at 24, 26. It also noted, however, that even if this second factor tilted the other way, the panel's "ultimate conclusion would remain the same" given the other two factors. *Id.* at 26 & n.8. Finally, the panel considered the "'the extent to which the government has actively shaped or controlled the expression'" at issue, which the panel explained was "fundamental to the government speech inquiry." *Id.* at 26 (quoting *Shurtleff*, 596 U.S. at 252). And as to that factor, the panel highlighted "California's extraordinary control over accredited CMEs," given that "California not only shapes the content of CMEs, but it also imposes several restrictions on their form and delivery." *Id.*; *see also id.* at 31. Because California "controls accredited CMEs 'from beginning to end,'" *id.* at 26 (citation omitted), the panel concluded that this factor weighed in favor of finding that California-accredited CMEs are government speech. *Id.* at 33.

Plaintiffs disagree with each of these conclusions. They contend that the panel's application of the three-factor government-speech test conflicts with other Supreme Court precedents, like *Shurtleff* and *Matal*. *See* Pet. 6. But that is wrong.

As the opinion makes plain, the panel considered and applied these precedents, concluding that they did not support plaintiffs' First Amendment claims. For instance, the panel explained that California's regulation of accredited CMEs "sharply differs from the [Patent and Trademark Office (PTO)] in *Matal*," Op. 21, because California "exercises far more control" over accredited CMEs "than the PTO in *Matal*" exercised over trademarks, *id.* at 36. The panel similarly articulated how "California's oversight over CMEs dwarfs the nominal supervision by the cities in *Shurtleff* and *Summum*." *Id.* at 36. The panel also noted that "*Walker* . . . undercuts, rather than reinforces, Dr. Khatibi's claims," *id.* at 37, because "[m]uch like Texas, the Board, for decades, has 'effectively controlled' [CMEs] 'by exercising final approval authority,'" and by "dictating content standards, pedagogical frameworks, and instructor qualifications," *id.* at 37 (quoting *Walker v. Texas Div., Sons of Confederate Vetarns*, 576 U.S. 200, 213 (2015)). Finally, the panel emphasized the similarities between the facts presented here and in other Supreme Court cases involving private participation in government speech programs. *E.g.*, *id.* at 24, 34. Such cases have been clear that "'the fact that private parties take part in the design and propagation of a message

does not extinguish the governmental nature of the message.'" *Id.* at 24 (quoting *Walker*, 276 U.S. at 317).[1]

In an attempt to manufacture a conflict, plaintiffs suggest that the panel decision reached various broad, far-reaching conclusions that could be misused in other government-speech cases. But plaintiffs misunderstand the panel opinion. Nowhere does the panel hold that "regulatory involvement and eligibility criteria are . . . enough to transform private expression into government speech." Pet. 7. On the contrary, the panel agreed that "[i]t would be a serious affront to the Constitution if regulatory history alone were sufficient to immunize speech from First Amendment scrutiny." Op. 18. The panel likewise nowhere held that California-accredited CMEs are government speech simply because they are subject to *some* regulatory structure. *See* Pet. 10-11. Instead, in applying the government-speech test, the panel emphasized the unique nature of California's regulatory control over these CMEs: "California—from beginning to end—dictates, controls, and approves the provider, form, purpose, and content of

[1] Plaintiffs also argue that the decision below conflicts with the Supreme Court's opinion in *National Institute of Family & Life Advocates v. Becerra (NIFLA)*, 585 U.S. 755 (2018). *See, e.g.*, Pet. 1, 6. But the decision in *NIFLA* involved the compelled-speech doctrine, not the government-speech doctrine. And "counsel for Dr. Khatibi clarified at oral argument [that] the 'thorny issues' of compelled speech and viewpoint discrimination are actually 'not before this court.'" Op. 22 n.7.

CMEs," and it "does so consistent with its tradition" of regulating the practice of medicine—including through decades of required continuing medical education. Op. 6. It was the particular combination of California's long history of regulating both medical practice and CMEs, and the State's extensive regulatory control over CMEs, that led to the panel's "narrow," fact-bound holding—a holding consistent with existing Supreme Court precedent, *see supra* at 6-8.

This Court should similarly reject plaintiffs' contention that the panel decision somehow "allows the state to label any professional discourse subject to regulation as government speech and thereby insulate it from constitutional scrutiny." Pet. 10. The panel was clear that its "holding [was] narrow." Op. 6. And it was equally clear that its government-speech conclusion was based on its application of the Supreme Court's test to "circumstances specific to California." *Id.* at 15. Indeed, the opinion itself suggests that the panel might not have reached the same conclusion with respect to *other States'* CMEs. The panel noted, for example, that "[n]ot all states share California's history or requirements" for CMEs, *id.* at 20 n.5, and that "many [States] also do not appear to exercise a comparable level of control over CMEs," *id.* at 32 n.10. Contrary to plaintiffs' claims (at 21-22), then, the panel opinion says nothing of note about whether *all* professional continuing education requirements are government speech. Instead, the panel decision simply stands for the proposition that *California-accredited*

CMEs are government speech in light of the specific history and regulatory framework attached to those CMEs.

II. THE PANEL'S DECISION INTERPRETS AND APPLIES SETTLED PRECEDENT SIMILARLY TO OTHER CIRCUITS

Plaintiffs' attempts to manufacture a conflict between the panel opinion and the government-speech decisions of other circuit courts also falls short. *See* Pet. 12 (suggesting that the panel "applied each part of the three-part test in a way that conflicts with several circuits"). As explained below, the panel's decision is consistent with those of other circuit courts. Indeed, plaintiffs have failed to identify even a single case from another circuit holding that continuing education courses—let alone courses with a similar history and regulatory structure as California-accredited CMEs—cannot be government speech.

Plaintiffs' first claimed conflict is illusory. They argue that "other circuits consider the 'history of expression' associated with the government's conduct" when resolving the "first prong" of the three-part government-speech test, rather than just "the government's history of regulation." Pet. at 12; *see also id.* at 12-14 (citing, e.g., *Little v. Llano County*, 138 F.4th 834 (5th Cir. 2025), and *Brown v. Yost*, 133 F.4th 725 (6th Cir. 2025)). In their view, a jurisdiction's "regulatory history" is relevant to the government-speech test only if "there's evidence that [the regulatory history] had an expressive purpose or effect." Pet. 14.

But the panel opinion did not adopt or apply any contrary rule. The panel was clear on this point: California's particular regulatory history with respect to CMEs counseled in favor of finding government speech, because that history evinced a clear intent to "express the State's views." Op. 20. As the panel explained, just as the Supreme Court in *Shurtleff* undertook a "historical analysis [that] examined flags' contents, materials, symbolism, location, and how frequently they were raised," it was proper to "look[] to *California's history* of regulating the medical profession." *Id.* at 19. And after examining that history, the panel held that "California's CME requirements necessarily reflect, as Dr. Khatibi effectively concedes, 'the importance of certain subjects to medical professionals.'" *Id.* at 20. In other words, California's particular regulatory history "reflects the State's evolving judgment of what subjects it has deemed essential to 'ensure the continuing competence of licensed physicians and surgeons,' of which implicit bias is one." *Id.* at 21.

That conclusion does not conflict with the out-of-circuit decisions that plaintiffs cite. For example, the panel's conclusion about the "expressive" nature of California's regulatory history is perfectly in line with the Fifth Circuit's conclusion in *Little* that the history of regulating public libraries and their contents indicated that "public libraries were speaking, loudly and clearly, to their patrons. 'These books will educate and edify you. But the books we have kept off the

shelves . . . aren't worth your time.'" 138 F.4th at 862. And California's regulatory history of conveying a message regarding what subjects the State deems important for doctors to know distinguishes this case from *Brown*, 133 F.4th at 734, where the state of Ohio had "not explained at all how summaries of proposed ballot initiatives have historically conveyed government messages."

Plaintiffs next contend that the panel opinion conflicts with other circuits' application of the second prong of the government-speech test, which asks "whether the public would perceive the speech as government speech." Pet. 14. In plaintiffs' telling, the panel opinion conflicts with the decisions of other circuits, which have held that "government oversight—without more—does not transform private expression into public speech." Pet. 14-15.

As described above, however, the panel opinion says nothing to the contrary. Indeed, the panel agreed with plaintiffs that "[i]t would be a serious affront to the Constitution if regulatory history *alone* were sufficient to immunize speech from First Amendment scrutiny." Op. 18 (emphasis added). Given this non-controversial rule, the panel necessarily based its government-speech conclusion on the fact that California's regulation of accredited CMEs involves *more* than just some regulatory involvement; instead, the CMEs amounted to government speech because California "controls accredited CMEs 'from beginning to end.'" *Id.* at 32 (quoting *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560-561 (2005)).

That level of control distinguishes this case from other cases where courts have found the mere existence of a regulatory framework to be insufficient to create government speech. *Compare, e.g.*, *id.* at 36 (distinguishing *Matal* because California "exercises far more control than the PTO"), *with New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 175 (2d Cir. 2020) (finding no government speech where the court could not "conclude" that "'from beginning to end' the messages conveyed by New Hope are so controlled by New York as to be the State's own" (citation omitted)).[2]

Plaintiffs' final claimed conflict also fails. They argue that the panel misapplied the third prong of the government-speech test (which concerns the extent of the government's control over the expression) because "it treated general regulatory authority as equivalent to editorial control over speech." Pet. 16. But the decision did no such thing. Instead, it detailed how "California not only shapes

[2] Nor was the panel's application of the second factor of the three-part test based on the "use of speculation to defeat a plaintiff's plausible allegations." Pet. 15 n.4. On the contrary, the panel stated that it was not "unreasonable to infer that licensees perceive the content of accredited CMEs as coming from the State *based on* Dr. Khatibi's own allegations." Op. 24 (emphasis added). In any event, the panel acknowledged that the second factor presented "a much closer call" than the others, *id.* at 23, and it held that "[e]ven assuming the public perception factor favors Dr. Khatibi, [its] ultimate conclusion would remain the same" given its analysis of the other factors, *id.* at 26 & n.9. Plaintiffs' claimed conflict concerning "the federal pleading standard" therefore provides no basis for further review of the panel's ultimate government-speech conclusion.

the content of CMEs" but "also imposes several restrictions on their form and delivery." Op. 26; *see id.* at 26-31 (laying out full statutory and regulatory scheme overseeing accredited CMEs). As the panel emphasized, California "has provided the starting and endpoint for any CME provider." *Id.* at 31. It has "dictate[d] who may teach the courses"; it has told "those qualified instructors to record their courses' purpose and teaching methodology"; it has "ensure[d] that their courses address specific topics"; and it has "set[] guidelines related to attendance and evaluation." *Id.* at 32. And the State has then made clear that it may "audit, accredit, or reject the CME" if it does not meet the State's standards after the fact. *Id.* Indeed, the panel noted that even "Dr. Khatibi ha[d] conceded that her CMEs *have* been shaped by California." *Id.* at 33. In other words, the panel opinion did not rely on the mere existence of a regulatory framework to find that California exercised "editorial control over speech," Pet. 16. It instead found government speech based on the particular degree of California's control *over the content* of accredited CMEs. *See, e.g.*, Op. 37 ("The *content* of accredited CMEs, as we have detailed, is shaped by the State from their inception." (emphasis added)).

The panel's decision thus aligns with the other out-of-circuit government-speech decisions highlighted in Plaintiffs' petition for rehearing. *See, e.g.*, Pet. 17. For example, in *Cajune v. Independent School District 194*, 105 F.4th 1070, 1081 (8th Cir. 2024), the Eighth Circuit found that certain posters displayed on school

walls could not be considered government speech "solely on the basis that the [school district] affixed its seal of approval on them." Instead, the Eighth Circuit held, "[g]overnment speech requires that a government shape and control the expression," *id.*—a test that the California-accredited CMEs readily meet in this case, *see* Op. 37. Similarly, in *Brown*, 133 F.4th at 735, the Sixth Circuit concluded that "summaries of proposed ballot initiatives" could not be called government speech merely because the Attorney General had "certif[ied] that a summary [was] fair and truthful." As the Sixth Circuit explained, that fair-and-truthful certification "hardly suggests that the summary expresses [the Attorney General's] approved message." *Id.* The panel here thus correctly concluded that the de minimis degree of control exercised in *Brown* pales in comparison to the extent of California's control over—and approval of—the content of accredited CMEs. *See* Op. 26-37; *see also id.* at 25 (explaining that "the entire CME scheme was created for licensees," and there would be no California-accredited CME courses without California requiring them to exist).

III. THE PANEL'S DECISION IS A NARROW, FACT-BOUND RULING THAT DOES NOT PRESENT QUESTIONS OF EXCEPTIONAL IMPORTANCE

Plaintiffs separately contend that rehearing is warranted in this case because it raises issues of exceptional importance. In their view, the panel decision poses a broad risk of government control over private expression. Pet. 19-22; *see also* Br. of *Amicus Curiae* Ass'n of American Physicians & Surgeons at 3, 8-10.

But the panel opinion itself undermines plaintiffs' claim. As the panel recognized, its holding was a "narrow" one. Op. 6. The inquiry into whether a particular case involves government speech is fact-intensive—it is "not mechanical," but instead "holistic" and "driven by a case's context rather than the rote application of rigid factors." *Id.* at 15 (quoting *Shurtleff*, 596 U.S. at 252). In applying the well-established government-speech test, the panel focused on "circumstances specific to California," *id.* at 15—particularly the relevant history and governing regulatory framework, *see, e.g.*, *id.* at 16-17, 26-31. And in rejecting plaintiffs' First Amendment claims, the panel was careful *not* to opine on whether *other* forms of expression might qualify as government speech. Indeed, the panel recognized that different States regulate CMEs differently, *id.* at 20 n.5, 32 n.10—implying that even another State's CMEs might not be government speech. Given the panel's careful, context-specific approach, this Court should not credit plaintiffs' concerns about government control over other forms of speech—like university classes or non-medical continuing education courses.

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CONCLUSION

The petition for rehearing or rehearing en banc should be denied.

Dated: September 23, 2025

Respectfully submitted,

s/ Kristin Liska

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANYA M. BINSACCA
Supervising Deputy Attorney General
KRISTIN A. LISKA
Deputy Attorney General

Attorneys for Defendants-Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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