No. 18-15840

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pacific Coast Horseshoeing School, Inc.,
Bob Smith, and Esteban Narez,
Plaintiffs-Appellants,
v.
Dean Grafilo *et al.*,
Defendants-Appellees.

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

BRIEF *AMICI CURIAE* OF PROFS. JANE BAMBAUER, DAVID BERNSTEIN, CLAY CALVERT, MARK LEMLEY, RODNEY SMOLLA, AND EUGENE VOLOKH IN SUPPORT OF PLAINTIFFS-APPELLANTS

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* Counsel thanks Tyler Hastings, Nicole Karatzas, and Brigid Mahoney, UCLA School of Law students who worked on this brief.

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INTEREST OF *AMICI CURIAE*[1]

Amici are all law professors who have written extensively about the freedom of speech:

- Jane Bambauer (Professor of Law, the University of Arizona).
- David Bernstein (George Mason University Foundation Professor at the George Mason University School of Law).
- Clay Calvert (Professor and Brechner Eminent Scholar in Mass Communication at the University of Florida in Gainesville, and director the Marion B. Brechner First Amendment Project).
- Mark A. Lemley (William H. Neukom Professor, Stanford Law School).
- Rodney Smolla (Dean and Professor of Law, Widener University Delaware Law School).

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

All parties have consented to the filing of this brief.

- Eugene Volokh (Gary T. Schwartz Professor of Law, UCLA School of Law).

Their only interest in the case is to promote the sound development of First Amendment law.

SUMMARY OF ARGUMENT

1. Teaching is speech, and the First Amendment includes a right to teach. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010); *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007); *Nova Univ. v. Educ. Inst. Licensure Comm'n*, 483 A.2d 1172, 1182 (D.C. 1984). Just as communication and receipt of information and ideas are generally protected by the First Amendment, so they are protected in the classroom. The Private Postsecondary Education Act is thus a speech restriction, because it limits schools' ability to teach the students that they want to teach.

2. The Act is also a content-based speech restriction, which is subject to strict scrutiny. Laws that restrict "speech [that] imparts a 'specific skill'" are "content-based regulation[s] of speech." *Humanitarian Law Project*, 561 U.S. at 27. And this law is also facially

content-based because it distinguishes teaching certain subjects (vocational ones) from teaching others ("solely avocational or recreational" ones), Cal. Educ. Code § 94874(a).

3. Like other forms of expression, teaching constitutes speech even when it is performed for money. The right to speak through books, newspapers, public lectures, and the like includes the right to sell access to such speech—otherwise, many of the speakers would be unable to provide the speech, and the listeners would be unable to receive it. The same is true for speaking through a series of classes. Thus, even if the Act hypothetically regulated only "executing an enrollment agreement," ER 12, this narrow restriction would be just as unconstitutional as a restriction on who may sign newspaper subscription agreements: It would effectively prohibit Esteban Narez, and many others like him, from receiving this educational speech.

4. The Act is not narrowly tailored to the government interest in preventing fraud, or even in protecting students from wasting money. For many vocations, including horseshoeing, a high school

education and test-taking ability are not required for effective performance. Indeed, these are among the vocations that may often earn the best living for people without high school diplomas. And rough proxies for supposedly fraudulent speech that risk chilling free speech cannot pass the strict scrutiny required for content-based speech restrictions.

5. Even if the Act were content-neutral and thus subject only to intermediate scrutiny, it is unconstitutional because it fails to leave open ample alternative channels for speech. Textbooks and videos are not an effective substitute for being taught by experienced teachers in a professional training program.

ARGUMENT

I. The Act is a speech restriction

The Act effectively prohibits the School from delivering a valuable form of speech—vocational training in horseshoeing—to anyone who lacks a high school diploma or GED and who has not passed an ability-to-benefit exam. Yet the "right to teach" is "of course, [a] fundamental right[] . . . and may not be denied or abridged." *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

The First Amendment protects "the educational process itself, which . . . include[s] not only students and teachers, but their host institutions as well." *Asociacion de Educacion Privada*, 490 F.3d at 11; *Cuesnongle v. Ramos*, 713 F.2d 881, 884 (1st Cir. 1983).

This extends as much to teaching specific skills as it does to broader academic curricula. In *Humanitarian Law Project*, the Court held that a law that restricted people from offering "training"—"instruction or teaching designed to impart a specific skill"—to members of designated terrorist organizations was a speech restriction. 561 U.S. at 21. What is true for speech that offers legal training to terrorists is equally true for speech that offers horseshoeing training to law-abiding citizens.

In *Humanitarian Law Project*, as in this case, the government argued that the law merely banned "conduct." *Id.* at 28. But the Court rejected that relabeling: Even though the law there could "be described as directed at conduct," "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* Therefore, the Court held, it was a restriction on speech, and thus presumptively unconstitutional. *Id.* (The Court

held that the presumption was rebutted under strict scrutiny, because of the compelling government interest in fighting terrorism; but, as Part IV discusses, no compelling government interest can justify the restriction in this case.)

Moreover, in *Humanitarian Law Project*, as in this case, the government purported to regulate whom people could teach: The petitioners in that case were free to teach international law to everyone except for members of designated foreign terrorist groups. *Id.* at 26. Yet the Court viewed this restriction on people's ability to teach particular kinds of students as subject to strict scrutiny.

Indeed, the right to teach is so important that courts have struck down even seemingly minor restrictions of this right. For example, in *Asociacion de Educacion Privada*, 490 F.3d at 5, a law required private schools to let students use old versions of textbooks if the changes in the new textbook were not significant. But the First Circuit struck down the law for infringing the school's First Amendment rights, because it interfered with the School's decisions about

how to teach and the school's right to create its own academic objectives. *Id.* at 14-15. The Act similarly interferes with the School's decisions about whom to teach.

And this First Amendment right to teach—and to learn—is simply a special case of the principles that "the . . . dissemination of information [is] speech within the meaning of the First Amendment," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011), and that "the Constitution protects the right to receive information," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). That is at least as true in the classroom as it is in other venues.

Nor is this Act analogous to the Solomon Amendment in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006). The Court in *FAIR* held that a law requiring universities to allow military recruiters, *id.* at 60, would not restrict speech because "accommodating the military's message does not affect the law schools' speech" or "limit[] what law schools may say." *Id.* at 60, 64. "[N]othing about the statute affects the composition of the group," meaning the group of "[s]tudents and faculty" who associate together in the university. *Id.* at 69-70.

The Act in this case, though, does "limit[] what [the] school[] may say" and does "affect[] the composition" of the student body: the School is forbidden from providing a horseshoeing education to certain students. Thus, under the holding in *FAIR*, the Act restricts speech and expressive association, not merely conduct.

The court below relied on this Court's holding in *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014), that a state law restricting licensed therapists from providing sexual reorientation therapy to underage patients regulated conduct. The court below concluded that the Act similarly regulates conduct because it "does not restrain Smith and the School from imparting information, dissemination opinions, or communicating a message." ER 12 (internal quotations omitted).

But the law in *Pickup* applied to a *medical profession*—there, psychology. Unlike education, medical treatment, especially mental health treatment, comes with "potential risk of serious harm to those who experience it." *Pickup*, 740 F.3d at 1223 (referring to physical and psychological harm). For that reason, it is "well recog-

nized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals," *id.* at 1229–30. Indeed, medical practice has been traditionally heavily restricted. *See Nat'l Ass'n for Adv. of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000). But the state lacks any similar traditionally recognized latitude to regulate the content of private educational institutions' speech, or their choices about whom to speak to. And the Act in this case does restrict such institutions from "imparting information" to the students they choose to teach.

Moreover, the reasoning of *Pickup*, which rests heavily on the theory that "professional speech" can be regulated as a form of conduct, 740 F.3d at 1225-26, has been sharply limited by *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). In that case, the Supreme Court noted that this Court, and several sister Circuits, "have recognized 'professional speech' as a separate category of speech that is subject to different rules," and specifically cited *Pickup* as an example. *Id.* at 2371. "But this Court," the Court went on to say, "has not recognized 'professional speech' as a separate category of speech," and the Court eventually concluded that

"neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2371, 2375.

In particular, the Court was especially skeptical about the potentially limitless scope of the professional speech doctrine on which *Pickup* rested, warning that "[a]s defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others," including even fortune tellers. *Id.* at 2375 (*citing* Rodney Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 68 (2016)). That, the Court said, was improper. Yet the court below tried to broaden the array of speakers purportedly covered by *Pickup* still further, to teachers. *NIFLA* makes clear that the First Amendment does not allow the government to end run around the strict scrutiny test by such facile labeling. Just as the California laws in *NIFLA* were deemed regulations of speech—and not merely of conduct—and

struck down, so too California's restriction on teaching is a speech restriction.

II. The Act is a content-based speech restriction

The Act not only restricts speech, but it does so based on the content of speech. The reasoning of *Humanitarian Law Project* makes this clear: When a law targets speech precisely because it "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge,'" it is content-based and subject to strict scrutiny. 561 U.S. at 27.

That, in turn, simply reflects the well-established principle that a law is content-based if it "on its face draws distinctions based on the message a speaker conveys," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (internal quotation marks omitted), or if it requires government officials to "examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (internal quotation marks omitted). The Act on its face distinguishes schools that offer vocational training from those offering "solely avocational or

recreational" training, Cal. Educ. Code § 94874(a), and thus requires government officials to examine what is taught to decide whether the Act applies. The Act is therefore a content-based speech restriction.

Of course, the Act contains some content-neutral elements—it only applies to private schools in California that charge tuition, ER 11—as well as content-based elements. But a law is content-based if it contains any content-based elements. The law in *Humanitarian Law Project*, for instance, was viewed as content-based even though it applied only to speech to foreign terrorist organizations (a content-neutral element) because it was limited to speech that imparted a specific skill (a content-based element). 561 U.S. at 27.

Likewise, in *Boos v. Barry*, 485 U.S. 312 (1988), the Court struck down an ordinance that "prohibit[ed] the display of any sign within 500 feet of a foreign embassy if that sign tend[ed] to bring that foreign government into public odium." *Id.* at 315 (internal quotations omitted). The ordinance contained content-neutral elements—it applied only to signs, and only if they were within 500 feet of a foreign embassy. But because it also contained a content-based element (it

targeted signs that criticized a foreign government), the law was content-based. *Id.* at 321.

Similarly, in *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972), the Court struck down an ordinance banning nonlabor picketing outside schools. The ban contained content-neutral elements—it only applied to picketing, and only outside schools. But because it also contained a content-based element (that the picketing not be related to a labor dispute), the law was content-based. *See also Carey v. Brown*, 447 U.S. 455, 455-456 (1980) (likewise treating an ordinance banning nonlabor residential picketing as content-based).

The Act is similarly a content-based regulation, because it turns on whether an institution offers training and on whether that training is vocational. The only way to make these determinations is to examine the content of what the school is teaching. The Act thus distinguishes speech based on content, just as the laws in *Humanitarian Law Project*, *Boos*, *Mosley*, and *Carey* did, and it is therefore content-based.

III. Payment for speech is protected under the First Amendment

Speech is fully protected even when it is paid for. That is well-established for newspapers, books, and other valuable forms of speech that could not be supplied unless paid for. It is equally true for schooling.

Thus, for example, in *Meyer v. Grant*, 486 U.S. 414 (1988), the Court struck down a ban on paying political petition circulators: By requiring circulators to be volunteers, the law "limit[ed] the number of voices who will convey appellees' message" and thus "restrict[ed] access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 422, 424. Paid speech, the Court recognized, is just as protected as unpaid speech. The Court held the same in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), when it held that the right to publish books included the right to pay authors (even former criminals) to write those books. *Id.* at 116-17.

Likewise, in *United States v. Dahlstrom*, 713 F.2d 1423, 1425, 1429 (9th Cir. 1983), this Court recognized that the First Amendment protects seminars for which attendees paid $6,000 to $12,000, and which taught the attendees how to reduce their tax liabilities using foreign trusts. If the First Amendment protects teaching tax avoidance methods for money, it should equally protect teaching horseshoeing for money as well.

The court below relied on *Illinois Bible Colleges Ass'n v. Anderson*, 870 F.3d 631 (7th Cir. 2017), and *Nova Univ.*, 483 A.2d at 1181, in arguing that educational institutions can be regulated. ER 14. But, unlike here, the regulations in those cases were content-neutral, and did not block any students from receiving the institution's speech: they merely required a library in one case and a certificate of approval in order to issue a degree in the other. *Illinois Bible Colleges Ass'n*, 870 F.3d at 635; *Nova Univ.*, 483 A.2d at 1184.

IV. The Act is not narrowly tailored to the government's interest

Of course, when money exchanges hands, the government has considerable latitude to make sure that the seller is not defrauding the buyer. *See, e.g.*, *Illinois Bible Colleges Ass'n*, 870 F.3d at 643

("[the colleges'] right to free speech does not include a right to use deceptive language to describe a . . . degree"). But the "ability-to-benefit" requirement is not limited to banning fraud or deception.

Indeed, despite its name, the requirement is not even narrowly tailored to a government interest in preventing students from foolishly wasting their money. Horseshoeing requires a different set of skills than those required for success in high school, on a GED test, or on the other tests that the state allows. Indeed, students who are not good at taking such tests may well find trades such as horseshoeing to be the most effective ways to earn a living.

Nor can the "ability-to-benefit" requirement be justified as a rough proxy for likelihood of success. Content-based restrictions on speech must pass strict scrutiny, not just the rational basis test that the court below applied, ER 13-16. And the Court's strict scrutiny caselaw makes clear that rough prophylactic requirements do not pass strict scrutiny, even when the government is trying to protect people's pocketbooks.

As the Court has held in its charitable fundraising cases, a rough proxy like that cannot be upheld when it is "simply too imprecise

an instrument to accomplish [the statute's] purpose." *Sec'y of State of Md. v. Munson Co.*, 467 U.S. 947, 961 (1984) (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)). For instance, in *Schaumburg*, a law prohibited "the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for 'charitable purposes.'" *Id.* at 622. That criterion, the Court held, was not narrowly tailored to the government interest in preventing fraud, because legitimate charitable organizations could justifiably spend more than 25 percent of their receipts on non-charitable expenditures. *Id.* at 635-36. Instead, the Court held, if the government wanted to serve its interest, "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Id.* at 637.

Likewise, in *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 789 (1988), the Supreme Court held that "using percentages [in a way similar to that in *Schaumburg*] to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in pre-

venting fraud." "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most previous freedoms." *Id.* at 801.

The same is true here: The First Amendment does not allow California's broad prophylactic rule, applicable to all vocational institutions, that presumes that students who lack formal education and test-taking skills cannot benefit from the institutions' speech. Rather, if California wants to regulate this field, it must do so more precisely, by prohibiting only fraudulent misrepresentations or similar misconduct.

V. Even if the Act were content-neutral, it does not leave open ample alternative methods for an audience to receive this speech

Even if the Act were content-neutral, that would not help the government because it does not "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

"An alternative is not ample if the speaker is not permitted to reach the 'intended audience.'" *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation

marks omitted). That is precisely what the Act does: It practically forbids Pacific Coast Horseshoeing School from reaching students like Esteban Narez with their speech.

An alternative channel is also inadequate if its use "provoke[s] a different reaction" or "carr[ies] different implications" than the foreclosed channel, or if its use is less "convenient" than, or not a "practical substitute" to, the foreclosed channel. *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994). That too is what the Act does: Though the School may "communicat[e] about horseshoeing generally," outside the context of its training program, ER 12, that is not a practical substitute to the training that the School would rather provide. Yes, the School could, for instance, create YouTube videos, write a blog about horseshoeing, or speak about horseshoeing in the town square; but that would be much less effective at teaching horseshoeing than its classes are.

Likewise, the Act does not leave open ample alternative channels for students like Narez to acquire the knowledge they seek. *See Packingham v. N.C.*, 137 S. Ct. 1730, 1732 (2017) (treating the right

"to gain access to information" on par with the right "to communicate with one another," even where content-neutral speech restrictions are concerned). A student who "learn[ed] about horseshoeing outside of enrollment at a private postsecondary educational institution," ER 12-13, would not get the same education as the carefully crafted, interactive training offered by the School.

CONCLUSION

The Act is a content-based restriction on speech; it must therefore pass strict scrutiny, but it cannot: It is not narrowly tailored to any consumer protection interests that the government might have. And even if the Act were seen as content-neutral, it still does not leave open ample alternative channels for the School to speak to students like Narez, and for students like Narez to learn the things that the School teaches. The Act therefore violates the First Amendment, and the District Court's contrary decision should be reversed.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae*

STATEMENT OF RELATED CASES

There are no related cases covered by 9th Cir. R. 28-2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

Dated: Aug. 15, 2018

s/ Eugene Volokh
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Aug. 15, 2018.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: Aug. 15, 2018

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