No. 25-1240

In the Supreme Court of the United States

AZADEH KHATIBI, M.D., ET AL.,
Petitioners,
v.
KRISTINA D. LAWSON, PRESIDENT OF THE MEDICAL BOARD OF CALIFORNIA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BUCKEYE INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether private instruction in courses required for state licensure constitutes government speech.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

SUMMARY OF THE ARGUMENT

The Court should reaffirm that medical professionals' speech is entitled to full First Amendment protection and cannot be recharacterized as government speech to justify compelled expression. In *Chiles* v. *Salazar*, 146 S. Ct. 1010 (2026), the Court made clear that so-called "professional speech" is not a lesser category of speech and remains fully protected. California's attempt to reframe its mandate for implicit bias training in continuing medical education (CME) courses as "government speech" is an effort to evade that rule. Whether in doctor-patient or

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

doctor-doctor contexts, speech by medical professionals remains private speech, and the State may not compel instructors to convey a preferred viewpoint.

California's requirement that continuing medical education instructors teach the State's favored perspective on implicit bias exceeds the traditional bounds of licensing authority. Although States may regulate professional qualifications, they may not dictate opinions or ideological perspectives. By forcing instructors to communicate a viewpoint they may reject, California violates both the right to speak and the right not to speak, fundamental protections recognized under the First Amendment.

Compelled speech of this kind undermines the marketplace of ideas, particularly in a field like medicine where knowledge and consensus evolve over time. Mandating one perspective suppresses dissent, limits intellectual debate, and deprives listeners of access to competing viewpoints. If governments could transform private speech into "government speech" simply by labeling it as such, they would gain dangerous power to silence disfavored views. This case thus presents a suitable vehicle for the Court to reaffirm limits on compelled speech and prevent improper expansion of the government-speech doctrine.

ARGUMENT

I. *Chiles* v. *Salazar* affirms that medical professionals' speech is entitled to full First Amendment protection.

This case is the flip side of *Chiles* v. *Salazar*, 146 S. Ct. 1010 (2026). *Chiles* involved Colorado's attempted regulation of a medical professional's speech to a patient—labeling it "professional speech." *Id.* at 1022. Here, California regulates a medical professional's speech when training other medical professionals, justifying the regulation as "government speech." But even in this context, a medical professional's speech remains private speech, fully protected by the First Amendment like anyone else's speech.

The Court previously rejected California's "professional speech" justification for mandating medical clinics' speech to patients. *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 765 (2018) (*NIFLA*). In *NIFLA*, California claimed that it could require pro-life crisis pregnancy centers to provide certain notices, including information about free or low-cost abortions. *Id.* at 760–61. California asserted that clinics' "professional speech" was entitled to less protection than non-professional speech. *Id.* at 765. The Court instead "expressly rejected the . . . notion that 'professional speech' represents some 'separate category of speech' subject to 'diminished constitutional protection.'" *Chiles*, 140 S. Ct. at 1024 (quoting *NIFLA*, 585 U.S. at 767).

Having lost the "professional speech" justification for regulating medical professionals' speech, California now asserts that, in reality, its speech

mandates are "government speech." Since California could not strip CME instructors of their First Amendment rights, it is conscripting them into government service.

Chiles addressed the government's ability to control medical professionals' speech head-on. Although *Chiles* addressed medical professionals' rights in a doctor-patient context, *id.* at 1017, the same rule should apply in doctor-doctor contexts too. California here seeks to dictate what particular "opinion or perspective" individuals may express on implicit bias—"the violation of the First Amendment is all the more blatant." *Id.* at 1021 (quoting *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). California's labeling its mandated private speech as "government speech" is frightening. "History is littered with examples of official efforts to manipulate and control professional speech—including 'the content of doctor-patient discourse'—in ways designed 'to increase state power,' 'suppress minorities,' and muzzle 'unpopular ideas.'" *Id.* at 1024 (quoting *NIFLA*, 585 U.S. at 767 (citing examples of government mandated harmful medical speech)).

And like Colorado in *Chiles*, California "seeks neither to regulate [Dr. Khatibi's] speech incident to any conduct, nor does it seek to compel disclosure of factual and uncontroversial information. Instead, it seeks to [mandate communicating] a viewpoint she wishes to [not] express." *Id.* at 1028.[2]

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[2] The law allows mandatory disclosure of information necessary for a patient's informed consent. *NIFLA*, 585 U.S. at 770.

The court below found meaning in that "California has actively regulated the medical profession since the late nineteenth century, and . . . has imposed qualifications on the practice of medicine ever since." Pet. App. 17a. But *Chiles* explains that "licensing laws have traditionally addressed what qualifications an individual must possess before practicing a particular profession." 146 S. Ct. at 1028. California's mandate that CME instructors teach the state's preferred view on implicit bias, Cal. Bus. & Prof. Code § 2190.1, goes far beyond that. "[W]hatever traditional interest a State may have in ensuring a professional possesses a particular set of qualifications, that interest does not automatically entail a right to dictate a professional's point of view." *Chiles*, 146 S. Ct. at 1028.

Even though California thinks its mandated speech is a good idea and wants to designate medical professional's speech as government speech, "that is not the world the First Amendment envisions for us. Licensed professionals 'have a host of good-faith disagreements' about the 'prudence' and 'ethics' of various practices in their fields." *Id.* at 1029 (citation omitted).

* * *

Free speech is not merely a constitutional rule; it reflects a preexisting human liberty that the First Amendment protects for everyone, including medical professionals. As one commentator explains, free expression is "the essence of being human" and is "not the creation of the Constitution, but rather embodied in that document." Jonathan Turley, *The Indispensable Right: Free Speech in the Age of Rage* 23 (Simon & Schuster 2024). That protection exists in

part to preserve "an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

So too, the First Amendment includes the right not to speak and refrain from the government's attempts to compel speech. See *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Just as Dr. Chiles had a First Amendment right to engage in talk therapy—even though it upset Colorado—Dr. Khatibi has a First Amendment right *not* to engage in implicit bias training—speech she deems harmful.

II. California's claim of government speech undermines the important marketplace of ideas by mandating specific ideas in the medical profession.

California's theory of government speech threatens the marketplace of ideas by allowing the State to dictate what CME instructors must say on a disputed issue. When government controls professional speech in that way, it risks monopolizing debate rather than allowing truth to emerge through open discussion. See *Red Lion Broad. Co.*, 395 U.S. at 389–90; *NIFLA*, 585 U.S. at 772.

An overzealous government can corrupt the market by limiting speech or, as in this case, by trying to force private citizens to voice the government's views. The government may speak for itself about the dangers it perceives from "implicit bias" and try to convince others to adopt its position. Cf. *Shurtleff* v. *City of Boston*, 596 U.S. 243, 251 (2022) (the First

Amendment does not prevent the government from stating an opinion). But forcing private citizens to voice the government's opinions not only crosses the constitutional line but also undercuts the kind of intellectual debate the First Amendment is supposed to encourage. Judges VanDyke, Bumatay, and Tung pointed out below that "implicit bias" training is "controversial," "political," and "ideological." Pet. App. 64a. While the government should never force private citizens to parrot the government line, it is even more egregious when the government invokes such a contentious topic.

Further, in *Red Lion Broadcasting Co.*, the Court articulated that *listeners* have First Amendment rights, just like speakers. 395 U.S. at 390. "That right may not constitutionally be abridged either by Congress or by" California. *Id.* Medical professionals attending CME's have a right to hear perspectives on bias other than the government endorsed view. If all they hear is the government's view, then medical professionals are unlikely to explore other ideas or challenge the government's view. The lack of diversity of thought undermines, rather than promotes, improvements in delivering medical services.

Medicine, like most fields, is an evolving field. What might be "true" today, may be provably false tomorrow. "Medical consensus, too, is not static; it evolves and always has. A prevailing standard of care may reflect what most practitioners believe today, but it cannot mark the outer boundary of what they may say tomorrow." *Chiles*, 146 S. Ct. at 1029. Eugenics, for example, was a prevailing scientific view for much of the Twentieth Century that resulted in the forced

sterilization of over 60,000 people. Megan Kalomiris, *Unfit to Breed: America's Dark Tale of Eugenics*, NIH Intramural Research Program (Feb. 3, 2022), https://tinyurl.com/27xyeb23. The eugenics movement was so strong that even this Court proclaimed that "[t]hree generations of imbeciles are enough." *Buck* v. *Bell*, 274 U.S. 200, 207 (1927). Luckily, science caught up with reality and forced sterilization ended in the 1960s. Kalomiris, *supra*. Thus, it is paramount that those in medical professions can challenge, research, and learn freely without state interference.

And the First Amendment agrees. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Red Lion Broad. Co.*, 395 U.S. at 390 (citation omitted). "[T]he people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 585 U.S. at 772. But if California wishes to proclaim that medical professionals suffer from implicit bias, it is free to say so directly. It cannot conscript medical providers to do its work for it.

III. This case is an excellent vehicle to declare that governments cannot justify their speech mandates to private parties by labeling the speech as government speech.

As the Court reviews its government speech jurisprudence, it should consider *Chiles'* strong protection of medical professionals' speech. The Court has well observed that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. California ignores that constellation as it prescribes the orthodoxy of its "understanding of implicit bias," Pet. App. 3a, and forces private CME instructors to teach that orthodoxy.

In the wake of *NIFLA*, California reclassified its mandated private speech into government speech. And in the aftermath of *Chiles*, more governments may try the same tactic. As this Court has observed, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, [the Court] must exercise great caution before extending [its] government-speech precedents." *Matal* v. *Tam*, 582 U.S. 218, 235 (2017).

The Court should grant certiorari to stop this expansion of the government-speech doctrine before it dims the light of Free Speech.

CONCLUSION

The government has a right to make sure doctors and other professionals are qualified to do their jobs. It does not have a right to commandeer their speech to mouth support for the government's position. Permitting anything else contravenes the First Amendment by stifling speech and ideas. The Court should grant certiorari to clarify that governments cannot evade this Court's precedent by labeling compelled speech as government speech.

Respectfully submitted,

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