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SUPREME COURT OF THE UNITED STATES

AZADEH KHATIBI, ET AL. *v.* FELIX C. YIP, PRESIDENT OF THE MEDICAL BOARD OF CALIFORNIA, ET AL.

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

No. 25–1240. Decided November 16, 2026

The petition for a writ of certiorari is denied. JUSTICE GORSUCH would grant the petition for a writ of certiorari.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting from the denial of certiorari.

In 2022, California began requiring private instructors in privately run and privately accredited continuing medical education (CME) courses to discuss how so-called implicit bias affects healthcare outcomes. The Ninth Circuit held that First Amendment scrutiny did not apply to this compelled-speech requirement because the breadth of California's CME regulation renders the content of any CME course government speech, not private speech. That logic fundamentally misunderstands this Court's precedents and the Constitution. First Amendment protections do not give way simply because a State heavily regulates speech.

I would have granted certiorari to clarify the government-speech doctrine. At a minimum, the Ninth Circuit misapplied *Shurtleff* v. *Boston*, 596 U. S. 243 (2022), which instructs courts to identify government speech by considering (1) "the history of the expression at issue," (2) "the public's likely perception as to who (the government or a private person) is speaking," and (3) "the extent to which the government has actively shaped or controlled the expression." *Id.*, at 252. The Ninth Circuit collapsed those distinct inquiries, focusing on the breadth of the government's regulatory scheme at each step. More fundamentally, however, *Shurtleff* is leading courts astray. I joined JUSTICE ALITO's

concurrence in *Shurtleff*, which warned that the majority's three-factor test could cause courts to conclude that extensive government regulation transforms a private message into government speech exempt from First Amendment scrutiny. *Id.*, at 263–266 (opinion concurring in judgment). As the Ninth Circuit's decision shows, those concerns were prescient. This Court should reconsider whether the *Shurtleff* test is the proper mode of analysis for identifying government speech.

I

California-licensed physicians are required to complete 50 hours of approved CME every two years. Cal. Code Regs., tit. 16, §1336(a) (2026). Credit-eligible CME courses are often organized by private entities, certified by private accreditors, and taught by private instructors. See §§1337(a), 1337.5(a)(1); Cal. Bus. & Prof. Code Ann. §2190.1(d)(3) (West Cum. Supp. 2026). The State does not preapprove course content but reserves the right to audit courses for compliance with its CME standards. Cal. Code Regs., tit. 16, §1337.5(b).

The Medical Board of California "adopt[s] and administer[s] [CME] standards," few of which relate to course content. Cal. Bus. & Prof. Code Ann. §2190 (West 2019); see Cal. Code Regs., tit. 16, §§1336–1339.5. In addition, the State requires that CME courses broadly relate to the medical profession. They must "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." Cal. Bus. & Prof. Code Ann. §2190.1(a) (West Cum. Supp. 2026). In 2019, however, the California Legislature added a requirement that after January 1, 2022, all CME courses must "contain curriculum that includes the understanding of implicit bias." §2190.1(d)(1). To satisfy that requirement, CME courses must contain "[e]xamples of how

implicit bias affects perceptions and treatment decisions of physicians and surgeons, leading to disparities in health outcomes" or "[s]trategies to address how unintended biases in decisionmaking may contribute to health care disparities." §§2190.1(e)(1), (2).

Petitioners Dr. Azadeh Khatibi and Do No Harm do not want to speak California's preferred message on implicit bias, and they challenged §2190.1(d) as compelling speech in violation of the First Amendment. Dr. Khatibi, a California-licensed ophthalmologist, creates and teaches CME courses. First Amended Complaint in No. 2:23–cv–06195 (CD Cal.), ECF Doc. 26, ¶5 (First Amended Complaint). She "disagrees that implicit bias is the primary factor driving disparities in healthcare" and does not want to devote time to the subject during her courses. *Id.*, ¶43. Do No Harm is a nonprofit corporation. *Id.*, ¶7. At least one of its members teaches CME courses and believes that implicit bias trainings "have not been shown to successfully reduce barriers to healthcare, and instead risk infecting healthcare decisions with divisive and discriminatory ideas." *Id.*, ¶61. Yet, California's implicit-bias-training requirement leaves petitioners no choice but to discuss the topic in a way that affirms the State's view that implicit bias causes "disparities in health outcomes." Cal. Bus. & Prof. Code Ann. §2190.1(e)(1) (West Cum. Supp. 2026).

The District Court dismissed the complaint on the theory that the implicit-bias-training requirement "constitutes government speech," *Khatibi* v. *Hawkins*, No. 2:23–cv–06195 (CD Cal., May 2, 2024), p. 14, and the Ninth Circuit affirmed. The Ninth Circuit held that all three *Shurtleff* factors indicate that "CMEs eligible for Board credit constitute government speech." *Khatibi* v. *Hawkins*, 145 F. 4th 1139, 1146 (2025). At every step of the analysis, the Ninth Circuit emphasized the breadth of the State's regulation. Considering history, the court noted that California "has long regulated the practice of medicine as an exercise of the

police power" and has "adopted, updated, and enforced CME standards." *Id.*, at 1147–1148 (internal quotation marks omitted). Considering the public's likely perception of the speaker in a CME course, the court reasoned that "licensees could attribute approved CMEs' content to California" because "their profession is heavily regulated." *Id.*, at 1151. Considering the extent to which the government has shaped the expression, the court cited "California's extraordinary control over accredited CMEs." *Id.*, at 1152. As Judge VanDyke explained in his dissent from the denial of rehearing en banc, the panel's "approach boil[ed] down to a single-factor analysis: does the government 'heavily' or 'actively' regulate CMEs?" *Khatibi* v. *Hawkins*, 164 F. 4th 1105, 1109 (CA9 2025).

II

A

In its blinkered application of the *Shurtleff* factors, the Ninth Circuit lost sight of the core government-speech inquiry: whether the government is "speak[ing] for itself or . . . regulat[ing] private expression." *Shurtleff*, 596 U. S., at 252.

The government-speech doctrine occupies a narrow corner of our First Amendment jurisprudence. The First Amendment protects the people's right of free speech against government interference; it does not prevent the government from speaking for itself. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467 (2009). "But courts must be very careful when a government claims that speech by one or more private speakers is actually government speech." *Shurtleff*, 596 U. S., at 262 (ALITO, J., concurring in judgment). "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could . . . muffle the expression of disfavored viewpoints," *Matal* v. *Tam*, 582 U. S. 218, 235 (2017), or, as

here, require private speakers to convey government messages without facing any constitutional scrutiny.

This Court has thus exercised "great caution" before characterizing a message as government speech. *Ibid.* In *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550 (2005), we held that government-sponsored beef ads constituted government speech because the government determined "the overarching message" of the ads, helped develop proposals for the ads, reviewed every ad "for substance and for wording," and the Secretary of Agriculture "exercise[d] final approval authority over every word used in every" ad. *Id.*, at 561. In *Summum*, we held that the permanent display of monuments in a public park was government speech because the City "effectively controlled the messages sent by the monuments in the Park by exercising final approval authority over their selection." 555 U. S., at 473 (internal quotation marks omitted). And, in *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200 (2015), we held that the messages on government-issued license plates, over which the State "maintain[ed] direct control," were government speech. *Id.*, at 208, 213.

Since *Walker*—which we have described as the "outer boun[d] of the government-speech doctrine," *Matal*, 582 U. S., at 238—we have been careful to distinguish between government control over messages and government control over the broader scheme through which the messages are communicated. We held, for example, that trademarks are private speech, notwithstanding the government's substantial involvement in the registration process. *Id.*, at 239. And, this Court held that flags flown outside of Boston's City Hall did not constitute government speech in part because the city regularly permitted private groups to freely fly their own colors. *Shurtleff*, 596 U. S., at 255–259. In all these cases, the controlling question was whether "the government intends to speak for itself or to regulate private expression." *Id.*, at 252.

Put in those simple terms, and in light of our precedents, California's attempt to require private individuals in privately accredited CME courses to run implicit-bias training is an evident attempt "to regulate private expression." *Ibid.* The Ninth Circuit resisted that conclusion. It mechanically analyzed the *Shurtleff* factors in isolation, without stepping back to consider "the identity of the speaker," which is "[t]he ultimate question" in the government-speech inquiry. *Id.*, at 263 (ALITO, J., concurring in judgment).

Even under the *Shurtleff* test, I doubt that California's implicit-bias-training requirement is government speech. First, California has not historically used CME to communicate government messages. While the State requires that CME courses generally relate to the practice of medicine and occasionally requires that courses cover certain subjects, California has not otherwise dictated the content of courses. See Cal. Bus. & Prof. Code Ann. §2190.1 (West Cum. Supp. 2026). Second, because California "relie[s] on the participation of private parties in executing the CME scheme," *Khatibi*, 145 F. 4th, at 1151, the public is unlikely to perceive a private instructor's CME course as government speech. As the Ninth Circuit acknowledged, Dr. Khatibi "plausibly alleged facts suggesting that attendees treat her as the person responsible for CME content." *Id.*, at 1150–1151. Third, while California extensively regulates the medical field, licenses physicians, and sets the requirements for credit-eligible CME, there is little evidence that California "shape[s] the *messages*" communicated in CME courses. Cf. *Shurtleff*, 596 U. S., at 256 (emphasis added). Despite its long recitation of California regulations, the Ninth Circuit did not identify any state law that requires private speakers in a CME course to express a particular *viewpoint*—even on contestable medical issues. See *Khatibi*, 145 F. 4th, at 1152–1157. The implicit-bias-training requirement is a notable departure from that practice. It should have been easy, then, for the courts below to

conclude that California's implicit-bias-training requirement regulates private speech.

More troubling than the Ninth Circuit's misapplication of the *Shurtleff* factors are the implications of the court's decision. On the Ninth Circuit's view of government speech, could California require a CME instructor to communicate the State's preferred message on the availability of abortion? Cf. *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. 755, 766 (2018). Could the State require a CME instructor to inform participants that for certain patients, gender-transition surgery is ethically required? Cf. *Chiles* v. *Salazar*, 607 U. S. 627, 636, 639–640 (2026). What of other professions whose members California licenses and regulates? At the next statewide legal conference at which lectures are offered for continuing legal education, could California require a keynote speaker to oppose racial preferences in law firm hiring? Applying the Ninth Circuit's logic, enough government regulation of the field would convert the private speaker's message in each of these hypotheticals into government speech unprotected by the First Amendment. That result does not follow from this Court's precedents, and it certainly does not follow from the Constitution.

B

If the Ninth Circuit's decision is truly the kind of result that *Shurtleff*'s three-factor test countenances, we should reconsider *Shurtleff*. Before *Shurtleff*, this Court had identified history, public perception, and government control as "relevant" but not mandatory "considerations" for identifying government speech. See *Walker*, 576 U. S., at 210. When *Shurtleff* described those considerations as a three-factor test, several Members of the Court—myself included—warned that the test would be unworkable and obscure the central inquiry in government-speech cases: whether the government is speaking or regulating private

speech. "[L]ike any factorized analysis," the *Shurtleff* majority's approach does not "provide a principled way of deciding cases." 596 U. S., at 266 (ALITO, J., concurring in judgment). Worse, myopic focus on the history and scope of government control over speech may give courts the false impression that state regulation can convert private speech into government speech. *Id.*, at 264–265.

After only a few years, those concerns are materializing. The Ninth Circuit relied on California's regulation of CME to conclude that requiring private speakers to communicate a government message was not compelled speech but *government* speech. That is precisely the paradox predicted by the concurrence in *Shurtleff*: that "government action that regulates private speech would" now "qualify as government speech unregulated by the First Amendment." *Id.*, at 269. But, neither compelled speech nor "[c]ensorship" is "made constitutional by aggressive and direct application." *Id.*, at 264. It cannot be the case that compelled speech becomes government speech because the government has compelled the speech.

I would grant certiorari to correct course. In my view, the relevant inquiry in a government-speech case is straightforward: Is the government "*speaking*," or is it "regulating private expression"? *Id.*, at 262. The challenged government activity must be "government speech in the literal sense—purposeful communication of a governmentally determined message by a person acting within the scope of a power to speak for the government." *Id.*, at 269–270. Moreover, "the government must . . . not rely on a means that abridges the speech of persons acting in a private capacity," *id.*, at 270, because doing so reveals that the government has moved from the role of speaker to that of regulator.

Under this framework, it is easy to see why California's law is subject to First Amendment scrutiny. The State's implicit-bias-training requirement is not speech by any government actor; it is a requirement that private speakers

communicate certain messages. Although the government may "deputiz[e] private persons as its agents" to convey its message, Dr. Khatibi and Do No Harm's members have not "voluntarily assumed" "a public or quasi-public capacity that empowers them to speak on behalf of the government." *Ibid.* They share their own messages through the CME courses they create and deliver, and they do so in their private capacities. See First Amended Complaint, ¶¶35, 60–62. Even "government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression," such as "compelled speech." *Shurtleff*, 596 U. S., at 269 (ALITO, J., concurring in judgment). When, as here, the government does not issue its own messages but instead requires private speakers to communicate the government's viewpoint, the First Amendment applies.

III

A State cannot regulate its way out of First Amendment scrutiny. We should not permit the government-speech doctrine to be wielded as "a cover for censorship" or a cloak for compelled speech. *Id.*, at 263. Because this case provided an opportunity to clarify that aspect of our government-speech doctrine, I respectfully dissent from the denial of certiorari.