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 OF *AMICI CURIAE* HOUSING AND ECONOMIC RIGHTS ADVOCATES, CONSUMERS UNION, THE PROJECT ON PREDATORY STUDENT LENDING, AND THE UC BERKELEY CENTER FOR CONSUMER LAW AND ECONOMIC JUSTICE, IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a for-profit parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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INTEREST OF *AMICI CURIAE*

Housing and Economic Rights Advocates ("HERA") is a California statewide, not-for-profit legal service and advocacy organization that provides legal advice, advocacy, and representation to low and moderate income consumers on a wide range of economic justice issues. In response to a significant increase in consumer requests for help, HERA's work has increasingly focused on student loan debt, and in particular, debt incurred while attending abusive for-profit education institutions. Through direct services and public workshops, HERA currently helps hundreds of Californians each year to understand their options and to access their rights for unmanageable student debt. These services include helping students who have been victimized by predatory for-profit schools with administrative complaints and applications for discharge based on school misconduct. HERA is presently co-counsel for debt-burdened former students of the failed for-profit Corinthian Colleges, Inc., who are seeking to enforce their right to student loan relief in federal class action litigation. *See Manriquez v. DeVos*, Case No. 17-cv-07210-SK, (N.D. Cal. June 19, 2018) (order granting in part and denying in part preliminary injunction), *appeal pending*, No. 18-16375 (9th Cir. July 24, 2018).

Consumers Union is the advocacy division of Consumer Reports, an independent, nonprofit organization that works side by side with consumers for

truth, transparency, and fairness in the marketplace. Consumer Reports uses its rigorous research and testing, consumer insights, journalism, and policy expertise to inform purchase decisions, improve the products and services that businesses deliver, and drive effective legislative and regulatory solutions and fair competitive practices. Consumer Reports has been active for decades in a wide range of policy issues affecting consumers, including fair treatment of student borrowers.

The Project on Predatory Student Lending represents students against the predatory for-profit college industry and is part of the Legal Services Center of Harvard Law School and of Harvard University. The Project was formed in 2012 to combat the massive fraud that was being perpetrated against students and taxpayers by for-profit colleges, and government policies that enable this predatory industry to continue to cheat borrowers and taxpayers. The Project represents thousands of former students across the country and litigates high-impact cases to protect borrower rights. The Project currently has cases on behalf of former students of for-profit college companies seeking to vindicate their promised right to relief from fraudulently induced student loans. *See Manriquez v. DeVos*, Case No. 17-cv-07210-SK. Many of the Project's clients are people of color, veterans, or immigrants. Most are the first in their family to attend college. The Project's work in this area supports its broader goals of economic justice and racial equality.

The UC Berkeley Center for Consumer Law & Economic Justice ("the

Center") works to ensure safe, equal, and fair access to the marketplace. Through research, advocacy, policy, and teaching, the Center acts to create a society where economic security and opportunity are available to all. The Center works with legislative bodies, administrative agencies, and courts on behalf of low-income consumers on a wide range of issues, advocating for development and enforcement of laws protecting and advancing consumer rights. The Center has participated in cases in this court and policy work around the state and the nation to establish protections for students in the for-profit education sector.

Amici curiae have represented borrowers who have been harmed by predatory schools. Through this work, *amici* have seen the harm to students caused by predatory school abuses and abrupt closures and recognized the necessity of enforcing regulations to regulate for-profit schools. *Amici* are deeply concerned that the State's ability to protect its citizens would be significantly weakened if Plaintiffs' startlingly expansive interpretation of the First Amendment were adopted.[1]

[1] The parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici* and their members, contributed money to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This First Amendment challenge to the commonsense ability-to-benefit rule would, if accepted, accomplish a sweeping backdoor deregulation of an industry, for-profit vocational education, whose members have caused extraordinary harm to low-income students across the country. The damage to student well-being would be severe. Beyond that, if Plaintiffs' view of the Free Speech Clause were adopted, and the First Amendment can be successfully invoked against any measure governing the conduct of any business whose operations involve speech, then the government will be hamstrung in its efforts to protect not only students, but also patrons of a vast range of businesses, with harms ranging from health and safety violations to fraud.

The stakes in this case are high. The law at issue only requires vocational and other postsecondary programs that charge tuition to show, before admitting a student who does not have a high school diploma or GED, that the student has an "ability to benefit" from the program. If Plaintiffs' free speech challenge to that modest law succeeds, then the First Amendment would not only prohibit California and other states from requiring schools to meet minimum standards for ensuring educational benefit to students, but also, implicitly, would prohibit any government entity from regulating any aspect of our nonpublic educational system. Under Plaintiffs' dramatically expansive view of the First Amendment's applicability,

could the federal government constitutionally require for-profit schools to adhere to any standards—for fire safety, for water use, for zoning, for nondiscrimination in employment? And could states require minimum licensing and similar standards for other businesses that operate through speech, like daycare centers, stock brokerages, psychotherapy offices, or law firms? Indeed, since under Plaintiffs' theory *any* government imposition on a business engaged in speech implicates the First Amendment, could court challenges requiring some form of heightened scrutiny be brought against laws placing any requirement whatsoever on, say, movie theaters, newspapers, or cell phone stores?

Fortunately, the Free Speech Clause has never been held to require such chaos. To the contrary, courts interpreting the First Amendment have always contemplated the necessary regulation of businesses involved in speech. "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). As for whether the First Amendment requires the elimination or modification of huge swaths of laws that are necessary to democratic self-governance and to the furtherance of health, safety, environmental, employment, and consumer protections: "That cannot be the

law." *See Interpipe Contracting, Inc., v. Becerra*, 898 F.3d 879, 896 (9th Cir. 2018).

Regulation of the conduct of the for-profit college sector is surely necessary. The harms inflicted on students by predatory schools over the past several decades, from deceptive recruiting schemes to under-resourced classrooms to empty promises of employment, have been amply documented in congressional investigations, independent reports, and the proliferation of enforcement actions by agencies tasked with protecting students and punishing fraud. Those harms are real and widespread, and the ability-to-benefit rule helps keep them from spreading even further.

There is no conflict between the ability-to-benefit requirement and the First Amendment. The order of the district court should be affirmed.

ARGUMENT

I. THE RULE AT ISSUE IN THIS CASE IS PART OF A REGULATORY STRUCTURE THAT IS ESSENTIAL TO PROTECT STUDENTS FROM ABUSIVE FOR-PROFIT SCHOOLS.

The rule challenged by Plaintiffs is a commonsense requirement, developed by California's legislature and Bureau of Private Postsecondary Education (BPPE), that ensures that predatory for-profit schools do not trick students into paying for an education from which they cannot benefit. BPPE was created by the 2009 California Private Postsecondary Education Act to, among other things, "protect[] consumers and students against fraud, misrepresentation, or other business practices at private postsecondary institutions that may lead to loss of students' tuition and related educational funds" and "establish and enforc[e] minimum standards for instructional quality and institutional stability."[2] The BPPE's authority to regulate and oversee the for-profit schools industry allows it to protect students and makes it one of the primary restraints on predatory conduct by these schools. The Bureau has no shortage of work to do.

For-profit schools have engaged in a well-documented litany of abuses well known to legal aid providers and to state and federal enforcement agencies:

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[2] *See* California Bureau of Private Postsecondary Education, *About Us*, *available at* https://www.bppe.ca.gov/about_us/; *see also* Cal. Educ. Code § 94875 ("In exercising its powers, and performing its duties, the protection of the public shall be the bureau's highest priority.")

programs that promise jobs for which students completing those programs are manifestly not qualified; recruitment practices that focus exclusively on maximizing the number of students and not their suitability for the programs; intentional targeting of potential students at emotionally vulnerable periods of their lives; teachers without proper credentials; and vocational classrooms devoid of necessary training equipment.[3] Investigation after investigation, report after report, and enforcement action after enforcement action have detailed the rampant and pervasive abuses that have characterized leading players in the industry.[4] In recent years, these leading players in the industry have collapsed after their pervasive predatory practices were revealed.[5]

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[3] *See, e.g., FTC v. DeVry Education Group, Inc.*, Case No. CV–16–00579–MWF–SSx, 2016 WL 6821112, at *4-5 (C.D. Cal. May 09, 2016) (noting that Defendants advertised a misleading 90 percent employment rate); *Salazar v. King,* 822 F.3d 61, 74 (2d Cir. 2016) ("we can be confident that there is a constant class of persons suffering the deprivation alleged in the complaint," that Defendant fraudulently certified ability-to-benefit students); *see also* Order Granting in Part and Denying in Part Preliminary Injunction, *Manriquez v. DeVos*, Case No. 17-cv-07210-SK, slip op. (dkt. 60) at 12 (discussing stories of students who suffered significant financial harm because they were deceived into borrowing money for a worthless education), *available at* https://predatorystudentlending.org/wpcontent/uploads/2018/05/PI-Order.pdf.

[4] *See generally* S. COMM. ON HEALTH, EDUC., S. REP. NO. 112–37, LABOR AND PENSIONS, FOR-PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (2012) ("SENATE HELP COMMITTEE REPORT") (detailing abuses and investigations), *available at* https://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf.

[5] Danielle Douglas-Gabriel, *For-Profit Corinthian Colleges Files for Bankruptcy*, WASH. POST, May 4, 2015, *available at* https://www.washingtonpost.com/.

The need for effective oversight of the for-profit school industry—and prophylactic measures to prevent these abuses from occurring in the first place—could not be more urgent.

A. Governmental analysis, academic research, and enforcement actions have established that the for-profit higher education industry requires vigorous oversight to protect students.

The fraudulent practices of for-profit schools have recently been confirmed and exposed by congressional investigators, academic researchers, and law enforcement agencies. Overwhelmingly, these sources show that for-profit schools' predatory practices lead students to enroll, and take on debt for, programs for which they would not have agreed to pay had they known in advance the true nature of the education provided.

1. Congressional studies consistently show that for-profit schools reap financial rewards by deceiving potential students.

Over the last three decades, congressional studies have shown that for-profit schools have continuously made misrepresentations about their programs to encourage students to enroll, only to have those students withdraw, drop out, or fail to complete their programs after paying thousands or tens of thousands in tuition,

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news/business/wp/2015/05/04/for-profit-corinthian-colleges-files-for-bankruptcy; Autumn Arnett, *More Than 100 For-Profit Institutions Closed During the Past Year, According to Federal Data*, EDUCATIONDIVE, June 6, 2018, *available at* https://www.educationdive.com/news/more-than-100-for-profit-institutions-closed-during-past-year-according-to/525094/.

incurring onerous student loan debts, and receiving no benefits.[6] In 1991, the Governmental Affairs Committee of the U.S. Senate found that students were frequently victimized by "unscrupulous and dishonest [. . .] operators" of private, for-profit trade and vocational institutions, who "leav[e] [students] with huge debts and little or no education."[7] The Senate report detailed for-profit schools' admissions and recruitment practices, including rampant examples of (1) deceptive advertising, (2) unethical and illegal recruitment efforts including false promises of employment, and (3) fabrication of information used to satisfy (federal) ability-to-benefit requirements that applied to students without a high school diploma or GED.[8] Specifically, the committee found that students who did not take the ability-to-benefit exams usually dropped out, often after having incurred student loan debts that they had no means to repay.[9]

Troubles in the industry, where, until recently, vigorous regulatory activity has been unusual, have continued over the decades. A quarter-century after the first Senate report, in 2017, the Department of Education found that the average six-

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[6] *See* SENATE HELP COMMITTEE REPORT, *supra* n. 4 at 16.
[7] *See* S. COMM. ON GOVERNMENTAL AFFAIRS, S. REP. NO. 102–58, ABUSES IN FEDERAL STUDENT AID PROGRAMS. REPORT MADE BY THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE 16-17 (1991) ("GOVERNMENTAL AFFAIRS REPORT"), *available at* https://files.eric.ed.gov/fulltext/ED332631.pdf.
[8] *See id.*
[9] *See id.* at 17.

year graduation rate among for-profit colleges was 23 percent, compared to 59 percent at public institutions and 66 percent at private nonprofit schools.[10] The for-profit college industry was responsible for only 13% of post-secondary students, but 47% of loan defaults and 98% of applications for loan cancellations based on fraud or school closure.[11]

These abuses reflected the tendency of for-profit schools, noted by the Governmental Affairs Committee, to prioritize profits over education, and business growth over student welfare. In investigating the American Career Training Corporation (ACT), for example, the Senate found that over a two-year period, instructors' salaries had stayed flat at approximately 1% of revenue, while advertising outlays—already 7 times the amount of teachers' salaries—had more than quadrupled to 33.8% of revenue,[12] starkly illustrating how much higher some for-profit schools prioritized recruitment over benefiting students after they enrolled.[13]

Two decades later, the extent and frequency of abuses had not abated. In 2012 the U.S. Senate HELP Committee found—as had the Governmental Affairs

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[10] United States Department of Education, National Center for Education Statistics, *Undergraduate Retention and Graduation Rates* (2017).
[11] *See* Project on Predatory Student Lending, *A Predatory Industry*, *available at* https://predatorystudentlending.org/predatory-industry/
[12] *See* GOVERNMENTAL AFFAIRS REPORT, *supra* n. 7, at 12.
[13] *See id.*

Committee in 1991—that for-profit school recruiters were frequently incentivized to mislead students because the recruiters were evaluated and paid based on the number of students they enrolled. The 2012 report found that admission and recruiting staff at even the largest, publicly traded for-profit school companies were under enormous pressure to enroll as many students as possible, often being rewarded for high enrollment numbers and fired for failing to hit their target numbers.[14] As a result, recruiters made false guarantees to prospective students that they would be placed in a job, and misrepresented material aspects of enrollment including the "cost of the program, the availability and obligations of federal aid, the time to complete the program, the completion rates of other students, the job placement of other students, the transferability of the credit, and the reputation and accreditation of the school."[15]

The 2012 Senate HELP Committee report also found that predatory for-profit institutions tend to recruit people who are already struggling to pay their bills even before adding student debt payments to their burden. For-profit schools expressly target people from vulnerable populations, including low-income communities, people of color, service members and veterans looking for a way to transition to civilian life, and victims of physical or psychological abuse. The

[14] *See* SENATE HELP COMMITTEE REPORT, *supra* n. 4, at 378-79.
[15] *See id.*

committee report included multiple examples of aggressive sales pitches that sought to exploit prospective students' vulnerabilities.[16] For example, the training materials for one for-profit university explicitly defined the kind of people they were trying to recruit as "Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experienced a Recent Death. Physically/ Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future."[17] Corinthian Colleges would later come under investigation for aggressive marketing toward precisely such vulnerable populations.[18]

2. Research confirms that a significant proportion of students who attend for-profit schools end up burdened with debt that they are unable to pay.

Academic and institutional studies have established that, with alarming frequency, students who attend for-profit certificate, associate, and bachelor's degree programs end up in a less advantageous position than they would have enjoyed had they simply never attended these schools. Students who attend for-profit schools earn, on average, 11 percent less in the five to six years after

[16] *See* SENATE HELP COMMITTEE REPORT, *supra* n. 4, at 58-63.
[17] SENATE HELP COMMITTEE REPORT, *supra* n. 4, at 58 (quoting Vatterott Educational Holdings, Inc., March 2007, DDC Training (VAT-02-14-03904)).
[18] *See* Complaint at ¶ 3, *People v. Corinthian Colleges, Inc., et al.*, No. 13-534793 (Cal. Super., S.F. County, Oct. 10, 2013), *available at* https://oag.ca.gov/system/files/attachments/press_releases/Complaint%2C%20filed%20stamped_0.pdf.

attendance than students who attended public institutions.[19] In fact, students who attend for-profit schools earn less even relative to their prior earnings.[20] With no additional earnings to show for the time and expense spent, these former students find themselves unable to repay significant federal and private student loan debt.[21] As a result, students face increasing interest, collection costs, and financial distress, and often default on their loans. In fact, nearly half of students who enroll at for-profit schools default on their student loans within five years of entering repayment.[22] Students who default face potentially dire consequences, including high penalties and collection fees, wage garnishment, offsets of their tax returns, and poor credit ratings, which may in turn lead to high interest rates on loans and credit cards, and potential suspension of the defaulter's professional license.[23]

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[19] *See* Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data* 2-3 (Nat'l Bureau of Econ. Research, Working Paper, May 2016), *available at* http://www.nber.org/papers/w22287.

[20] *See* Cellini & Turner, *supra* n. 19, at 20.

[21] *See* Adam Looney & Constantine Yannelis, BROOKINGS PAPERS ON ECONOMIC ACTIVITIES, *A Crisis in Student Loans? How Changes in the Characteristic of Borrowers and in the Institutions They Attended Contributes to Rising Loan Defaults* 41 Tbl. 6 (Fall 2015), *available at* https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/.

[22] The Brookings report calculated that the median borrower at a for-profit school owed $12,700 in 2013. *See id.*

[23] Kaitlin Mulhere, *For-Profit College Students are Defaulting on Their Loans at an Alarming Rate*, TIME MONEY (Jan. 12, 2018), *available at* http://time.com/money/5099019/for-profit-college-student-loan-default/.

Academic research supports the congressional findings that for-profit schools target low-income Americans and people of color for recruitment—to those students' detriment. African Americans and Latinos at for-profit schools, on average, borrow more than their peers at public and private, non-profit schools, even after controlling for income levels.[24] Yet, most gain no value from these schools—nearly 8 out of 10 African Americans and 2 out of 3 Latino for-profit students do not complete their programs.[25] This is especially problematic in light of the fact that a borrower's failure to complete an educational program is a strong predictor of student loan default.[26]

3. Enforcement actions have uncovered widespread misrepresentations of the value of for-profit schools' programs, including systematic falsification of job placement rates.

In recent years, law enforcement agencies have uncovered evidence that for-profit schools are engaged in widespread deceptive and illegal practices which

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[24] *See* PETER SMITH & LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, DO STUDENTS OF COLOR PROFIT FROM FOR-PROFIT COLLEGE? POOR OUTCOMES AND HIGH DEBT HAMPER ATTENDEES' FUTURES 21 (OCT. 2014), *available at* https://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf.

[25] *See id*.

[26] *See* DEANNE LOONIN, NAT'L CONSUMER LAW CTR., THE STUDENT LOAN DEFAULT TRAP 11 (2012) (citing lack of completion as key risk factor for default); LAWRENCE GLADIEUX & LAURA PERNA, NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., BORROWERS WHO DROP OUT 9 (2005) (finding that a quarter of borrowers who completed non-degree programs in 2001 defaulted on their loans, as compared to a third of borrowers who did not complete their programs).

have resulted in hundreds of thousands of students enrolling in inferior educational programs and ending up with little to show for it but debt.[27] The cases have unearthed pervasive deception in recruiting tactics, predatory lending and collection practices, and failure to provide even a minimally adequate education. For example, the Brookings Institution found that in 2015 alone, at least 28 for-profit colleges were being investigated by either the Department of Education or state and local authorities.[28] That report also determined that students from those 28 colleges had borrowed more than $57 billion in student loans in the previous five years.[29]

Enforcement agencies' settlements with for-profit colleges detail the kind of abusive practices that these schools have engaged in. For example, the Federal Trade Commission (FTC) and the Office of the Attorney General of Massachusetts brought separate lawsuits against DeVry University for misleading prospective students with ads that touted high employment success rates and income levels

[27] *See* ROBYN SMITH, NAT'L CONSUMER LAW CTR., ENSURING EDUCATIONAL INTEGRITY 3 (JUNE 2014), *available at* https://www.nclc.org/images/pdf/pr-reports/for-profit-report.pdf.
[28] *See* DAVID WESSEL, BROOKINGS INSTITUTE, LOTS RIDING ON THE ED DEPT STANDARD FOR STUDENT-LOAN FORGIVENESS (JUNE 18, 2015), *available at* https://www.brookings.edu/opinions/lots-riding-on-ed-dept-standard-for-student-loan-forgiveness/.
[29] *See id*.

upon graduation.[30] The lawsuits ultimately found that DeVry prominently advertised that "90 percent of graduates who sought employment landed jobs in their field of study within six months of graduating."[31] However, in reality, DeVry programs had job placement rates as low as 52 percent.[32] To settle these two suits, DeVry agreed to pay over $455,000 in restitution to students in Massachusetts, $49.4 million in cash to be distributed nationwide to qualifying students who were harmed by the deceptive ads, and $50.6 million in debt relief.[33] In the same year, the U.S. Department of Justice settled a lawsuit with Kaplan Higher Education for $1.3 million after bringing a civil suit against Kaplan for employing unqualified instructors at its campuses.[34] The Department of Justice found that Kaplan retained

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[30] FTC, *DeVry University Agrees to $100 Million Settlement with FTC* (DEC. 15, 2016) ("DEVRY FTC SETTLEMENT"), *available at* https://www.ftc.gov/news-events/press-releases/2016/12/devry-university-agrees-100-million-settlement-ftc; Securities and Exchange Commission, DeVry Form 8-K, a50610060, *available at* https://www.sec.gov/Archives/edgar/data/730464/000115752313001773/a50610060.htm.

[31] Jillian Fennimore, *AG Healey Secures $455,000 in Refunds for Students Deceived by Online For-Profit Schools* (July 5, 2017), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-07-05-refunds-for-students-deceived-by-online-for-profit-school.html; DEVRY FTC SETTLEMENT, *supra* n. 30.

[32] Fennimore, *supra* n. 31.

[33] Fennimore, *supra* n. 31; DEVRY FTC SETTLEMENT, *supra* n. 30.

[34] Department of Justice, U.S. Attorney's Office, Western District of Texas, *For-Profit College Kaplan to Refund Federal Financial Aid Under Settlement with United States* (Jan. 5, 2015), *available at* https://www.justice.gov/usao-wdtx/pr/profit-college-kaplan-refund-federal-financial-aid-under-settlement-united-states.

at least five unqualified instructors,[35] who taught more than 4,500 students in the medical assistant program, where Kaplan charged each student $2,000 for the course.

The high volume of enforcement actions against for-profit schools underscores the necessity of regulating these schools *before* they commit deceptive acts and other misconduct against students.

B. Robust for-profit school regulation is necessary to combat predatory school misconduct.

The collapse of Corinthian Colleges and ITT Tech, among others, and the enormous difficulties in making defrauded students whole,[36] call for prophylactic measures to help prevent harm from occurring in the first place. Without preventive regulations like the ability-to-benefit rule governing for-profit schools, schools would be able to continue recruiting new students who might receive no benefit from the program. These students will waste their time, energy, and hopes—for which they can never be reimbursed, even if their tuition debt is

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[35] The Department of Justice noted that these five instructors "represent a small sampling of the many unqualified instructors [Kaplan] has used to fraudulently generate Title IV income." *See* Mark Reagan, *Kaplan College Reaches Settlement with Feds*, SAN ANTONIO CURRENT (Jan. 5, 2015), *available at* https://www.sacurrent.com/the-daily/archives/2015/01/05/kaplan-college-reaches-settlement-with-feds.

[36] *See, e.g.,* Solomon Moore, *More Student Borrowers May Be Eligible to Cancel Federal Student Loans Than Have Applied for Relief*, EDSOURCE (July 19, 2018), *available at* https://edsource.org/2018/forprofit/600346 (noting backlog in processing more than 127,000 applications).

eventually discharged by later enforcement actions against these schools. Even if enforcement agencies require these particular schools to pay restitution, the path to this outcome is long and difficult (and the likelihood of any given school being investigated is low), only adding to the financial and emotional stress students already experience from being burdened with debt for a program that provided them no benefit.

Predatory school practices are a tremendous source of frustration, financial loss, and loss of opportunity for students. For example, one student at the now-defunct Corinthian Colleges, Jennifer Craig, took out almost $10,000 in student loans to complete a program in medical insurance billing.[37] Even though she completed her program, Ms. Craig was unable to get a job in that field because the medical insurance billing industry required at least one year of experience, which she had not obtained in her training at Corinthian.[38] Numerous individuals were similarly harmed as a result of Corinthian's fraudulent practices.[39]

When students' ability to benefit from a program is not examined, all too often they end up taking out loans for programs that leave them with burdensome loan obligations for decades after their enrollment.[40] For example, Marilyn

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[37] *See* Order Granting in Part and Denying in Part Preliminary Injunction, *Manriquez v. DeVos*, Case No. 17-cv-07210-SK, at 12.
[38] *Id.*
[39] *Id.* at 12-14.
[40] *Salazar v. King*, 822 F.3d at 69.

Mercado was only 17 years old when she signed up for a program at Wilfred Academy, a for-profit beauty school in New York.[41] In violation of the (analogous) federal ability-to-benefit law,[42] Wilfred Academy never asked if she had a high school diploma or GED, or required her to take the ability-to-benefit exam.[43] During her time at Wilfred, she did not learn basic knowledge needed to work at a salon—such as cutting hair—and was not prepared to pass the cosmetology license test.[44] Twenty-seven years later, Ms. Mercado was still paying off her student loans for a program from which she never benefited.[45]

California needs to be able to implement effective and enforceable regulations to protect vulnerable students from being deceived into assuming heavy debt that they may never be able to discharge, because the abuses at for-profit schools have continued for so long and over so many schools, and with such damage to students' financial health.[46] And who knows how any more students would have been defrauded in the absence of the ability-to-benefit rule? Because Plaintiffs make such sweeping constitutional claims, a decision in their favor

[41] *Id.*
[42] *See* 20 U.S.C. § 1091.
[43] *Id.*
[44] *Id.*
[45] *See id.*
[46] *See* 11 U.S.C. § 523.

would injure future students across the spectrum of the troubled for-profit education industry, causing a degree of harm that is difficult to overstate.

II. THE ABILITY-TO-BENEFIT RULE REGULATES ONLY NON-EXPRESSIVE CONDUCT.

As Defendants explain in detail in their Answering Brief, the ability-to-benefit rule regulates non-expressive conduct. Def. Ans. Br. at 14-35. Regulations that impose incidental burdens on speech do not implicate the First Amendment, and a law regulating non-expressive conduct does not require First Amendment review simply because it applies to educational institutions. *Id*.

The ability-to-benefit requirement regulates neither speech nor expressive conduct. The requirement that students without high school diplomas, or some kind of equivalent degree, must take an ability-to-benefit examination before enrolling in a for-profit college represents a prophylactic measure aimed solely at preventing improper conduct: the revenue-driven enrollment of students who are unlikely to derive significant benefit from their time at the school.

This is not in any way a case about suppressing speech. There is no indication—and no party argues—that the rule is a disguised attempt to make it harder to communicate about how to make horseshoes. Rather, the ability-to-benefit rule is an application of generally applicable legal principles, having to do with not defrauding students through unfair business practices. It is aimed not at speech or expression, but at preventing non-expressive misconduct. *See NIFLA v.*

Becerra, 138 S. Ct. 2361, 2373 (2018) ("[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech"); *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d at 896 (only conduct that "bears a tight nexus to a protected First Amendment activity" is subject to more than rational basis scrutiny, and "the conduct must be 'inherently expressive' to merit constitutional protection."); *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) (laws regulating conduct are subject only to rational basis review).

Conduct that takes place in advance of protected communicative activity and does not directly affect that activity is not protected. The ability-to-benefit rule does not control what the school can teach. It serves only to make it more difficult for schools to mislead students who cannot benefit into enrolling—a necessary, prophylactic measure in an industry so rife with fraudulent players.

III. PLAINTIFFS' THEORY OF AN ALL-ENCOMPASSING FIRST AMENDMENT WOULD MAKE REGULATING FOR-PROFIT COLLEGES, OR ANY OTHER EXPRESSIVE INDUSTRY, A BURDENSOME IF NOT UNWORKABLE TASK.

Plaintiffs' reading of the First Amendment could require heightened judicial scrutiny of even the most mundane governmental actions, like ordinances governing the design of parking lots or the types of windows permitted by the Building Code. That is a prescription for paralysis and antithetical to the democratic self-governance which the First Amendment was designed to help enable.

Under Plaintiffs' theory, the First Amendment would make regulation of for-profit schools—an urgent government responsibility—cumbersome if not wholly unworkable. And, of course, the First Amendment applies beyond the context of for-profit colleges. Plaintiffs' interpretation could render any business that operates through communication—a customer service center, an electronics store, even a hair salon—effectively ungovernable.

Plaintiffs' view of the First Amendment is so startlingly expansive that under their theory, legal challenges would not even need to succeed in order to effectively prevent the government from regulating private schools and other communication-based businesses. The effort of litigating those challenges would be burden enough. Since Plaintiffs claim, Appellants' Opening Brief (AOB) at 43, that *any* restriction on a for-profit school should invoke "First Amendment scrutiny"—meaning something more rigorous than rational basis review—then even for generally applicable, content-neutral laws, the government would have to prove that its interest was substantial and that the law was narrowly tailored. *See Berger v. City of Seattle*, 569 U.S. 1029 (9th Cir. 2009) (en banc) (striking down park-permit regime as insufficiently tailored). That is a considerable burden, even if—as Plaintiffs note, AOB at 38—most such laws could ultimately survive intermediate scrutiny. The process of adjudication itself could make regulating communication-based businesses unworkably difficult.

Fortunately, despite Plaintiffs' claims, the First Amendment does not require that such obstacles be thrown in the way of basic self-governance. When non-expressive conduct is at issue, as it is here, the government may govern, subject only to the deferential bounds of the rational basis standard. *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978) (observing that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity" and listing "numerous examples ... of communications that are regulated without offending the First Amendment").

A. The First Amendment Does Not Prevent the Application of Essential Health and Safety, Environmental, Employment and Consumer Protection Laws to For-Profit Colleges.

California must be able to exercise its basic authority to regulate businesses in order to protect students and other residents of the State from harm. If the First Amendment prevents California from requiring basic financial safety measures of for-profit schools simply because communication occurs within their walls, then the State will be similarly unable to regulate those schools to enforce basic health and safety laws, environmental laws, and employment laws. The fact that the ability-to-benefit rule applies only to for-profit colleges is simply a reflection of the peculiar risks of the industry, in the same way that hard hats are required on construction sites, masks are mandatory in nail salons, three-day rights of rescission must accompany door-to-door sales, and fire drills are required of

elementary schools. Properly construed, the First Amendment does not mandate chaos.

Yet, as the District Court pointed out, "under Plaintiffs' conception of speech, nearly every regulation of postsecondary education would require First Amendment scrutiny because teaching involves speech. Regulations on economic activity, such as private education, will always be speech-adjacent because commerce relies on the communication of ideas."[47]

Plaintiffs' reading of the First Amendment would likewise threaten basic regulations that protect public safety. The State must be able to enforce safety regulations regardless of whether the regulated business involves communication. For example, the State's Fire Code prohibits school districts from allowing students to smoke in classrooms or enclosed facilities, requires schools to participate in emergency drills, and designates that buildings must have a fire alarm system. Cal. Fire Code §§ 310.2, 408.3.4, 907.2.1.[48] These regulations prohibit PCHS, a teaching facility, from operating unless it follows the fire safety

[47] *Pacific Coast Horseshoeing School v. Grafilo*, No. 2:17-cv-02217-JAM-GGH, slip op. at 10 (E.D. Cal. Apr. 12, 2018).

[48] The City of Plymouth, California, where Plaintiffs are located, has adopted the 2013 California Fire Code. *See* Plymouth Municipal Code, Tit. 15.05 (May 15, 2017), *available at* http://www.cityofplymouth.org/doc-forms.html.

codes. The City of Plymouth has adopted similar regulations for plumbing,[49] building codes,[50] and water quality.[51]

All of these restrictions apply to schools, and rightly so. Although the "practical operation," AOB at 27, of any of these laws could, like the ability-to-benefit rule, theoretically interfere with the "teaching and learning" at PCHS, *id*., none of them has anything directly to do with speech activity. None of them prohibits or restricts speech or expressive conduct; instead, they all enhance student health, safety and welfare. Under Plaintiffs' theory of the First Amendment, however, PCHS could sue Plymouth over each one of these laws and require the City to prove, under at least intermediate scrutiny, see AOB at 44, that it has an important, content-neutral reason for applying the rule to PCHS, that the ordinance does not burden substantially more speech than is necessary, and that the ordinance leaves open ample alternative means of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 788 (1989). Perhaps—even probably—the

[49] *See e.g.,* Plymouth Municipal Code, Tit. 13.03.010 (prohibiting all parties, including schools, from discharging sewage, industrial wastes, or other polluted waters into any stream or watercourse any sewage); *see also* 2013 California Plumbing Code (adopted by City of Plymouth).
[50] *See generally* Plymouth Municipal Code, Tit. 15; *see also* 2013 California Building Code § 1613 (adopted by City of Plymouth) (requiring every building structure to be constructed to resist the effect of earthquake motions).
[51] *See generally* Plymouth Municipal Code, Tit. 14 (requiring all entities in Plymouth, including schools, to comply with water quality regulations in order to protect the public water supply from contamination).

City would win these cases. But at what cost in time and labor, and in the bizarre differentiations that would be required in applying the same rule to different businesses? Why should it be more difficult to require fire safety or water quality standards in a school than in any other business that might be located on the same street?

Plaintiffs' prescription for hyper-aggressive First Amendment review would make a sector sorely in need of vigilant oversight, *see supra* Section I, much more difficult to regulate.

B. Under Plaintiffs' Reading of the First Amendment, All Businesses That Involve Communication Would Be Invited to Exempt Themselves From Accepted Standards of Conduct.

The domain of the First Amendment does not extend to any and all operations of a business simply because the business operates through communication. The television studio may be required to have sprinklers, newspaper reporters may still be compelled to pay unemployment taxes, psychologists and psychiatrists still need to be licensed before they are able to take on clients, and lawyers must pass the Bar exam before practicing law.

Like licensure requirements, the ability-to-benefit rule does not regulate a school's curriculum, conversations in the classroom, or any other aspect of speech. As this Court has held, "scrapping conduct-based laws that have only an attenuated relationship to speech would have the perverse effect of invalidating legitimate

exercises of state authority to protect the general health and welfare." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d at 896. These conclusions are well grounded in case law and common sense. To hold otherwise would be to engage in distending—or "weaponizing"[52]—the First Amendment.

Although Plaintiffs maintain that the ability-to-benefit rule should fail because it affects a "contract for speech," AOB at 23, that argument proves far too much. If any regulation affecting a "contract for speech" were invalid, then, for example, the "negative option rule" could not govern contracts for magazine subscriptions or online advertising services, see 16 C.F.R. § 425.1; *FTC v. Commerce Planet, Inc*., 815 F.3d 593 (9th Cir. 2016) (applying rule to website-hosting service); the Restore Online Shoppers' Confidence Act could not regulate the online disclosures of companies selling information, *see* 15 U.S.C. § 8403; *FTC v. Credit Bureau Center, LLC*, 235 F.Supp.3d 1054 (N.D. Ill. 2017) (applying statute to credit score and credit monitoring business); California could not prohibit the scalping of tickets for movies or concerts (a regulation largely targeted to "expressive industries"), *see* Cal. Penal Code § 346; and all state laws applying a

[52] *Janus v. Am. Federation of State, County, and Mun. Employees, Council 31*, 138 S.Ct. 2448, 2501 (2018) (Kagan, J., diss.) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech.... The First Amendment was meant for better things.")

minimum age for contracts would be presumptively invalid when applied to contracts for mobile phone service.

The extent of disruption to everyday government operations that Plaintiffs propose is truly remarkable. Under their view, the *minimum* level of scrutiny potentially applicable to a law affecting their school—even a content-neutral, generally applicable law—is "intermediate scrutiny," which they dub "the most deferential First Amendment standard there is." AOB at 44. And, Plaintiffs continue, "it is the government—not the speaker—who bears the burden of meeting that standard." *Id*. Therefore, even for building codes requiring sprinkler systems and fire doors, Plaintiffs believe that the government bears the "heavy" burden, *id*. at 44, of establishing, using "real evidence," *id*. at 43, that it has a substantial interest and that the law is narrowly tailored to accomplish that goal. To require government to operate daily under that absurd regime is a recipe for regulatory paralysis.

Under this regime a school, or a stockbroker's office, or a union hall—and though perhaps not a hardware store, or a sandwich shop, or a sports emporium—could put the government to its proof in justifying, say, a zoning requirement that all buildings in the downtown area have wood shingles, or a mansard roof. Would the city council's esthetic preference be adjudged a sufficiently substantial

interest? And what evidence would the government need to gather to prove it?[53] Even if the outcome were ultimately in favor of the government, should a city really have to muster evidence and establish narrow tailoring every time a school—or an auction house, or a cell phone store—objects to the width of sidewalks or the spacing of lampposts or another of the thousand mundane decisions that governments must make on grounds that have nothing to do with the protection of speech?

The answer, of course, is no. The government should not have to meet the heightened requirements of intermediate scrutiny, not to mention strict scrutiny, in order to engage in workaday oversight of businesses within its jurisdiction. Fortunately, Plaintiffs' theory remains just a theory. The *law* of the First Amendment is quite different, and it does not require anything more than rational basis review of the ability-to-benefit rule.

CONCLUSION

The ability-to-benefit rule has nothing to do with the speech aspects of the farrier-training business. The State is not seeking to suppress or to compel or in any way to regulate PCHS's speech, but instead is requiring schools to ensure that

[53] The same is true of challenges to regulations that, like the ability-to-benefit rule, affect only a single industry—though the difference in treatment might not be as obvious.

potential students have a reasonable likelihood of realizing the hoped-for benefits that induce them to spend large sums to enroll. The risks to students posed by members of the for-profit college and vocational school industry require effective government oversight, including the ability-to-benefit rule; the First Amendment, properly construed, does not stand in the way.

The order of the district court granting the motion to dismiss should be affirmed.

Respectfully Submitted,

Dated: October 16, 2018

By: /s/ Seth E. Mermin

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