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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST HORSESHOEING
SCHOOL, INC.; BOB SMITH; and
ESTEBAN NAREZ,

Plaintiffs,

v.

DEAN GRAFILO, et al.,
Defendants.

No. 2:17-cv-02217-JAM-GGH

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Pacific Coast Horseshoeing School (the "School") and its owner, Bob Smith ("Smith"), seek to enroll a potential student, Esteban Narez ("Narez"). Under California's Private Postsecondary Education Act of 2009 (the "Act"), CAL. EDUC. CODE §§ 94800 et seq., the School may not enroll students unless they meet ability-to-benefit requirements. Because Narez did not meet those requirements, the Act required the School to deny his application. Plaintiffs elected to legally challenge the Act by filing a Complaint in this Court which alleges that the Act abridges the School's and Smith's First Amendment right to teach horseshoeing and Narez's First Amendment right to learn horseshoeing.

1 Defendants have moved to dismiss. Mot., ECF No. 15.
2 Plaintiffs oppose dismissal. Opp'n, ECF No. 18. For reasons
3 explained below, the Court grants Defendants' motion.¹
4

5 **I. BACKGROUND**

6 A. The Private Postsecondary Education Act of 2009

7 In the Act, the California legislature expressed concern
8 about the value of degrees issued by private postsecondary
9 schools and the lack of protection for the schools' students and
10 consumers of their services. CAL. EDUC. CODE § 94801(b). In
11 promulgating the Act, the legislature sought to ensure:

12 (1) Minimum educational quality standards and
13 opportunities for success for California students
attending private postsecondary schools in California.

14 (2) Meaningful student protections through essential
15 avenues of recourse for students.

16 (3) A regulatory structure that provides for an
appropriate level of oversight.

17 (4) A regulatory governance structure that ensures
18 that all stakeholders have a voice and are heard in
policymaking by the bureau.

19 (5) A regulatory governance structure that provides
20 for accountability and oversight by the Legislature
through program monitoring and periodic reports.

21 (6) Prevention of the harm to students and the
22 deception of the public that results from fraudulent
or substandard educational programs and degrees.

23
24 CAL. EDUC. CODE § 94801(d).

25 The Bureau for Private Postsecondary Education (the

26 _____
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for February 27, 2018. In deciding this motion, the
Court takes as true all well-pleaded facts in the complaint.

1 "Bureau") regulates private postsecondary educational
2 institutions. CAL. EDUC. CODE § 94875. The Bureau approves
3 regulated institutions that meet minimum operating standards.
4 CAL. EDUC. CODE § 94887. Defendant Michael Marion serves as
5 Chief of the Bureau, which is located within California's
6 Department of Consumer Affairs. Compl., ECF No. 1, p. 2 ¶ 11.
7 Defendant Dean Grafilo is the appointed Director of California's
8 Department of Consumer Affairs. Id. ¶ 12.

9 Before a regulated institution can execute an enrollment
10 agreement with a student who did not graduate high school or pass
11 an equivalency examination, such as the General Educational
12 Development (GED) test, that student must pass "an independently
13 administered examination from the list of examinations prescribed
14 by the United States Department of Education" or a Bureau-
15 approved examination relevant to the intended occupational
16 training. CAL. EDUC. CODE §§ 94811, 94904(a-b); 5 CAL. CODE
17 REGS. § 71770(a)(1).

18 B. Pacific Coast Horseshoeing School, Smith, and Narez

19 Horseshoeing is the practice of shaping metal to be fitted
20 and nailed into a horse's hoof. Compl. at 2 ¶ 16. A person who
21 shoes horses is called a farrier. Id. ¶ 17. In California,
22 farriering does not require a license. Id. ¶ 21.

23 Smith founded the School in 1991. Id. at 3 ¶¶ 26-27. Five
24 times each year, the School offers a full-time eight-week
25 curriculum to about 12 to 14 students. Id. ¶¶ 28, 32. That
26 curriculum includes classroom session and practice removing,
27 shaping, and applying horseshoes to horses. Id. ¶ 28. Classroom
28 sessions focus on horseshoeing theory; horse anatomy, movement,

1 and lameness; and business advice on client management, self-
2 employment, and interaction with barns, trainers, and
3 veterinarians. Id. ¶ 30. The School evaluates students by
4 written or oral examinations. Id. ¶ 31. As of this year, the
5 School's tuition costs \$6,000. Id. ¶ 33.

6 The School qualifies as a regulated institution under the
7 Act because it (1) is a private entity located in California that
8 (2) offers a curriculum to the public for a vocational purpose
9 and (3) charges tuition. Id. at 4 ¶¶ 34-36; see also CAL. EDUC.
10 CODE §§ 94857, 94858. The Act thus requires the School only
11 enroll students who have high school diplomas or recognized
12 equivalents, or have passed ability-to-benefit examinations.
13 CAL. EDUC. CODE § 94904.

14 Plaintiffs assert that earning a passing score on an
15 ability-to-benefit examination is unnecessary for horseshoeing.
16 Compl. at 5 ¶ 46. The School, which previously did not impose
17 educational prerequisites to admission, does not accept state or
18 federal student loans. Id. at 6 ¶¶ 52-53. Smith does not charge
19 students who are unable to benefit from the School's curriculum
20 because he refunds all but \$250 of tuition paid if continuing the
21 course is not in the student's best interest after the first
22 week. Id. ¶ 54.

23 The School was first inspected by the Bureau in 2016. Id.
24 ¶ 55. The Bureau determined that the School's admissions
25 requirements did not comply with the Act because it lacked
26 admission prerequisites. Id. ¶ 56. Smith inquired whether the
27 Bureau would recognize his practice of partially refunding
28 tuition after the first week to non-benefiting students as an

1 alternative to having students pass an ability-to-benefit
2 examination. Id. at 6-7 ¶ 57. The Bureau did not accept Smith's
3 proposal as an alternative to the Act's requirements. Id.
4 Accordingly, in 2017, Smith modified the School's admissions
5 standards to call for a high school diploma, its equivalent, or
6 passage of an ability-to-benefit examination, as required for
7 Bureau approval. Id. at 7 ¶¶ 58-59. Because of this change, the
8 School has since rejected otherwise qualified students who did
9 not meet these academic qualifications. Id. ¶ 60.

10 One such student turned away due to admissions standards
11 changes is Plaintiff Esteban Narez. Narez dropped out of high
12 school and has not subsequently earned his high school diploma or
13 GED. Compl. at 7-8 ¶¶ 63-64, 75. Jobs in the equine field
14 sparked Narez's passion for horses. Id. ¶¶ 67-68. After working
15 alongside a farrier, Narez sought to become a farrier himself.
16 Id. at 8 ¶¶ 70-73. Narez believes studying for and taking the
17 GED or an ability-to-benefit examination would conflict with his
18 work schedule and would not substantially advance his career.
19 Id. at 8-9 ¶¶ 78-79. Although the School wanted to admit Narez,
20 it rejected his application because he did not meet the Act's
21 ability-to-benefit requirements for enrollment at a private
22 postsecondary educational institution. Id. ¶¶ 76-77, 81.

23 Plaintiffs' Complaint seeks a judicial declaration that the
24 ability-to-benefit requirement is unconstitutional and injunctive
25 relief to this effect. Prayer for Relief ¶¶ A, C.

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1 Psychology, 228 F.3d 1043, 1053 (9th Cir. 2000) ("NAAP"). Under
2 the Fourteenth Amendment, "a statute is required to bear only a
3 rational relationship to a legitimate state interest, unless it
4 makes a suspect classification or implicates a fundamental
5 right." Id. at 1049. Because horseshoeing schools, their
6 purveyors, and aspiring farriers are not members of suspect
7 classes entitled to heightened scrutiny, the Court must examine
8 whether the ability-to-benefit requirement implicates the
9 fundamental right of free speech.

10 The Court must first determine whether the Act regulates
11 speech or conduct. Pickup v. Brown, 740 F.3d 1208, 1225 (9th
12 Cir. 2014). The Supreme Court instructs that "restrictions on
13 protected expression are distinct from restrictions on economic
14 activity or, more generally, on nonexpressive conduct." Sorrell
15 v. IMS Health Inc., 564 U.S. 552, 567 (2011). In the case of
16 the latter, "the First Amendment does not prevent restrictions
17 directed at commerce or conduct from imposing incidental burdens
18 on speech." Id.

19 Defendants provide several sources of binding authority in
20 support of their argument that the ability-to-benefit
21 requirement regulates conduct, not speech. See Rumsfeld v.
22 Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 62
23 (2006) ("FAIR") (holding that a law compelling publicly funded
24 law schools to offer the military equivalent access to campus as
25 other employers regulated conduct); Pickup, 740 F.3d at 1229
26 (holding that a law prohibiting mental health providers from
27 providing sexual orientation change efforts therapy to minors
28 regulated conduct). In FAIR, the Supreme Court found that the

1 Solomon Amendment regulated "conduct, not speech" because "[i]t
2 affects what law schools must do—afford equal access to military
3 recruiters—not what they may or may not say." 547 U.S. at 60.
4 Similarly, in Pickup, the Ninth Circuit concluded that a state
5 law that allowed licensed therapists to discuss the pros and
6 cons of sexual reorientation therapy with their patients, but
7 prohibited that therapy as a treatment for minors, regulated
8 conduct. 740 F.3d at 1229.

9 Plaintiffs counter that this issue is controlled by the
10 Supreme Court's decision in Holder v. Humanitarian Law Project,
11 561 U.S. 1 (2010). In Holder, the Supreme Court held that a
12 law, which prohibited the provision of "material support or
13 resources" to certain foreign organizations that engage in
14 terrorist activity, regulated speech and required a more
15 demanding standard of First Amendment review. Id. at 28.
16 Although the law was directed at conduct, "the conduct
17 triggering coverage under the statute consist[ed] of
18 communicating a message," meaning the law regulated speech. Id.

19 Plaintiffs argue that the regulation here is triggered by
20 the fact that their speech is vocational in content, rendering
21 the Act a content-based speech restriction. Opp'n at 5. But
22 the text of the Act belies this interpretation. As mentioned
23 above, the Act's requirements apply to schools that qualify
24 under California Education Code Sections 94857 and 94858. The
25 mere fact that a school teaches vocational skills is
26 insufficient to bring an institution under the Act's umbrella
27 unless the school is also private, operating in California, and
28 charging tuition. See id. Further, the ability-to-benefit

1 requirement is not triggered by vocational teaching, but rather
2 by executing an enrollment agreement. CAL. EDUC. CODE
3 § 94904(a).

4 Additionally, as the Ninth Circuit noted in Pickup, the law
5 at issue in Holder was extremely broad: it completely barred all
6 "communicat[ion of] information about international law and
7 advocacy to a designated terrorist organization." 740 F.3d at
8 1230. The reach of the ability-to-benefit requirement is not
9 nearly as far-reaching.

10 Much like Pickup, the Act does not restrain Smith and the
11 School from "imparting information," "disseminating opinions,"
12 or "communicating a message." 740 F.3d at 1230. While
13 Plaintiffs argue their speech is being restricted, the only
14 thing that the School cannot do is execute an enrollment
15 agreement with a student who has not demonstrated an ability to
16 benefit under the Act. CAL. EDUC. CODE § 94904(a). That
17 ability may be shown by passing an examination prescribed by the
18 United States Department of Education, id. at § 94904(a), or by
19 passing a Bureau-approved examination that is relevant to the
20 intended occupational training, id. at § 94904(b).²

21 Nothing in the Act prohibits Smith and the School from
22 sharing information and communicating about horseshoeing
23 generally. Nothing prohibits Narez from learning about
24 horseshoeing outside of enrollment at a private postsecondary

25 ² Accepting all allegations in the Complaint as true, the School
26 has not availed itself of the option to propose a different
27 examination, under subsection (b), that would be more relevant to
28 its course material. Similarly, Narez has not attempted to take
any ability-to-benefit examination, much less alleged that he
lacks the competence to pass such an examination.

1 educational institution prior to passing an ability-to-benefit
2 examination.

3 As Defendants highlight, under Plaintiffs' conception of
4 speech, nearly every regulation of postsecondary education would
5 require First Amendment scrutiny because teaching involves
6 speech. Reply, ECF No. 19, p. 2. Regulations on economic
7 activity, such as private education, will always be speech-
8 adjacent because commerce relies on the communication of ideas.
9 Courts have not held, however, that these incidental burdens on
10 speech caused by the regulation of commerce infringe on
11 fundamental rights under the First Amendment. Sorrell, 564 U.S.
12 552, 566-67 (2011).

13 B. Rational Basis Review

14 If a law regulates non-expressive conduct, rather than
15 speech, the law "must be upheld if it bears a rational
16 relationship to a legitimate state interest." Pickup, 740 F.3d
17 at 1231. The government's action need not "actually advance its
18 stated purposes," so long as "the government could have had a
19 legitimate reason for acting as it did." Nat'l Ass'n for
20 Advancement of Psychoanalysis v. California Bd. of Psychology,
21 228 F.3d 1043, 1050-51 (9th Cir. 2000) (quoting Dittman v.
22 California, 191 F.3d 1020, 1031 (9th Cir. 1999)). The Court
23 "need only determine whether the [law] has a 'conceivable basis'
24 on which it might survive rational basis scrutiny." Id.

25 Educational institutions have a right to academic freedom
26 under the First Amendment. Regents of Univ. of California v.
27 Bakke, 438 U.S. 265, 312 (1978). Yet that academic freedom does
28 not mean that an educational institution may use the First

1 Amendment to shield itself from government regulation and
2 oversight rationally related to a valid government purpose. See
3 Illinois Bible Colleges Ass'n v. Anderson, 870 F.3d 631, 642
4 (7th Cir. 2017), as amended (Oct. 5, 2017), cert. denied sub
5 nom. Illinois Bible Colleges Ass'n v. Cross, No. 17-960, 2018 WL
6 325305 (U.S. Feb. 20, 2018) (holding that the state did not
7 infringe on the schools' "right to free speech by regulating
8 degree-issuing post-secondary education"); Nova Univ. v. Educ.
9 Inst. Licensure Comm'n, 483 A.2d 1172, 1181 (D.C. 1984)
10 ("Schools are not shielded by the First Amendment from
11 governmental regulation of business conduct deemed detrimental
12 to the public merely because they are engaged in First Amendment
13 activities.")

14 The Act's legislative findings detail that "[n]umerous
15 reports and studies have concluded that California's previous
16 attempts at regulatory oversight of private postsecondary
17 schools under the Department of Consumer Affairs ha[d]
18 consistently failed to ensure student protections or provide
19 effective oversight of private postsecondary schools." CAL.
20 EDUC. CODE § 94801(c). In adding additional operational
21 requirements for private postsecondary educational institutions,
22 the Act aimed to ensure that these schools would have "[m]inimum
23 educational quality standards and opportunities for success" and
24 an "appropriate level of oversight." CAL. EDUC. CODE
25 § 94801(d)(1,3). The Act further sought to ensure the
26 "[p]revention of the harm to students and the deception of the
27 public that results from fraudulent or substandard educational
28 programs and degrees." CAL. EDUC. CODE § 94801(d)(6).

1 California has a legitimate state interest in preventing
2 private postsecondary schools operating in the state from
3 harming students and deceiving the public. That desire to
4 prevent harm and deception is rationally related to the
5 requirement that students at private postsecondary educational
6 institutions show sufficient competency to benefit from that
7 education. See CAL. EDUC. CODE §§ 94904, 94811. It is
8 plausible that the legislature thought requiring students to
9 prove their ability to benefit through examinations or diplomas
10 would improve the students' opportunities for success at
11 postsecondary institutions, and that is enough to sustain the
12 Act. See Romero-Ochoa v. Holder, 712 F.3d 1328, 1331 (9th Cir.
13 2013).

14 While Plaintiffs believe that speech-adjacent paternalism
15 "has no place in the American legal landscape," Opp'n at 1,
16 precedent does not support using the courts as a tool to
17 substitute Plaintiffs' preferences for those of the state's
18 elected representatives. Cf. Minnesota v. Clover Leaf Creamery
19 Co., 449 U.S. 456, 464 (1981) ("States are not required to
20 convince the courts of the correctness of their legislative
21 judgments."); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963)
22 ("[I]t is up to legislatures, not courts, to decide on the
23 wisdom and utility of legislation."). The Fourteenth Amendment
24 does not give courts the authority to invalidate a state
25 regulation every time an individual finds it to be unnecessary
26 or inconvenient.

27 Therefore, the Court finds that the Act and its ability-to-
28 benefit requirement are rationally related to the legitimate

1 government interest of protecting students and the public from
2 harm and deception.

3
4 C. Leave to Amend

5 The Court need not grant leave to amend where amendment
6 would be futile. Deveraturda v. Globe Aviation Sec. Servs., 454
7 F.3d 1043, 1049 (9th Cir. 2006). As explained above,
8 Plaintiffs' Complaint does not state a claim as a matter of law.
9 Plaintiffs have pointed to no facts suggesting amendment could
10 rectify this issue, making dismissal with prejudice appropriate.

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12 **III. ORDER**

13 For the reasons above, the Court GRANTS Defendants' motion
14 to dismiss with prejudice.

15 IT IS SO ORDERED.

16 Dated: April 11, 2018

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19 JOHN A. MENDEZ,
20 UNITED STATES DISTRICT JUDGE
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