No. 25-1240

In the Supreme Court of the United States

AZADEH KHATIBI, 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 OF AMICI CURIAE THE STATES OF MONTANA, IOWA, AND 12 OTHER STATES AND PRESIDENT OF THE ARIZONA STATE SENATE WARREN PETERSEN AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES STEVE MONTENEGRO IN SUPPORT OF PETITIONERS

KATE B. SAWYER
KATLYN DIVIS
FUSION LAW, PLLC
7600 N. 15th St.,
Suite 150
Phoenix, AZ 85020
kbs@fusion.law
Counsel for Petersen and Montenegro

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
**Counsel of Record*
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
(406) 444-2026
christian.corrigan@mt.gov
Counsel for Montana

(Additional Counsel listed on inside cover)

BRUNN (BEAU) W.
ROYSDEN III
BRETT J. TALLEY
CULPER LAW, PLLC
111 W. Marshall Ave.
Phoenix, AZ 85013
beau@culper.law

Counsel for Petersen and Montenegro

BRENNA BIRD
Attorney General
ERIC WESSAN
Solicitor General
OFFICE OF IOWA
ATTORNEY GENERAL
1305 E Walnut Street
Des Moines, IA 50319
eric.wessan@ag.iowa.gov

Counsel for Iowa

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INTEREST OF AMICI CURIAE

Amici are state government bodies with a significant interest in maintaining their freedom to speak, or not speak, on matters of public concern, while ensuring that the First Amendment rights of private speakers are protected.[1]

The government-speech doctrine is "essential" to the proper functioning of government. *Matal v. Tam*, 582 U.S. 218, 235 (2017). Indeed, "[w]hen the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say." *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022). *Amici* therefore have an important interest in preserving that freedom to speak or remain silent.

But that interest necessarily includes ensuring those same governments do not attempt to censor private speech under the guise of "government speech." Treating private speech as government speech undermines the important safeguards of the First Amendment. Thus, this Court has recognized that courts "must exercise great caution" when scrutinizing the line between government and private speech. *See Matal*, 582 U.S. at 235.

Many of the undersigned expressed these same concerns in support of petitioners in *Shurtleff*.[2] And so

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[1] Pursuant to Supreme Court Rule 37.2, counsel for *Amici* timely notified counsel of record of their intent to file this brief. Pursuant to Supreme Court Rule 37.6, the undersigned certifies that no party's counsel authored this brief in whole or in part, and only *Amici* made a monetary contribution to this brief's preparation and submission.

[2] *See* Brief for Kentucky, Arizona, Arkansas, Georgia, Louisiana, Missouri, Montana, Nebraska, South Carolina, Tennessee, Utah

Amici here submit this brief to urge the Court to grant certiorari and again ensure that the boundaries of the government-speech doctrine remain firm, protecting both government speakers and private citizens.

SUMMARY OF ARGUMENT

Under this Court's government-speech precedents, this should not be a difficult case. California is requiring *private* speakers who prepare and present *private* Continuing Medical Education ("CME") instruction to speak California's viewpoint regarding "implicit bias" and how it affects the medical profession and disparate health outcomes. *See* Cal. Bus. & Prof. Code § 2190.1(d). In California's scheme, the message is not being communicated by government instructors—private instructors are the speakers. And those private speakers are preparing their own curriculum and providing instruction on medical-related topics of their choosing. Some of those private instructors, including Petitioners here, disagree with California's viewpoint on "implicit bias." Indeed, the concepts of "implicit bias," and more broadly diversity, equity, and inclusion ("DEI"), are controversial. DEI and related concepts have been the subject of intense legal, public, and political debate, especially over the past few years.

Yet, somehow, the Ninth Circuit declared California's "implicit bias" requirement for private speakers to be "government speech." Certainly, the government-speech doctrine is important—"essential" even—to the proper functioning of government. *See Matal*, 582 U.S. at 235. When the government takes a course of action, the government "necessarily takes a particular viewpoint and rejects others." *Id.* at 234.

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and West Virginia as *Amici Curiae* Supporting Petitioners, *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) (No. 20-1800).

But courts "must exercise great caution" so that the government-speech classification is not used to censor private speech. *See id.* at 235.

Instead of "exercis[ing] great caution," the Ninth Circuit expanded the scope of the government-speech doctrine by holding that private speech, over which the government has historically exercised little or no control, now can be characterized as "government speech." *See id.* In reaching this conclusion, the Ninth Circuit relied heavily on the fact that California has long regulated the medical profession. But acting in a professional capacity does not remove First Amendment protection. *See Chiles v. Salazar*, 607 U.S. ___, 146 S. Ct. 1010, 1022 (2026). This expansion of the government-speech doctrine is particularly concerning because it allows a regulation that compels not only the content of speech, but also a particular viewpoint, to avoid First Amendment scrutiny altogether. And regulating speech based on viewpoint "represents an even more egregious form of content regulation" that the government "must nearly always abstain from" regulating. *Id.* at 1021 (internal quotation marks omitted).

The Ninth Circuit's conclusion also fails to align with this Court's recent conclusion in *Chiles*, which applied strict scrutiny to a Colorado law that prohibited professional therapists from speaking a particular viewpoint. If the First Amendment bars a state from prohibiting professionals from speaking the state's disfavored view, so too should it bar a state from compelling professionals to speak the state's favored view. If the speech here is "government speech," California evades First Amendment scrutiny under *Chiles* entirely.

In dissenting from the denial of rehearing en banc here, Judge Tung said it well: "What … does the law do? Simply put, it requires [Petitioners] to convey a message that the government favors but that [Petitioners] do not." Pet. App. 87a (Tung, J., dissenting from denial of rehearing en banc). The Court should grant certiorari here to again reinforce the boundaries of the government-speech doctrine, and ensure that private citizens' First Amendment rights are also protected.

ARGUMENT

I. The Ninth Circuit Dangerously Expanded the Government-Speech Doctrine, Allowing Governments to Compel Speech Without Facing First Amendment Scrutiny

The Ninth Circuit's opinion here expands the government-speech doctrine so that it sweeps in the private speech of California's CME instructors, avoiding any First Amendment scrutiny. The opinion opens the door to allow governments to compel regulated professionals to speak the governments' messages all under the guise of "government speech." That cannot be squared with the First Amendment.

A. Courts Must Not Allow the Government-Speech Doctrine to Be Used to Subsume Private Speech

Amici understand well the vital function and necessity of the government-speech doctrine. While the First Amendment prohibits the government from censoring private speakers based on viewpoint, "[t]he Free Speech Clause ... does not regulate government speech." *Matal*, 582 U.S. at 234 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009))

(alterations in original); *see also Shurtleff*, 596 U.S. at 247–48 ("[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views."). That is so because "[w]hen a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others." *Matal*, 582 U.S. at 234. The government "naturally chooses what to say and what not to say" whenever it "wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs[.]" *Shurtleff*, 596 U.S. at 251. Indeed, "'it is not easy to imagine how government could function' if it were subject to the restrictions that the First Amendment imposes on private speech." *Matal*, 582 U.S. at 234 (quoting *Summum*, 555 U.S. at 468); *see also Shurtleff*, 596 U.S. at 248 (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015)) ("[t]he government must be able to 'promote a program' or 'espouse a policy[.]'"). The Constitution instead allows for the government's speech to be checked "first and foremost" by "the ballot box, not on rules against viewpoint discrimination." *Shurtleff*, 596 U.S. at 252.

This Court, however, has recognized that the government-speech doctrine "is susceptible to dangerous misuse," and that courts "must exercise great caution before extending [ ] government-speech precedents." *Matal*, 582 U.S. at 235. If not careful, the government-speech doctrine could be "used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473; *see also Shurtleff*, 596 U.S. at 263 (Alito, J., concurring) (recognizing that courts should prevent the government-speech doctrine from "being used as a cover for censorship"). Because "[t]he boundary between government speech and private expression

can blur," *Shurtleff*, 596 U.S. at 252, courts must ensure that governments do not extend the doctrine beyond its core purpose.

B. The Ninth Circuit Expanded the Government-Speech Doctrine to Encompass Private Professional Speech

Despite this Court's cautions, the Ninth Circuit held that CME instruction prepared and presented by *private* speakers in *private* settings is "government speech" under the *Shurtleff* factors. Pet. App. 14a. In *Shurtleff*, the Court called the analysis of "whether the government intends to speak for itself or to regulate private expression" a "holistic inquiry." 596 U.S. at 252. And the Court listed three nonexclusive factors that "guide the analysis"—"the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.*

In its discussion of the *Shurtleff* factors, the Ninth Circuit here relied heavily on the long history of California's scheme regulating medical care in the state and the idea that CME instruction exists within that regulatory scheme. *See* Pet. App. 14a–22a. To be sure, states possess police powers to regulate the medical profession. *See Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954). But that power does not allow regulatory enactments to supersede the protections that the First Amendment provides even within that context. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 767 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'").

The Ninth Circuit relied on California's medical regulation scheme despite California traditionally exercising little to no control over the creation and content of CME courses, leaving their development and deployment to private instructors. As Judge VanDyke noted in dissent from denial of rehearing en banc, California has historically "broadly dictate[d] that the content of CME courses must—unsurprisingly—be medical in nature." *See* Pet. App. 66a (VanDyke, J., dissenting from denial of rehearing en banc). But beyond that, California has not dictated specific course content, required preapproval of CME courses, or regularly reviewed course content, and it leaves editorial control with the instructors. Pet. App. 67a (VanDyke, J., dissenting from denial of rehearing en banc) (citing Cal. Code Regs. tit. 16, § 1337.5(b)). Yet the Ninth Circuit says this is "government speech."

This expansion of the government-speech doctrine is particularly dangerous because were it not for the lower courts' incorrect conclusion that the CME regulation is "government speech," the courts would have had to analyze the challenge here under this Court's First Amendment speech jurisprudence—an inquiry that would likely have required the strictest scrutiny. It is well-settled that the First Amendment not only applies to what private individuals say, but also to what private individuals decide "to leave unsaid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). So regulations that target speech, or a choice not to speak, based on the "content" of that speech are "[a]s a general matter … presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Nat'l*

Inst. of Fam. & Life Advocs., 585 U.S. at 766 (internal quotation marks omitted). And as this Court recently confirmed again in *Chiles*, regulating speech based on viewpoint "represents 'an egregious form' of content regulation." 146 S. Ct. at 1021; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). The government "must nearly always 'abstain' from" regulating private viewpoints. *Chiles*, 146 S. Ct. at 1021. But categorizing the CME regulation as "government speech" avoids altogether the regulation being scrutinized.

And there would be little question that California is compelling not only the content of speech here, but also the viewpoint. California is requiring private CME instructors to prepare and present "curriculum that includes the understanding of implicit bias," which includes addressing, at a minimum, either "[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 by shaping behavior and producing differences in medical treatment along lines of race, ethnicity, gender identity, sexual orientation, age, socioeconomic status, or other characteristics." Cal. Bus. & Prof. Code § 2190.1(d)–(e).

The Ninth Circuit's expansion is also dangerous because, in avoiding First Amendment scrutiny, it appears to do precisely what this Court recently held untenable in *Chiles*—that is, regulate the private speech of professionals. In *Chiles*, Colorado attempted to regulate the practice of mental health counseling by

forbidding counselors from engaging in speech the government deemed "conversion therapy." 146 S. Ct. at 1017–18. Under that law, counselors were only permitted to speak in ways that affirmed so-called gender transition or a client's stated sexual orientation; they were prohibited from speaking in ways that might discourage those intentions or attractions. *Id.* at 1018. The lower courts upheld Colorado's law as a proper regulation of professional conduct. *Id.* at 1019. But this Court reversed, rejecting the lower court's characterization of the speech as conduct, and recognizing that "the First Amendment's protections extend to licensed professionals much as they do to everyone else." *Id.* at 1022. The Court found that strict scrutiny review of Colorado's regulation was appropriate, explaining that viewpoint discrimination is particularly disfavored. *Id.* at 1021. The Court explained that "[w]hen the government seeks not just to restrict speech based on its subject matter, but also seeks to dictate what particular opinion or perspective individuals may express on that subject, the violation of the First Amendment is all the more blatant." *Id.* (internal quotation marks omitted).

This case is indeed the other side of the *Chiles* coin. Just as the government cannot prohibit a professional acting in a private capacity from speaking a viewpoint that is contrary to that of the government, neither can the government compel the speaker to speak the government's viewpoint.

II. California is Compelling Private Medical Professionals to Speak the State's Viewpoint on a Contested and Controversial Topic

California is not merely compelling speech; it is compelling speech endorsing a highly contested viewpoint. The concept of implicit bias is by no means a neutral and noncontroversial topic. Petitioners here express a viewpoint that diverges from California's viewpoint, alleging that "'there is inconsistent evidence that implicit bias in healthcare is prevalent and results in disparate treatment outcomes;'" that "they are unpersuaded that implicit bias trainings would solve the problem, even if it does exist;" and "that trainings can cause 'counterproductive anger, frustration, and resentment among those taking the trainings.'" Pet. App. 93a. And because of this, Petitioners do not want to be compelled to speak the state's viewpoint—one with which Petitioners do not agree—in their personal capacity.

And Petitioners are not alone. California is compelling Petitioners and others to present a viewpoint that in some cases may be tied to broader diversity, equity, and inclusion ("DEI") agendas. In the past few years, DEI-based practices and programs have not only generated significant debate in the court of public opinion,[3] but they have also spurred extensive executive and legislative action.

For example, at the federal level, President Trump has rescinded a swath of the Biden Administration's

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[3] *See, e.g.*, Rachel Minkin, *Views of DEI Have Become Slightly More Negative Among U.S. Workers*, Pew Rsch. Ctr. (Nov. 19, 2024), https://www.pewresearch.org/short-reads/2024/11/19/views-of-dei-have-become-slightly-more-negative-among-us-workers/.

DEI-based policies. In Executive Order 14148, President Trump noted that "[t]he injection of 'diversity, equity, and inclusion' (DEI) into our institutions has corrupted them by replacing hard work, merit, and equality with a divisive and dangerous preferential hierarchy." Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025). Shortly after, President Trump issued Executive Order 14151, noting that the Biden Administration "forced illegal and immoral discrimination programs, going by the name 'diversity, equity, and inclusion' (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military." Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025). President Trump then reversed the course, ordering agencies and departments to terminate certain activities including "all 'equity action plans,'" and all "'equity' actions, initiatives, or programs." *Id.* Similarly, President Trump issued Executive Order 14173, ordering "all executive departments and agencies … to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements" and "order[ing] all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities." Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025). And most recently, President Trump issued Executive Order 14398, reaffirming that federal contractors may "not engage in any racially discriminatory DEI activities." Exec. Order No. 14398, 91 Fed. Reg. 16147 (Mar. 26, 2026).

Similarly, state legislatures and policymakers have taken up the debate, enacting laws and regulations both favoring and disfavoring DEI. For

example, states have prohibited required DEI-related training for government employees.[4] And states have prohibited DEI offices at public institutions of higher education.[5] Recently, the American Bar Association voted to eliminate a DEI requirement for accreditation of U.S. law schools.[6] Expressing the opposite viewpoint on DEI, multiple states have created government offices or departments to specifically promote and incorporate DEI efforts.[7] Meanwhile, universities across the country are taking divergent positions on whether to require DEI pledges by faculty seeking tenured positions.[8]

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[4] *See, e.g.*, Ariz. Rev. Stat. § 41-1494 (prohibiting the state and its political subdivisions from requiring employees "to engage in training … that presents any form of blame or judgment on the basis of race, ethnicity or sex," which is defined to include the concept that "[a]n individual, by virtue of the individual's race, ethnicity or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously").

[5] *See, e.g.*, Tex. Educ. Code Ann. § 51.3525 (prohibiting public higher education institutions from "establish[ing] or maintain[ing] diversity, equity, and inclusion office[s]").

[6] Karen Sloan, *American Bar Association Votes to Eliminate DEI Rule for Law Schools*, Reuters (May 17, 2026), https://www.reuters.com/legal/government/american-bar-association-votes-eliminate-dei-rule-law-schools-2026-05-15/.

[7] *See, e.g.*, Colo. Rev. Stat. Ann. § 24-50-146 (creating a "statewide equity office" that "[c]onsult[s] with state agencies on best practices regarding equity, diversity, and inclusion"); Wash. Rev. Code Ann. § 43.06D.900 (creating an office to "assist government agencies to promote diversity, equity, and inclusion in all aspects of their decision making"); Va. Code Ann. § 2.2-435.12 (creating the state government "position of Director of Diversity, Equity, and Inclusion").

[8] *See*, *e.g.*, Michael Burke, *University of California to No Longer Require Diversity Statements in Faculty Hiring*, EdSource (Mar. 20, 2025), https://edsource.org/2025/university-of-california-to-no-longer-require-diversity-statements-in-faculty-hiring/728778; Brendan McDonald, *University of Washington*

Into this maelstrom of national debate over DEI, including implicit bias training, and other deeply controversial issues, California has thrust petitioners and anyone else who engages in CME instruction. In doing so, it has forced these *private* actors to serve as the mouthpiece of the California government, endorsing one viewpoint in the controversy while implicitly rejecting the other. And it has done so despite having other viable avenues for expressing California's position on implicit bias in medicine. This Court's gravest concerns about the government-speech doctrine's dangers have come to fruition in the Ninth Circuit's embrace of California's actions.

III. If the Court Does Not Grant Certiorari, States Within the Ninth Circuit Will Be Able to Compel the Speech of Regulated Professionals

If allowed to stand, the Ninth Circuit's decision will undermine this Court's carefully crafted restrictions on the reach of the government-speech doctrine. And the strict scrutiny this Court applied in *Chiles* will mean little if states can merely commandeer practitioners in a regulated field and require them to deliver the state's preferred viewpoint, to the exclusion of others.

Further, what begins as regulation of CME in the Ninth Circuit will likely spread to other fields in other circuits. *See Chiles*, 146 S. Ct. at 1030 (Kagan, J., concurring) (discussing how other states might craft viewpoint-restricting laws if Colorado's statute were allowed to stand). It is true that medical care is

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Still Requires 'Diversity Statements' for Wide Range of Positions, Campus Reform (Oct. 24, 2025, 2:12 PM), https://www.campusreform.org/article/-university-washington-still-requires-diversity-statements-wide-range-positions/28838.

heavily regulated. So too are many other industries and occupations around the country, including law, education, and finance. If California's statute passes Constitutional muster, the prior limitations on the government-speech doctrine fall away, leaving only questions about just how far this power reaches.

Can states compel practitioners within any regulated field to express preferred viewpoints on controversial issues of public debate under the guise of government speech? Can the government avoid the consequences of *Chiles* by simply requiring licensed therapists to express the official, state position on gender and sexual orientation? Do lawyers, doctors, educators, engineers, and a host of other professionals become vessels of government speech merely by taking part in regulated industries? Even on the narrow issue of implicit bias in CME now before the Court, other states may take the opposite view from California's and force instructors to deliver their competing message. Instructors who move to new states may find themselves compelled to deliver the opposite viewpoint than the one they were forced to share in their previous state of residence. These scenarios are not speculation; they are the predictable consequence of the Ninth Circuit's ruling.

Government speech is critical to the states. States' ability to take positions on matters of public interest is essential to a functioning society. But just as important is the principle that the government cannot commandeer private citizens to deliver that message, forcing them to adopt a viewpoint with which they disagree, on pain of losing their ability to speak in the regulated field at all.

This Court's precedents in this area are clear. The Ninth Circuit's opinion fundamentally misapplies

them. This Court should restore the balance its government-speech precedents require.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

JUNE 1, 2026

KATE B. SAWYER
KATLYN DIVIS
FUSION LAW, PLLC
7600 N. 15th St.,
Suite 150
Phoenix, AZ 85020
kbs@fusion.law

BRUNN W. ROYSDEN III
BRETT J. TALLEY
CULPER LAW, PLLC
111 W. Marshall Ave.
Phoenix, AZ 85013
beau@culper.law

Counsel for President Warren Petersen and Speaker Steve Montenegro

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
**Counsel Of Record*
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
(406) 444-2026
Christian.Corrigan@mt.gov
Counsel for Montana

BRENNA BIRD
Attorney General
ERIC WESSAN
Solicitor General
OFFICE OF IOWA ATTORNEY GENERAL
1305 E Walnut Street
Des Moines, IA 50319
eric.wessan@ag.iowa.gov

Counsel for Iowa

Legal Representatives of *Amici* States

STEVE MARSHALL
Attorney General of Alabama

CORI MILLS
Acting Attorney General of Alaska

CHRIS CARR
Attorney General of Georgia

RAÚL R. LABRADOR
Attorney General of Idaho

THEODORE E. ROKITA
Attorney General of Indiana

KRIS KOBACH
Attorney General of Kansas

LIZ MURRILL
Attorney General of Louisiana

MICHAEL T. HILGERS
Attorney General of Nebraska

GENTNER DRUMMOND
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

KEN PAXTON
Attorney General of Texas

JOHN B. MCCUSKEY
Attorney General of West Virginia