No.

IN THE
Supreme Court of the United States

ANTHEM PRESCRIPTION MANAGEMENT, LLC, ET AL.,
Petitioners,

v.

JERRY BEEMAN AND PHARMACY SERVICES, INC., DOING BUSINESS AS BEEMAN'S PHARMACY, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

THEODORE J. BOUTROUS, JR.
Counsel of Record
GAIL E. LEES
CHRISTOPHER CHORBA
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
tboutrous@gibsondunn.com

THOMAS M. DEE
CHRISTOPHER A. SMITH
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Ste. 600
St. Louis, Missouri 63105
(314) 480-1500

Counsel for Petitioner Express Scripts, Inc.
[Additional Counsel Listed on Inside Cover]

MARK A. JOHNSON
JOSEPH E. EZZIE
BAKERHOSTETLER LLP
65 East State Street,
Suite 2100
Columbus, Ohio 43215

JOANNE LICHTMAN
NICOLE A. SKOLOUT
BAKERHOSTETLER LLP
555 South Flower Street,
Suite 4200
Los Angeles, California 90071

Counsel for Cardinal Health MPB, Inc.

SEAN M. SHERLOCK
TODD E. LUNDELL
SNELL & WILMER, LLP
600 Anton Boulevard,
Suite 1400
Costa Mesa, California 92626

Counsel for Restat, LLC

RICHARD S. GOLDSTEIN
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019

KENT B. GOSS
ORRICK, HERRINGTON &
SUTCLIFFE LLP
777 S. Figueroa Street,
Suite 3200
Los Angeles, California 90017

Counsel for Medco Health Solutions, Inc.

THOMAS N. MAKRIS
PILLSBURY WINTHROP SHAW
PITTMAN, LLP
2600 Capitol Avenue, Suite 300
Sacramento, California 95816

BRIAN D. MARTIN
PILLSBURY WINTHROP SHAW
PITTMAN, LLP
501 West Broadway, Suite 1100
San Diego, California 92101

Counsel for First Health Services Corp.

J. KEVIN SNYDER
VIVIAN I. KIM
DYKEMA GOSSETT LLP
333 South Grand Avenue,
Suite 2100
Los Angeles, California 90071

Counsel for Prime Therapeutics

THOMAS M. PETERSON
MOLLY MORIARTY LANE
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, California 94105

Counsel for Anthem Prescription Management, LLC

ROBERT A. MUHLBACH
KIRTLAND & PACKARD LLP
2041 Rosecrans Avenue,
Third Floor
El Segundo, California 90245

Counsel for RX Solutions, Inc.

KENT A. HALKETT
MUSICK, PEELER & GARRETT LLP
One Wilshire Boulevard,
Suite 2000
Los Angeles, California 90017

Counsel for Benescript Services, Inc.

SHIRLEY M. HUFSTEDLER
BENJAMIN J. FOX
MORRISON & FOERSTER LLP
707 Wilshire Boulevard,
Suite 6000
Los Angeles, California 90017

Counsel for Argus Health Systems, Inc.

MARK T. PALIN
ANDRES C. HURWITZ
MICHAEL J. RUBINO
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
12800 Center Court Drive,
Suite 300
Cerritos, California 90703

Counsel for Tmesys, Inc.

NICHOLAS P. ROXBOROUGH
MARINA N. VITEK
ROXBOROUGH, POMERANCE, NYE & ADREANI LLP
5820 Canoga Avenue, Suite 250
Woodland Hills, California 91367

Counsel for National Medical Health Card Systems, Inc. (n/k/a/ Catamaran PBM of Illinois, Inc.)

TAMI S. SMASON
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California 90071

ROBERT H. GRIFFITH
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654

Counsel for AdvancePCS; AdvancePCS Health L.P., successor in interest to FFI RX Managed Care, Inc.; PharmaCare Management Services, Inc.; TDI Managed Care Services, Inc.

NEIL R. O'HANLON
MICHELLE ROBERTS
HOGAN LOVELLS US LLP
1999 Avenue of the Stars,
Suite 1400
Los Angeles, California 90067

Counsel for Mede America Corp.

MATTHEW OSTER
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN
11400 W. Olympic Boulevard
9th Floor
Los Angeles, California 90064

Counsel for WHP Health Initiatives, Inc. (n/k/a Catamaran PBM of Illinois II, Inc.)

QUESTION PRESENTED

Section 2527 of the California Civil Code requires "prescription drug claims processors" to compile, summarize, and disseminate "reports" to their clients regarding pharmaceutical dispensing fees. The law was enacted at the behest of California pharmacies for the express purpose of helping the pharmacies charge higher prices—not for the purpose of preventing consumer deception.

The question presented in this petition is whether a law is subject to heightened scrutiny under the First Amendment when it compels a company to engage in speech with its clients for a purpose *other than* preventing consumer deception.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this Court, Defendants-Appellants below, are Express Scripts, Inc.; AdvancePCS; AdvancePCS Health L.P.; PharmaCare Management Services, Inc.; TDI Managed Care Services, Inc., doing business as Eckerd Health Services; Medco Health Solutions, Inc.; Cardinal Health MPB, Inc., f/k/a Managed Pharmacy Benefits, Inc.; First Health Services Corp.; Benescript Services, Inc.; Anthem Prescription Management, LLC; Argus Health Systems, Inc.; Mede America Corp.; National Medical Health Card Systems, Inc.; Prime Therapeutics; Restat, LLC; RX Solutions, Inc.; Tmesys, Inc.; and WHP Health Initiatives, Inc. (collectively, "petitioners").

Respondents in this Court, Plaintiffs-Appellees below, are Jerry Beeman and Pharmacy Services, Inc., doing business as Beeman's Pharmacy; Anthony Hutchinson and Rocida, Inc., doing business as Finley's Rexall Drug; Charles Miller, doing business as Yucaipa Valley Pharmacy; Jim Morisoli and American Surgical Pharmacy, Inc., doing business as American Surgical Pharmacy; and Bill Pearson and Pearson and House, doing business as Pearson Medical Group Pharmacy, on behalf of themselves and all others similarly situated and on behalf of the general public (collectively, "respondents").

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioners' corporate disclosure statements, filed with this Court on May 29, 2014, remain unchanged.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals remanding the case to the district court has not been published, but is available at 2014 WL 1047410. Pet. App. 1a-3a. The en banc court of appeals opinion and order certifying a question to the California Supreme Court is published at 689 F.3d 1002. Pet. App. 90a-105a. The California Supreme Court opinion, answering the court of appeals' certified question, is published at 315 P.3d 71. Pet. App. 8a-87a. A now-vacated opinion of the court of appeals is reported at 652 F.3d 1085. Pet. App. 111a-165a. The opinion of the district court is unreported, but is available at 2007 WL 8433882. Pet. App. 174a-198a.

JURISDICTION

The court of appeals filed its order on March 19, 2014. On May 31, 2014, Justice Kennedy granted an extension of time for filing a petition for a writ of certiorari until July 17, 2014. No. 13A1185. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(c)

Because this petition draws into question the constitutionality of Section 2527 of the California Civil Code, a statute of a State, and neither the State nor any agency, officer or employee thereof is a party, 28 U.S.C. § 2403(b) may be applicable.

Pursuant to 28 U.S.C. § 2403(b), the Attorney General of California previously has been notified that the constitutionality of a California statute has been drawn into question by this litigation. Pet. App. 219a-220a.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), California Civil Code Sections 2527 and 2528 are set out verbatim in the Appendix to this petition. Pet. App. 210a-213a.

STATEMENT

California Civil Code Section 2527 presses private companies into government service, forcing them to disseminate information to their clients that the government could (but has chosen not to) disseminate itself, in order to achieve the desired aims of a group of pharmacies that lobbied for the legislation. These pharmacies—including respondents here—hope that the dissemination of this information will lead to higher fees for dispensing prescription drugs, either through private negotiations or government-imposed price regulations.

In the Ninth Circuit, laws like Section 2527 that compel companies to engage in speech are not subject to *any* First Amendment scrutiny, provided the speech is deemed "factual" in nature. That position deepens a three-way split among the lower courts, many of which have misinterpreted this Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

The Ninth Circuit's position also contradicts this Court's recent decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666–67 (2011), which reaffirmed that the "First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression." And it ignores this Court's repeated rulings that laws compelling speech, no less than laws restricting speech, are equally suspect under the First Amendment. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

In today's regulatory environment—where federal agencies and state and local governments increasingly are conscripting private companies to advance their policy goals through disclosures of purportedly "factual" information—this Court's review is warranted to clarify the level of constitutional scrutiny applicable to such laws and to ensure that all courts are uniformly enforcing the First Amendment.

1. Petitioners are pharmacy benefit managers ("PBMs") that contract with third-party payors, health plan sponsors, or administrators such as insurers, health maintenance organizations, governmental entities, and employers to facilitate cost-effective delivery of prescription drugs to the PBMs' clients' health plan members. Pet. App. 10a. PBMs may, for example, create networks of retail pharmacies that agree to accept certain discounted reimbursement rates when they fill prescriptions for health plan members. *Id.* Network reimbursements generally are lower than what pharmacies would charge non-network, cash-paying customers, reducing costs for health plan sponsors. Pet. App. 10a-11a. Being part of a PBM's network benefits the retail pharmacy by expanding its customer base, thereby increasing its sales volume for both prescription drugs and other items.

Respondents are independent retail pharmacists licensed in California who believe that PBM-negotiated reimbursement rates are "too low," and that the profitability of certain pharmacies has suffered as a result. Pet. App. 238a.

2. Section 2527 of the California Civil Code requires prescription drug claims processors[1] in California to conduct or obtain "the results of a study or studies which identifies the fees . . . of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to private consumers." Cal. Civ. Code § 2527(c). The fees "shall be computed by reviewing a sample of the pharmacy's usual charges for a random or other representative sample of commonly prescribed drug products, subtracting the average wholesale price of drug ingredients, and averaging the resulting fees by dividing the aggregate of the fees by the number of prescriptions reviewed." *Id.*

This information "shall be transmitted by certified mail" every 24 months "by each prescription drug claims processor to the chief executive officer or designee, of each client for whom it performs claims processing services." Cal. Civ. Code § 2527(d). Along with the raw data, the report "shall include a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th)." Cal. Civ. Code § 2527(c).

"The California legislature enacted [Section 2527] at the behest of the California Pharmacists Association," which desired "to increase the rate of re-

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[1] The statutory scheme applies to "prescription drug claims processors," a term defined in the statute and subject to several exceptions. Cal. Civ. Code § 2527(b). Petitioners maintain that they are not "prescription drug claims processors" and have reserved their objections accordingly. Pet. App. 96a n.1. That issue, however, is not implicated for purposes of this appeal, as the Ninth Circuit recognized. *Id.*

imbursement by third-party payors." Pet. App. 13a, 95a. The initial bill was "sponsored by the California Pharmacists Association," whose goal was to "achieve by legislation a reimbursement policy which it believes is equitable, a goal members cannot achieve through collective bargaining and have not achieved through the courts." Pet. App. 227a-228a. As explained in an Assembly Committee staff paper, the bill was designed to counteract "[t]he goal of third-party administrators and payors," which was "to keep costs as low as possible, a goal in direct conflict with that of the pharmacists." Pet. App. 228a. In other words, the proponents of this bill hoped to *raise* consumer prices.

For this reason, the California Department of Insurance initially opposed the bill: "The end result of the bill, we think, [would] be to increase premiums to all insureds, with pharmacies being the ultimate beneficiaries. We think it is not in the best interest of the insurance-buying public." Pet. App. 231a. Nevertheless, following several "changes . . . proposed by the original bill sponsor, the California Pharmacists Association," the legislation was enacted. Pet. App. 15a.

In describing the new provisions, staff to the Assembly Committee on Finance, Insurance, and Commerce explained that "[t]he purpose . . . is to require claims processors to present objective data on the range and percentiles of usual and customary charges of pharmacists in the hope that at a time in the future this information will become the basis for reimbursement." *ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.*, 42 Cal. Rptr. 3d 256, 264 (Cal. Ct. App. 2006) (quoting legislative history). Pharmacists "hope" that dissemination of the studies under Section 2527 will also inspire further "legisla-

tive intervention," should higher reimbursement rates not be achieved through private negotiations. Pet. App. 207a.

3. In 2002 and 2004, respondents filed putative class action complaints in the United States District Court for the Central District of California alleging that petitioners failed to comply with the reporting requirements of Section 2527. Pet. App. 96a. Section 2528 imposes steep civil penalties for "[a] violation of Section 2527" ranging from $1,000 to $10,000, along with liability for attorney fees and injunctive and declaratory relief. Section 2527 does not define a "violation," but respondents have asserted that a violation occurs each time a prescription is processed. Pet. App. 176a-177a, 270a-272a. Thus, respondents seek aggregated penalties on behalf of 2,200 California pharmacies in the amount of several *billion* dollars. Pet. App. 280a, 291a, 309a, 320a.

Petitioners filed motions for judgment on the pleadings, challenging the constitutionality of Section 2527 under both the United States and California Constitutions. The district court denied petitioners' motions, holding that Section 2527 "does not violate the free speech rights of PBMs under either the federal or California Constitution." Pet. App. 198a.

The court relied extensively on Ninth Circuit precedent for the proposition that the First Amendment does not apply to disclosure laws that do "not impermissibly compel an ideological message." Pet. App. 195a (citing *Envtl. Def. Ctr., Inc. v. United States Envtl. Prot. Agency*, 344 F.3d 832 (9th Cir. 2003) ("*EPA*")). The court also relied on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), holding that "the U.S. Supreme Court has declined to subject statutes to any discernible level of constitutional scrutiny after de-

termining that they involve no 'compelled recitation of a message containing an affirmation of belief.'" Pet. App. 194a-195a. It distinguished *Riley*, 487 U.S. 781, holding that *Riley* applies only to certain kinds of "core free speech," such as political or ideological opinions. Pet. App. 182a.

The district court certified its decision for interlocutory review. Pet. App. 168a-173a. Pursuant to 28 U.S.C. § 1292(b), the Ninth Circuit agreed to resolve the constitutionality of Section 2527 under both the U.S. and California Constitutions. Pet. App. 166a-167a.[2]

A three-judge panel of the Ninth Circuit affirmed the district court in a split decision. Pet. App. 153a. The panel majority, like the district court, cited prior Ninth Circuit precedent and held that Section 2527 does not implicate the First Amendment *at all*; in the panel majority's view, laws compelling speech implicate the First Amendment only when they "affect the content of the [speaker's] message" by forcing the speaker to adopt "Government-mandated pledge[s] or

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[2] The Ninth Circuit also agreed to decide whether, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the district court should have followed three California Court of Appeal decisions, all of which held that section 2527 violates the liberty of speech clause in the California Constitution. *See ARP Pharmacy Servs*., 42 Cal. Rptr. 3d 256; *A.A.M. Health Grp., Inc. v. Argus Health Sys., Inc.*, No. B183468, 2007 WL 602968 (Cal. Ct. App. Feb. 28, 2007); *Bradley v. First Health Servs. Corp.*, No. B185672, 2007 WL 602969 (Cal. Ct. App. Feb. 28, 2007). Because the California Supreme Court had not yet decided the issue, and because the Ninth Circuit panel disagreed with the California Court of Appeal's First Amendment analyses, the Ninth Circuit ultimately held that the district court was not required to follow the Court of Appeal decisions. Pet. App. 151a-153a. That holding is not at issue here.

motto[s]," or the like. Pet. App. 136a-137a & n.12 (citing *EPA*, 344 F.3d at 848–51; *FAIR*, 547 U.S. at 62); *but see Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."). The panel majority also explained its view that *Riley* applies only to reporting requirements that chill certain types of core speech. Pet. App. 135a-137a.

Judge Wardlaw dissented, rejecting the majority's proffered distinctions of *FAIR* and *Riley*. Judge Wardlaw explained that the panel majority erred by holding that the compulsion of speech is "different from the prohibition of such speech"—to the contrary, this Court has held that the distinction between compulsion and prohibition is "'without constitutional significance.'" Pet. App. 162a (quoting *Riley*, 487 U.S. at 796). Judge Wardlaw also criticized the panel majority for ignoring *Sorrell*, 131 S. Ct. 2653—a decision issued less than four weeks earlier that the majority mentioned only once in a footnote. As Judge Wardlaw explained, *Sorrell* is directly on point because it holds that the "'First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression.'" Pet. App. 162a (quoting *Sorrell*, 131 S. Ct. at 2666–67).

The Ninth Circuit voted to rehear the case en banc. In a unanimous opinion, the court ruled that "[t]he outcome of this appeal is dictated by the scope of the free speech clause of the California Constitution," which "is broader and more protective than the First Amendment"—the implication being that Section 2527 is constitutional under the First Amendment and is invalid *only* if it violates the California Constitution. Pet. App. 98a (internal quotation marks omitted). Thus, the Ninth Circuit certified to the California Supreme Court the question whether

"California Civil Code section 2527 compel[s] speech in violation of . . . the California Constitution." Pet. App. 95a. As the en banc court explained, "[i]f . . . the California Supreme Court itself were to . . . conclude that the statute is constitutional" under the California Constitution, then "its decision would control in California state and federal courts." Pet. App. 98a-99a.

The California Supreme Court accepted the certified question and, in a divided opinion with two justices dissenting, held that Section 2527 does not violate the liberty of speech clause of the California Constitution. Pet. App. 10a. The California Supreme Court's decision relied almost exclusively upon "principles articulated by the United States Supreme Court in interpreting 'freedom of speech' under the First Amendment." Pet. App. 22a; *see also* Pet. App. 28a ("In the compelled speech context, we have looked to First Amendment case law for persuasive guidance when confronted with a paucity of state constitutional doctrine.").

As an initial matter, the California Supreme Court disagreed with "the Ninth Circuit panel's conclusion that the reporting requirements of section 2527 'are not subject to *any* form of First Amendment scrutiny.'" Pet. App. 24a (emphasis in original) (quoting Pet. App. 151a). Citing *Sorrell*, *FAIR*, and *Riley*, the court explained that "compelled statements of fact" do not "fall outside the ambit of First Amendment protection." Pet. App. 25a.

Turning to the level of scrutiny that applies to Section 2527, however, the California Supreme Court surveyed this Court's First Amendment jurisprudence and found heightened scrutiny inapplicable for two reasons: First, the court held that Section 2527

"does not compel speech reflecting any viewpoint, belief, or ideology." Pet. App. 33a (discussing, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tornillo*, 418 U.S. 241; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)). Second, the court held that Section 2527 is a commercial speech regulation compelling truthful statements about products and services. Pet. App. 46a (discussing, *e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Zauderer*, 471 U.S. 626; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Applying rational basis review, the court upheld Section 2527 as constitutional.

When the case returned to the Ninth Circuit, petitioners urged the court to revisit the constitutionality of Section 2527 under the First Amendment (Pet. App. 215a-217a), but the court refused to do so. The en banc panel simply issued an order vacating the initial three-judge panel decision and remanding the case to the panel. Pet. App. 7a. And, in a memorandum disposition, the panel "remanded to the district court for such further proceedings as remain following the district court's denial of Appellants' motions for judgment on the pleadings." Pet. App. 3a.

Thus, it is apparently settled in California state and federal courts that Section 2527 is constitutional under both the U.S. and California Constitutions. As a result of the Ninth Circuit's decision, petitioners have been forced to proceed with the litigation in the district court on that basis.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepens a three-way split among the lower courts regarding whether, and to what extent, the First Amendment applies to laws compelling speech by companies that is unrelated to preventing consumer deception or fraud. In the Ninth Circuit, the First Amendment does not apply *at all* to such laws—a position that contravenes the decisions of this Court by establishing an artificial divide between so-called "factual" speech (which is unprotected) and "core" speech (which is protected), and by affording less constitutional protection when speech is compelled than when it is restricted. In the First, Second, and Sixth Circuits, as well as the California and Massachusetts Supreme Courts, such laws *are* subject to First Amendment review but receive only the lowest form of protection. In the Fourth and D.C. Circuits, such laws receive heightened scrutiny unless they serve the purpose of preventing consumer deception.

Much of the confusion in the lower courts stems from uncertainty over the scope of this Court's decision in *Zauderer*, 471 U.S. 626, which held that laws compelling speech by companies are constitutional as long as they are "reasonably related to the State's interest in preventing deception to consumers." *Zauderer* did not address the level of scrutiny applicable to laws that purport to serve state interests *other* than preventing consumer deception—a question of the utmost importance today, with federal agencies and state and local governments increasingly forcing private companies to disclose purportedly "factual" information in order to advance the government's policy goals. This Court's review is urgently required to clarify the level of constitutional scrutiny applicable to such laws and to protect com-

panies from being forced to convey the government's message.

I. THE DECISION BELOW DEEPENS A THREE-WAY SPLIT AMONG THE LOWER COURTS.

A. This Court recently held that laws prohibiting companies from disclosing "factual" information are subject to heightened scrutiny under the First Amendment. *Sorrell*, 131 S. Ct. at 2663–67. As the Court explained, "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Id.* at 2667; *see also id.* at 2666–67 (the "First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression").

This Court has also repeatedly confirmed that the First Amendment applies equally to both compelled speech and restricted speech. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *Pac. Gas*, 475 U.S. at 9–10; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The distinction between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796–97 (emphasis in original); *see also Wooley*, 430 U.S. at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'").

Nevertheless, there is a great deal of confusion in the lower courts regarding the First Amendment scrutiny that applies to laws compelling "factual" speech by companies. In *Zauderer*, 471 U.S. at 651, this Court held that such laws are subject only to ra-

tional basis review *if* their purpose is to prevent consumer deception. *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–50 (2010) (applying the "less exacting scrutiny described in *Zauderer*" to a law designed "to combat the problem of inherently misleading commercial advertisements"). But this Court has not determined the standard of review that applies to disclosure laws serving other purposes. As commentators have observed, this Court has "yet to address whether commercial disclosure laws serving state interests *other* than curing consumer deception should be subject to rational basis review." Jennifer M. Keighley, *Can You Handle The Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539, 562 (2012) (emphasis added).

B. The lower courts are sharply divided over the proper scope of *Zauderer* and the applicability of the First Amendment to laws compelling companies to disclose factual information for purposes *other* than preventing consumer deception. At least three competing positions have emerged: (1) in the Ninth Circuit, the First Amendment does not apply *at all* to laws that compel companies to engage in factual speech; (2) in the First, Second, and Sixth Circuits, as well as the California and Massachusetts Supreme Courts, the First Amendment *does* apply to compelled factual speech, but such laws are subject only to *Zauderer* review no matter their purpose; and (3) in the Fourth and D.C. Circuits, laws compelling factual speech by companies trigger heightened First Amendment scrutiny when they serve purposes other than the prevention of consumer deception.

Indeed, this very case exemplifies the splintered state of the lower courts' jurisprudence—the Ninth Circuit and the California Supreme Court reached

the same result for different reasons, representing two of the three competing positions.

1. The Ninth Circuit stands alone in holding that the First Amendment is inapplicable to laws requiring companies to engage in factual speech. In *EPA*, 344 F.3d at 848, municipal storm sewer system operators challenged a federal regulation requiring them to distribute educational materials about "the impacts of stormwater discharges," ways to reduce stormwater runoff pollutants, and the hazards caused by illegal discharges and improper waste disposal. Although the companies contended that the regulation required them "to communicate messages that they might not otherwise wish to deliver," the Ninth Circuit held that the First Amendment was inapplicable because the regulation was "non-ideological," did not compel the recitation of a specific "message," and did not prohibit the companies from stating that the information they provided was "required by federal law." *Id.* at 848–51. The court further found that the regulation could not "be read as compelling speech" under the First Amendment because the regulation was "consistent with the regulatory goals of the overall scheme of the Clean Water Act" and therefore constituted "appropriate educational and public information activities." *Id.* at 849–50.

Here, the Ninth Circuit effectively reaffirmed *EPA*. The constitutionality of California Civil Code Section 2527 under *both* the federal and state constitutions was squarely presented for review by the Ninth Circuit sitting en banc, providing that court an opportunity to overrule or distinguish *EPA*. The three-judge Ninth Circuit panel had relied extensively on *EPA* in holding that Section 2527 was not subject to First Amendment scrutiny. Pet. App. 143a-

144a. But the en banc court ruled instead that "[t]he outcome of this appeal is dictated by the scope of the free speech clause of the California Constitution," which "is broader and more protective than the First Amendment"—in effect, ruling that Section 2527 is constitutional under the First Amendment (per *EPA*) and is invalid *only* if it violates the California Constitution. Pet. App. 98a (internal quotation marks omitted). And now that "the California Supreme Court" has "conclude[d] that the statute is constitutional" under the California Constitution (Pet. App. 98a-99a), it is apparently settled that Section 2527 satisfies both the federal and state constitutions.

2. The First, Second, and Sixth Circuits, as well as the California and Massachusetts Supreme Courts, have held that laws compelling companies to make factual statements *are* subject to First Amendment review but apply only the lowest possible constitutional scrutiny, as articulated in *Zauderer*, 471 U.S. at 650–51.

In *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 113–15 (2d Cir. 2001) ("*NEMA*"), the Second Circuit held that a state labeling law implicated protected speech under the First Amendment but upheld the law under rational basis review. The court found that *Zauderer* applied even though the speech was *not* intended to combat consumer deception because the law was "inextricably intertwined with the goal of increasing consumer awareness" and thus was not "inconsistent with the policies underlying First Amendment protection of commercial speech," *id.* at 115, namely the promotion of a "robust and free flow of accurate information," *id.* at 114. The court also found it dispositive that the regulation compelled speech, holding that heightened scrutiny only "applie[s] to statutes

that *restrict* commercial speech." *Id.* at 114–15 (emphasis in original).

Eight years later, in *New York State Restaurant Ass'n v. New York City Board of Health*, 556 F.3d 114, 133 n.21 (2d Cir. 2009), the Second Circuit reaffirmed *NEMA*, again holding that "laws mandating factual disclosures are subject to the [*Zauderer*] rational basis test even if they address non-deceptive speech." The court therefore upheld a regulation requiring restaurants to post food-calorie contents on menus.

The First and Sixth Circuits, as well as the Massachusetts Supreme Court, have similarly determined that *Zauderer*'s rational basis test applies to compelled speech by companies irrespective of the purpose of the laws. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309–10 (1st Cir. 2005) (upholding law compelling pharmacy benefit managers to disclose all "financial arrangements with third parties" under rational basis review); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012) ("*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception."); *Bulldog Investors Gen. P'ship v. Sec'y of the Commonwealth*, 953 N.E.2d 691, 707–08 (Mass. 2011) (finding that *Zauderer* and *Milavetz* "do not expressly limit the reasonable relation test to the particular State interest in preventing consumer deception").

And in this case, the California Supreme Court held that the reasonable relationship test articulated in *Zauderer*, and not heightened scrutiny, applied to Section 2527. Pet. App. 46a. The court conceded that *Zauderer* was "not directly analogous to the pre-

sent case" because "the purpose or effect of section 2527 [was not] to prevent deception or misleading statements," but it nevertheless ruled that *Zauderer* scrutiny applies whether laws are intended "to prevent deception or simply to promote informational transparency." Pet. App. 45a-46a.

3. Finally, the Fourth and D.C. Circuits apply heightened scrutiny to laws that compel companies to engage in factual speech for purposes other than preventing consumer deception.

In *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), the plaintiffs challenged a tobacco labeling law requiring "general disclosures about the negative health effects of smoking." The court found that "[t]he Supreme Court has *never* applied *Zauderer* to disclosure requirements not designed to correct misleading commercial speech." *Id.* at 1213 (emphasis added). To the contrary, the court of appeals identified several decisions from this Court "suggest[ing] that *Zauderer* should be construed to apply *only* when the government affirmatively demonstrates that an advertisement threatens to deceive consumers." *Id.* at 1214 (emphasis in original). For example, *Zauderer* scrutiny did not apply to "a federal law requiring mushroom producers to pay an assessment to support generic advertising" because "there was no suggestion 'that the mandatory assessments . . . [were] somehow necessary to make voluntary advertisements non-misleading for consumers.'" *Id.* at 1213 (quoting *United Foods*, 533 U.S. at 416); *see also id.* (discussing *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994)). Accordingly, the court held that the challenged regulation fell outside the "narrow enclave carved out by *Zauderer*," applied heightened scrutiny, and invalidated the regulation. *Id.* at 1217–22.

Likewise, earlier this year, in *National Ass'n of Manufacturers v. SEC*, 748 F.3d 359, 363 (D.C. Cir. 2014) ("*NAM*"), the D.C. Circuit addressed the constitutionality of a federal regulation requiring manufacturers to disclose whether their products contain "conflict free" minerals. As in *R.J. Reynolds*, the court held that rational basis is the "exception, not the rule, in First Amendment cases," and reaffirmed that *Zauderer* is limited to laws aimed at preventing consumer deception. *Id.* at 370.

The Fourth Circuit has also applied heightened scrutiny to laws compelling speech by companies for purposes other than preventing consumer deception. *See Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189–93 (4th Cir. 2013) (en banc) (applying heightened scrutiny to regulation requiring pregnancy resource centers to post signs stating that they did "not have a licensed medical professional on staff"); *see also Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 283 n.8 (4th Cir. 2013) (en banc) ("Because the City contends that the Ordinance regulates misleading commercial speech, our focus is on the potential applicability of rational basis scrutiny.").

* * *

The choice among these conflicting levels of scrutiny under the First Amendment is sure to be outcome-determinative for many laws and regulations compelling speech by companies. In the Fourth or D.C. Circuit, California Civil Code Section 2527—which the parties and every court to consider the question (including the California Supreme Court) agree is *not* aimed at preventing consumer deception—would be subject to heightened scrutiny, forcing the government to justify the law based on im-

portant state interests. A bare desire to benefit the members of the California Pharmacists Association would not pass muster. In the Ninth Circuit, however, California is permitted to impose on private companies and compel them to carry the State's message unburdened by the First Amendment. This Court should grant review to ensure that compelled speech laws like Section 2527 are subject to the same stringent constitutional standards wherever they are enacted in the United States.

II. THE NINTH CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

This Court's review is also warranted because the Ninth Circuit's disregard for the First Amendment—its position that laws compelling companies to engage in "non-ideological," "factual" speech receive no constitutional scrutiny *at all* (*EPA*, 344 F.3d at 850; *see also* Pet. App. 151a)—cannot be squared with this Court's precedent.

In *Sorrell*, this Court examined the constitutionality of a Vermont statute that *restricted* the same type of speech that is *compelled* by California Civil Code Section 2527. The statute at issue in *Sorrell* "prohibit[ed] pharmacies, health insurers, and similar entities from . . . disclosing . . . information" about certain prescription practices—similar to the information that Section 2527 requires prescription drug claims processors to provide to their clients. *Sorrell*, 131 S. Ct. at 2660; *see also* Pet. App. 162a (Wardlaw, J., dissenting) ("The Vermont law in [*Sorrell*] is the flip side of California's § 2527; they involve similar speech that Vermont prohibits and California compels."). The Vermont statute was even enacted to accomplish a similar purpose as Section 2527. *See Sor-*

rell, 131 S. Ct. at 2661. Nevertheless, even though the statute in *Sorrell* restricted "factual" speech, this Court applied heightened First Amendment scrutiny because "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 2667.

Likewise, in *FAIR*, this Court reaffirmed its earlier holding that "compelled statements of fact . . . like compelled statements of opinion, are subject to First Amendment scrutiny." *FAIR*, 547 U.S. at 62 (citing *Riley*, 487 U.S. at 797–98). The Court upheld the statute at issue only because the trivial amount of speech it compelled was "plainly incidental to the [law's] regulation of conduct," not because of any distinction between fact and opinion, or compelled speech and restricted speech. *Id.*

Under these and other binding precedents, Section 2527 unquestionably implicates the First Amendment. As this Court explained in *Riley*, 487 U.S. at 800, "burdening a speaker with unwanted speech" is an impermissible method of "communicat[ing] the desired information to the public," especially where "the State may itself publish" the information. *See also* Pet. App. 81a-82a (Corrigan, J., dissenting) ("The Legislature may determine that having higher reimbursement rates would ultimately benefit the public . . . [and] may pass any number of laws to this end, including directly regulating reimbursement rates. But the Legislature's preference, by itself, does not justify intrusion into protected speech rights."). Put simply, "prophylactic, imprecise, and unduly burdensome rule[s] . . . in the area of free expression"—like Section 2527—"are suspect." *Riley*, 487 U.S. at 800–01; *see also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327–32 (2013) (government can criminalize

prostitution but cannot condition government funding on the adoption of an explicit policy opposing prostitution).

Moreover, even the position taken by the California Supreme Court in this case—that Section 2527 is subject to rational basis review under *Zauderer*—is inconsistent with this Court's jurisprudence. By its own terms, *Zauderer* applied diminished constitutional scrutiny because the law at issue served the State's particular interest "in preventing deception of consumers." *Zauderer*, 471 U.S. at 651; *see also Milavetz*, 559 U.S. at 231 (applying *Zauderer* scrutiny to law aimed at "inherently misleading" speech). As Justice Corrigan of the California Supreme Court correctly explained in her dissenting opinion in this case, "*Zauderer* did not contemplate that all disclosures of factual information should be subject to the lowest standard of review, but only those principally designed to protect consumers." Pet. App. 78a (Corrigan, J., dissenting).

Under this Court's First Amendment jurisprudence, the only proper approach is to apply heightened scrutiny to compelled disclosure laws, like Section 2527, that are *not* aimed at preventing consumer deception—something that neither the Ninth Circuit nor the California Supreme Court did in this case. As the D.C. Circuit correctly explained, any other rule permits the government to "regulate otherwise protected speech" in a manner "obviously repugnant to the First Amendment." *NAM*, 748 F.3d at 372.[3]

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[3] In her dissenting opinion below, Judge Wardlaw discussed another reason to apply heightened scrutiny to laws compelling companies to make factual statements unrelated to consumer deception: Where, as here, such laws are regulations of non-commercial speech, *see City of Cincinnati v. Discovery Network,*

III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE.

With increasing frequency, federal agencies and state and local governments have been enacting laws and regulations that force private companies to engage in speech for reasons that have nothing to do with consumer deception. *See* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 Val. U. L. Rev. 555, 584 (2006) ("[C]ommercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception."). In an era of shrinking government budgets and reluctance to raise taxes, such compelled disclosures provide a low-cost means for governmental entities to pursue their regulatory objectives by "passing the buck" onto the private sector. *See, e.g.*, *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211, 1221 (noting that the regulation at issue "represent[ed] [the] FDA's attempt to . . . forc[e] [tobacco companies] to bear the cost of disseminating an anti-smoking message.").

[Footnote continued from previous page]

Inc., 507 U.S. 410, 423 (1993), they are content-based restrictions requiring strict scrutiny. *See Riley*, 487 U.S. at 795, 798 (law compelling disclosure of the percentage of charitable contributions that were turned over to charity constituted "a content-based regulation of speech" meriting "exacting First Amendment scrutiny"); *Sorrell*, 131 S. Ct. at 2663 (holding that the challenged Vermont statute was a content-based restriction because it restricted "speech with a particular content"); *cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) (finding no apparent "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech").

For example, recently enacted laws and regulations compelling companies to speak for reasons *other* than preventing consumer deception include:

- Laws and regulations requiring restaurants, hotels, and other places of public accommodation to post sanitation inspection scores publicly, *see* N.C. Gen. Stat. § 130A-249 (2014); Tenn. Code Ann. § 68-14-317 (2014); N.Y.C. Health Code tit. 24, § 23.03 (2010);

- Laws and regulations requiring restaurants to publicize the calories in menu items, *see* 21 U.S.C. § 343(q)(5)(H) (2012); Cal. Health & Safety Code § 114094 (2012); N.Y.C. Health Code tit. 24, § 81.50 (2008);

- Regulations requiring tobacco products to display the phone number "1-800-QUIT-NOW," *see* 21 C.F.R. § 1141 (2012);

- Regulations requiring casinos to advertise "a responsible gambling message" and the phone number for a "referral service[] for problem gamblers," *see* Cal. Code Regs. tit. 4, § 12461 (2013);

- Regulations requiring appliances to be labeled with their energy consumption levels, *see* 16 C.F.R. § 305.11 (2011);

- Regulations requiring new cars to be labeled with their estimated mileage per gallon, *see* 16 C.F.R. § 259.1 (2011); and

- Regulations requiring "pregnancy service centers" to provide information about the presence of medically trained staff, *see* N.Y.C. Admin. Code § 20-816(a)-(f) (2011); Montgomery County (Md.) Res. 16-1252 (2010); Austin (Tex.) City Code § 10-10-1 *et seq*. (2012).

Even where these laws purport to compel only factual speech with which no one can reasonably disagree, they are often meant to convey normative messages and ideological viewpoints with which companies *do* disagree. It is not uncommon, for example, for the government to require a company to engage in speech that is designed to persuade potential customers *not* to purchase the company's products (or, alternatively, to pay less money for them). *See, e.g.*, *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211–12 ("In effect, the graphic images are not warnings, but admonitions: 'Don't buy or use this product.'") (alteration omitted). A recent Executive Order candidly instructs agencies to consider "alternatives to direct regulation," such as "encourag[ing] the desired behavior" by "providing information upon which choices can be made by the public." Exec. Order No. 13563 (Jan. 18, 2011).

In fact, in this very case, Justice Corrigan of the California Supreme Court explained in her dissenting opinion that Section 2527 represents "an attempt by the government to put its thumb on the scale" of negotiations between "sophisticated business entities," forcing prescription drug claims processors to "engage in speech for the sole purpose of potentially modifying a term of a privately negotiated contract." Pet. App. 80a-81a (emphasis omitted); *see also* Pet. App. 81a (noting that "the government has taken sides, resorting to compelled speech to promote its vision of what [a] private contract should look like"). Across the country, similar efforts to engage in this type of "paternalism writ large," Pet. App. 84a, threaten to conscript innumerable private companies to serve as the government's "billboard," *Wooley*, 430 U.S. at 715. This case presents the Court with an opportunity to clarify the constitutional scrutiny that

is triggered by such laws, which the lower courts can then apply on a case-by-case basis.

* * *

The Ninth Circuit's decision exacerbates existing confusion over the constitutional limits on laws compelling speech by companies, disregards this Court's First Amendment jurisprudence, and enhances the government's ability to conscript private companies into public service. This Court's review is warranted to restore the uniformly applicable limitations that the First Amendment imposes on compelled speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE J. BOUTROUS, JR.
Counsel of Record
GAIL E. LEES
CHRISTOPHER CHORBA
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
tboutrous@gibsondunn.com

THOMAS M. DEE
CHRISTOPHER A. SMITH
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Ste. 600
St. Louis, Missouri 63105
(314) 480-1500

Counsel for Petitioner Express Scripts, Inc.

July 17, 2014

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; et al., Plaintiffs - Appellees, v. ANTHEM PRESCRIPTION MANAGEMENT, LLC; et al., Defendants - Appellants.	No. 07-56692 D.C. No. CV-04-00407-VAP MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; et al., Plaintiffs - Appellees, v. TDI MANAGED CARE SERVICES, INC., doing business as ECKERD HEALTH SERVICES; et al., Defendants - Appellants.	No. 07-56693 D.C. No. CV-02-01327-VAP

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Submitted January 30, 2014**
[Filed March 19, 2014]
Pasadena, California

Before: REINHARDT, SILVERMAN, and WARDLAW, Circuit Judges.

Appellees' motion to lift the stay of district court proceedings pending disposition of these consolidated interlocutory appeals is GRANTED. Under 28 U.S.C. § 1292(b), the district court certified for interlocutory appeal its denials of Appellants' motions for judgment on the pleadings. Because the California Supreme Court's opinion in *Beeman v. Anthem Prescription Management, LLC*, 315 P.3d 71 (Cal. 2013), resolved the *Erie* issue that animated the district court's § 1292(b) orders, these appeals are now remanded to the district court for such further proceedings as remain following the district court's denial of Appellants' motions for judgment on the pleadings. The remaining motions are moot. Each party shall bear its own costs on appeal.

IT IS SO ORDERED.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC., doing business as Finleys Rexall Drug; CHARLES MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC., doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, doing business as Pearson Medical Group Pharmacy; on behalf of themselves and all others similarly situated and on behalf of the general public *Plaintiffs-Appellees*,	No. 07-56692 D.C. No. CV-04-00407-VAP

v.
ANTHEM PRESCRIPTION MANAGEMENT, LLC; ARGUS HEALTH SYSTEMS, INC.; BENESCRIPT SERVICES, INC.; FFI RX MANAGED CARE; FIRST HEALTH SERVICES CORPORATION; MANAGED PHARMACY BENEFITS, INC., formerly known as Cardinal Health MPB Inc.; NATIONAL MEDICAL HEALTH CARD SYSTEMS, INC.; PHARMACARE MANAGEMENT SERVICES, INC.; PRIME THERAPEUTICS; RESTAT CORPORATION; RX SOLUTIONS, INC.; TMESYS, INC.; WHP HEALTH INITIATIVES, INC.; MEDE AMERICA CORP.,
Defendants-Appellants.

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC., doing business as Finleys Rexall Drug; CHARLES

No. 07-56693

D.C. No. CV-02-01327-VAP

MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC., doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, doing business as Pearson Medical Group Pharmacy; on behalf of themselves and all others similarly situated and on behalf of the general public, *Plaintiffs-Appellees*, v. TDI MANAGED CARE SERVICES, INC., doing business as ECKERD HEALTH SERVICES; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; ADVANCE PCS, Advance PCS Health, L.P.; RX SOLUTIONS, INC., *Defendants-Appellants*.	ORDER

Filed January 29, 2014

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Diarmuid F. O'Scannlain, Sidney R. Thomas, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton and N. Randy Smith, Circuit Judges.

ORDER

The case is remanded to the three-judge panel for consideration in light of the California Supreme Court's opinion in *Beeman* v. *Anthem Prescription Management, LLC*, No. S203124 (Cal. Dec. 19, 2013). The prior panel opinion, 652 F.3d 1085 (9th Cir. 2011), is vacated.

APPENDIX C

Filed 12/19/13

IN THE SUPREME COURT OF CALIFORNIA

JERRY BEEMAN et al.,	
Plaintiffs and Respondents,	S203124
v.	Ninth Cir. U.S. Ct. App. No. 07-56692
ANTHEM PRESCRIPTION MANAGEMENT, LLC, et al.,	C.D. Cal. No. CV 04-00407-VAP
Defendants and Appellants.	

JERRY BEEMAN et al.,	)	
	)	
Plaintiffs and Respondents,	)	
	)	
v.	)	Ninth Cir. U.S. Ct. App. No. 07-56693
	)	
TDI MANAGED CARE SERVICES, INC., et al.,	)	C.D. Cal. No. CV-02-01327-VAP
	)	
Defendants and Appellants.	)	
	)	

We granted a request from the United States Court of Appeals for the Ninth Circuit, sitting en banc, to address the following issue of state law pursuant to California Rules of Court, rule 8.548: Does Civil Code section 2527 compel speech in violation of article I, section 2 of the California Constitution?

Civil Code section 2527 requires prescription drug claims processors to compile and summarize information on pharmacy fees and to transmit the information to their clients. Defendants contend that this statute is a content-based speech requirement that cannot satisfy either strict scrutiny or intermediate scrutiny under California's free speech guarantee. Plaintiffs counter that the statute only requires the transmission of "objective, statistical data" and therefore does not implicate any free speech protection. In addition, plaintiffs contend that the statute, if it implicates a right to free speech, is ordinary economic regulation subject to rational basis review and, in any event, would satisfy the intermediate

scrutiny standard that applies to restrictions on commercial speech.

As explained herein, we hold that Civil Code section 2527 does implicate the right to free speech guaranteed by article I of the California Constitution. At the same time, we hold that the statute, which requires factual disclosures in a commercial setting, is subject to rational basis review and satisfies that standard because the compelled disclosures are reasonably related to the Legislature's legitimate objective of promoting informed decisionmaking about prescription drug reimbursement rates.

I.

In the panel decision now being reviewed en banc, the Ninth Circuit provided the following description of the parties to this litigation: "Plaintiffs own five independent retail pharmacies licensed in California. Defendants are current or former pharmacy benefit managers ('PBMs'). They 'contract with third-party payors or health plan administrators such as insurers, HMOs, governmental entities, and employer groups to facilitate cost-effective delivery of prescription drugs to health plan members or other persons to whom the third-party payors provide prescription drug benefits.' PBMs assist in the 'processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof.' In other words, PBMs act as intermediaries between pharmacies and third-party payors such as health insurance companies. Pursuant to this role, PBMs may create networks of retail pharmacies that agree to accept certain reimbursement rates when they fill prescriptions for health plan members. According to Defendants, network reimbursements 'generally are lower than what

pharmacies would charge uninsured, cash-paying customers.' " (*Jerry Beeman and Pharmacy Services v. Anthem Prescription Management* (9th Cir. 2011) 652 F.3d 1085, 1090 (*Beeman II*).)

In 2002, plaintiffs filed a federal class action suit alleging that defendants failed to comply with Civil Code section 2527. (All further statutory references are to the Civil Code unless otherwise indicated.) Section 2527 imposes specific obligations on "prescription drug claims processor[s]" as a prerequisite of entering into or performing any contracts with licensed California pharmacies or processing or assisting with the processing of any prescription drug claim involving licensed California pharmacies. (§ 2527, subd. (a).) The act defines "prescription drug claims processor" as "any nongovernmental entity which has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and which processes, consults, advises on, or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof." (§ 2527, subd. (b).) For purposes of this litigation, defendants do not contest that they are "prescription drug claims processors" subject to section 2527. (*Beeman II*, *supra*, 652 F.3d at p. 1090, fn. 1.)

Section 2527, subdivision (c) requires prescription drug claims processors to "conduct[] or obtain[] the results of a study or studies which identifies the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to private consumers. The study or studies shall meet reasonable professional standards of the statistical profession. The determination of the pharmacy's fee

made for purposes of the study or studies shall be computed by reviewing a sample of the pharmacy's usual charges for a random or other representative sample of commonly prescribed drug products, subtracting the average wholesale price of drug ingredients, and averaging the resulting fees by dividing the aggregate of the fees by the number of prescriptions reviewed. A study report shall include a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th). This study or these studies shall be conducted or obtained no less often than every 24 months."

Section 2527, subdivision (d) requires prescription drug claims processors to send the studies to their clients: "The study report or reports obtained pursuant to subdivision (c) shall be transmitted by certified mail by each prescription drug claims processor to the chief executive officer or designee, of each client for whom it performs claims processing services. Consistent with subdivision (c), the processor shall transmit the study or studies to clients no less often than every 24 months. [¶] Nothing in this section shall be construed to require a prescription drug claims processor to transmit to its clients more than two studies meeting the requirements of subdivision (c) during any such 24-month period. [¶] Effective January 1, 1986, a claims processor may comply with subdivision (c) and this subdivision, in the event that no new study or studies meeting the criteria of subdivision (c) have been conducted or obtained subsequent to January 1, 1984, by transmitting the same study or studies previously transmitted, with

notice of cost-of-living changes as measured by the Consumer Price Index (CPI) of the United States Department of Labor."

Section 2528 provides for civil enforcement of section 2527: "A violation of Section 2527 may result only in imposition of a civil remedy, which includes, but is not limited to, imposition of statutory damages of not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000) depending on the severity or gravity of the violation, plus reasonable attorney's fees and costs, declaratory and injunctive relief, and any other relief which the court deems proper. Any owner of a licensed California pharmacy shall have standing to bring an action seeking a civil remedy pursuant to this section so long as his or her pharmacy has a contractual relationship with, or renders pharmaceutical services to, a beneficiary of a client of the prescription drug claims processor, against whom the action is brought provided that no such action may be commenced by the owner unless he or she has notified the processor in writing as to the nature of the alleged violation and the processor fails to remedy the violation within 30 days from the receipt of the notice or fails to undertake steps to remedy the violation within that period and complete the steps promptly thereafter."

Sections 2527 and 2528 were enacted in 1982. (Stats. 1982, ch. 296, § 1, pp. 936–938; Assem. Bill No. 2044 (1981–1982 Reg. Sess.) (Assembly Bill 2044).) The bill was sponsored by the California Pharmacists Association in an effort to increase the rate of reimbursement by third-party payors. (Assem. Com. on Finance, Insurance & Commerce, Analysis of Assem. Bill No. 2044 (1981–1982 Reg. Sess.) for hearing on May 12, 1981, p. 6 (Bill Analy-

sis).) Assembly Bill 2044 was prompted not only by a concern with the reimbursement rates to pharmacists (see Bill Analysis, at pp. 1–2) but also by the United States Supreme Court's 1979 decision holding that the federal antitrust exemption for the "business of insurance," where regulated by state law, does not extend to contracts between insurers and pharmacies (*Group Life & Health Ins. Co. v. Royal Drug Co.* (1979) 440 U.S. 205; see Bill Analysis, at p. 5). As a result of that decision, pharmacists were unable to collectively bargain for fees or collectively refuse to participate in third-party payment programs. (Bill Analysis, at pp. 5, 7.)

As introduced, Assembly Bill 2044 would have imposed specific prices on prescription drug claims processors by requiring nongovernmental third-party payors to reimburse pharmacies for services rendered to group plan members at no less than the "usual charges of the pharmacy for the same or similar services to private consumers not covered by a group plan." (Bill Analysis, at pp. 1–2, underscoring omitted.) The bill also prohibited any third-party payor from imposing any payment systems in which the upper limit on claim payments was "less than the 90th percentile of usual charges within the state." (*Id.* at p. 2.) The bill was opposed by insurance companies, unions, and healthcare service plans, all of which were concerned it would result in increased costs. (*Id.* at pp. 3–4.) The Governor and the Department of Insurance also opposed the bill because it would "inhibit or prevent attempts by insurers at cost control" and "would have the probable result of raising the reimbursable amounts throughout a large portion of the state." (Legis. Counsel Brian L.

Walkup, Dept. Insurance, letter to Assemblymember Bill Lancaster, June 2, 1981, p. 1.)

After failing to make it out of committee, Assembly Bill 2044 was amended to replace the minimum-reimbursement requirements with the current requirement that prescription drug claims processors conduct or obtain, and transmit to their clients, studies identifying the prevailing fees of California pharmacies for pharmaceutical dispensing services. (Assem. Bill 2044, as amended Jan. 18, 1982.) These changes were proposed by the original bill sponsor, the California Pharmacists Association. (See John H. Simons, Cal. Pharmacists Association, mem., Dec. 22, 1981, in Assem. Com. on Finance, Insurance & Commerce bill file.) As the bill's author explained in a letter to the Governor: "An interim hearing of the Assembly Finance, Insurance and Commerce Committee last November established that because of antitrust constraints, pharmacists are unable to negotiate directly with the underwriters or processors. And neither the underwriters or processors conduct statistical analyses of pharmacy pricing levels prior to adopting a reimbursement policy. [¶] These findings caused me to amend [Assembly Bill] 2044 to include essentially the provisions that are now before you . . . . [¶] I am hopeful that the legislation will serve to break the reimbursement logjam that has temporarily strained relationships between pharmacists, underwriters and claims processors." (Assemblymember Bill Lancaster, letter to Governor (1981–1982 Reg. Sess.) June 14, 1982, Governor's chaptered bill files.) The Department of Insurance offered this analysis of the enrolled bill: "[T]he bill is significantly limited in scope . . . . [¶] We point out that the bill is fairly innocuous in its impact, since it merely re-

quires a study to be made and distributed to clients, and does not require any action to be taken based on the study. Nevertheless, it may help identify areas for cost-containment in the future." (Dept. of Insurance, Enrolled Bill Rep. on Assem. Bill No. 2044 (1981–1982 Reg. Sess.) p. 2.)

Although section 2528 provides for private enforcement of section 2527, it does not appear that the statute prompted any litigation until 2002, when plaintiffs initiated a series of suits in federal and state court. In its request for this court's review, the Ninth Circuit, sitting en banc, provided this account: "Plaintiffs filed class action complaints against defendant prescription drug claims processors in the Central District of California in 2002 and 2004 (the *Beeman* cases) alleging, among other things, that Defendants failed to comply with the reporting requirements of section 2527. The district court dismissed the cases for lack of standing without reaching the merits. While Plaintiffs' appeal of the standing issue was pending in our court, three of the five plaintiffs sued some, but not all, of the defendants in Los Angeles Superior Court, again alleging violations of section 2527. The California Court of Appeal affirmed the trial court's dismissal of the suit in an unpublished opinion and declared section 2527 unconstitutional under article I, section 2 of the California Constitution. *See Bradley* [*v. First Health Services Corp.* (Feb. 28, 2007, B185672) [nonpub. opn.]]. The *Bradley* court relied on *ARP Pharmacy* [*Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1312] in which the Court of Appeal also found section 2527's reporting requirements unconstitutional. The California Su-

preme Court denied review of *Bradley* on June 13, 2007.

"In the *Beeman* cases, the Ninth Circuit panel concluded that Plaintiffs had standing, reversed the district court and remanded for further proceedings. *See Beeman v. TDI Managed Care* [*Services, Inc.* (2006)] 449 F.3d 1035, 1037 . . . . On remand, Defendants moved for judgment on the pleadings, arguing that section 2527 unconstitutionally compels speech in violation of both the United States and California Constitutions. Defendants based their constitutional arguments on the decisions in *Bradley*, *ARP* [*Pharmacy Services*], and *A.A.M.* [*Health Group, Inc. v. Argus Health Systems, Inc.* (Feb. 28, 2007, B183468) [nonpub. opn.]]. Each of those California Court of Appeal decisions holds the reporting requirement of section 2527 unconstitutional under article I, section 2 of the California Constitution. Denying Defendants' motions, the district court concluded that there was 'convincing evidence' that the California Supreme Court would not follow the holdings of the intermediate appellate courts. Defendants then filed this interlocutory appeal.

"The majority of a three-judge panel of this court also declined to follow the intermediate California court decisions striking down section 2527 as unconstitutional under California's free speech clause. Instead, it independently assessed the constitutionality of the statute under First Amendment principles, reasoning that the California Supreme Court would decide the state constitutional question 'by relying, primarily, if not exclusively, on First Amendment precedent.' *Beeman* [*II*, *supra*], 652 F.3d at 1094. The majority identified two critical errors in the Court of Appeal decisions that it was convinced the

California Supreme Court would not make: (1) giving insufficient weight to *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47 (2006) . . . and (2) misinterpreting *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

"The dissent argued (1) we were bound by the *Erie* doctrine to follow the California Court of Appeal decisions; (2) the California Supreme Court would not necessarily rely upon First Amendment jurisprudence to interpret its own state's constitutional free speech clause, which 'enjoys existence and force independent of the First Amendment,' [citation], and is 'broader and more protective' than the First Amendment, [citation]; and (3) the California Courts of Appeal had in fact correctly analyzed First Amendment law and incorporated those principles into the decisions to strike down section 2527 under the California Constitution." (*Beeman v. Anthem Prescription Management, LLC* (9th Cir. 2012) 689 F.3d 1002, 1006–1007, fn. omitted (en banc) (*Beeman III*), quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 489, and *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366.)

The Ninth Circuit explained the need for guidance from this court as follows: "The outcome of this appeal is dictated by the scope of the free speech clause of the California Constitution as applied to section 2527. This constitutional question is critical to California's interest in consistent enforcement and interpretation of its constitution and laws in both state and federal courts. It is only because the panel's *Beeman* [*II*] decision has been withdrawn that the result that section 2527 is enforceable in federal,

but not state, courts has been avoided. The majority of the three judge panel acknowledged that this situation, if left in place, would lead to forum shopping and the inconsistent enforcement of state law. [(See *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 74–78.)] Without the California Supreme Court's examination of this question, the risk remains that the *en banc* court would follow the lead of the panel majority to the same end. If, of course, the California Supreme Court itself were to agree with the panel majority, then it too would conclude that the statute is constitutional, and its decision would control in California state and federal courts. The conflicting views of the law in the panel opinion illustrate the importance of this question in the context of (1) whether our court is bound to follow the precedent of *ARP Pharmacy* [*Services*], and (2) to what degree, if any, federal First Amendment precedent affects the constitutionality of section 2527 under California's free speech clause." (*Beeman III*, *supra*, 689 F.3d at p. 1007.)

We granted review in order to resolve this question of state constitutional law.

II.

The free speech guarantee of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

In considering a free speech claim under article I, "we begin with the unquestioned proposition that the California Constitution is an independent document and its constitutional protections are separate from and not dependent upon the federal Constitution . . . ." (*Los Angeles Alliance for Survival v. City of*

Los Angeles, *supra*, 22 Cal.4th at p. 365; see *Gerawan Farming, Inc. v. Lyons*, *supra*, 24 Cal.4th at pp. 489–490 (*Gerawan I*).) "The state Constitution's free speech provision is 'at least as broad' as [citation] and in some ways is broader than [citations] the comparable provision of the federal Constitution's First Amendment." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 958–959 (*Kasky*).) Unlike the First Amendment, California's free speech clause "specifies a 'right' to freedom of speech explicitly and not merely by implication," "runs against . . . private parties as well as governmental actors" and expressly "embrace[s] all subjects." (*Gerawan I*, at pp. 491–493.) However, "[m]erely because our provision is worded more expansively and has been interpreted as more protective than the First Amendment . . . does not mean that it is broader than the First Amendment in all its applications." (*Alliance for Survival*, at p. 367; see *Kasky*, at p. 969.) Our case law interpreting California's free speech clause has given respectful consideration to First Amendment case law for its persuasive value, while making clear that "federal decisions interpreting the First Amendment are not controlling." (*Alliance for Survival*, at p. 367.)

Applying this approach here, we examine the constitutionality of section 2527 by disentangling two questions: Does the statute's requirement that prescription drug claims processors transmit information on pharmacy fees to their clients implicate the right to freedom of speech under the California Constitution? If so, what level of judicial scrutiny applies to section 2527's speech requirement? We address the first question in this part and, answering

it in the affirmative, turn to the second question in part III below.

As noted, section 2527 requires prescription drug claims processors to conduct or obtain, and to transmit to their clients, the results of studies identifying the fees charged by California pharmacies to private customers. The information at issue — a "study report" that includes "a preface, an explanatory summary of the results and findings" that provide various statistics comparing pharmacy fees (§ 2527, subd. (c)) — is factual in nature. This statutorily required communication, we conclude, implicates California's free speech guarantee.

The text of California's free speech guarantee makes clear that the freedom to speak extends to "all subjects." (Cal. Const., art. I, § 2, subd. (a).) In *Gerawan I*, we emphasized the " 'unlimited' scope" of this language in contrast to the First Amendment, which "was 'not intended' to embrace all subjects." (*Gerawan I*, *supra*, 24 Cal.4th at pp. 493, 486.) Just as we observed in *Gerawan I* that the phrase "all subjects" in article I " 'does not exclude' commercial speech from its 'protection' " (*Gerawan I*, at p. 494), here we see no textual basis for excluding from article I's coverage factual statements like the study report required by section 2527.

Further, it is well established that freedom of speech under article I includes both the right to speak and the right to refrain from speaking. "Article I's right to freedom of speech, like the First Amendment's, is implicated in speaking itself. Because speech results from what a speaker chooses to say and what he chooses not to say, the right in question comprises both a right to speak freely and also a right to refrain from doing so at all, and is

therefore put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say." (*Gerawan I*, *supra*, 24 Cal.4th at p. 491.) In *Gerawan I*, we observed that when article I was originally adopted in 1849, "the prevailing political, legal, and social culture was that of Jacksonian democracy," a culture that valued "equality and open opportunity, economic individualism, and wide and unrestrained commercial speech." (*Gerawan I*, at p. 495.) Informed by article I's text and the historical context of its adoption, we held — in a departure from then-controlling First Amendment precedent (*Gerawan I*, at pp. 497–509 [discussing *Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457 (*Glickman*)]) — that a government order requiring a plum grower to fund generic advertising about plums implicates (but does not necessarily violate) the right to freedom of speech under article I. (*Gerawan I*, at pp. 509–515, 517.) The broad principles set forth in *Gerawan I* — that article I's coverage of "all subjects" is " 'unlimited' in scope" (*Gerawan I*, at p. 493) and that the right to speak freely includes the right not to speak at all (*id.* at p. 487) — support the conclusion that a statute requiring transmission of factual information to a business entity in a commercial context implicates article I's free speech clause.

This understanding draws further support from principles articulated by the United States Supreme Court in interpreting "freedom of speech" under the First Amendment. The high court precedent involving speech that most closely approximates the factual information at issue in section 2527 is *Sorrell v. IMS Health Inc.* (2011) 564 U.S. __ [131 S.Ct. 2653] (*Sorrell*). There, the high court considered a First

Amendment challenge to a Vermont law "restrict[ing] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." (*Id.* at p. __ [131 S.Ct. at p. 2659].) In discussing whether the "prescriber-identifying information" should be characterized as "a mere 'commodity' " or as protected speech, the high court noted the general rule that "the creation and dissemination of information are speech within the meaning of the First Amendment." (*Id.* at pp. __–__ [131 S.Ct. at pp. 2666–2667].) The high court then said: "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes." (*Id.* at p. __ [131 S.Ct. at p. 2667].) But the high court stopped short of deciding the issue and instead held that the state restriction, which specifically prohibited disseminating or using the information for marketing, worked an impermissible "speaker- and content-based burden on protected expression," "even assuming . . . that prescriber-identifying information is a mere commodity." (*Ibid.*)

In support of its suggestion that factual information qualifies as protected speech, the high court in *Sorrell* cited *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476 (*Rubin*), which invalidated a federal regulation banning disclosure of alcohol content on beer labels. (See *Sorrell*, *supra*, 564 U.S. at p. __ [131 S.Ct. at p. 2667].) In *Rubin*, there was no dispute that the brewing company sought "to disclose only truthful, verifiable, and nonmisleading factual information about alcohol content on its beer labels." (*Rubin*, at p. 483.) The high court concluded that the

factual information about alcohol content was protected commercial speech and that restrictions on such speech require substantial justification, which the government in that case failed to provide. (*Id.* at pp. 481–486.)

The Ninth Circuit panel here recognized that the government "may not *prohibit* speakers from disseminating facts" but determined that it is "quite different" for the government to compel factual speech. (*Beeman II*, *supra*, 652 F.3d at p. 1100, fn. 14.) Citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, *supra*, 547 U.S. 47 (*FAIR*) and *Riley v. National Federation of Blind, supra*, 487 U.S. 781 (*Riley*), the Ninth Circuit panel concluded that "not all fact-based disclosure requirements are subject to First Amendment scrutiny. Instead, such requirements implicate the First Amendment only if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make." (*Beeman II*, at pp. 1099–1100, fn. omitted.) Respectfully, we do not believe *FAIR* or *Riley* supports the Ninth Circuit panel's conclusion that the reporting requirements of section 2527 "are not subject to *any* form of First Amendment scrutiny." (*Beeman II*, at p. 1106.)

FAIR rejected a First Amendment challenge by various law schools to the 1996 Solomon Amendment's requirement that institutions of higher education, as a condition of receiving federal funds, provide military recruiters the same access provided to other recruiters. (10 U.S.C. § 983.) Addressing the law schools' claim of compelled speech, the high court observed that "recruiting assistance provided by the schools often includes elements of speech. For ex-

ample, schools may send e-mails or post notices on bulletin boards on an employer's behalf. [Citations.] Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment." (*FAIR*, *supra*, 547 U.S. at pp. 61–62.) But the high court observed that "[t]he compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct" and explained that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in [*Board of Education v.*] *Barnette* [(1943) 319 U.S. 624] and *Wooley* [*v. Maynard* (1977) 430 U.S. 705] to suggest that it is." (*FAIR*, at p. 62.)

In rejecting the law schools' compelled speech claim, *FAIR* did not hold that compelled statements of fact fall outside the ambit of First Amendment protection. To the contrary, the high court said that "these compelled statements of fact ('The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.'), like compelled statements of opinion, *are subject to First Amendment scrutiny*." (*FAIR*, *supra*, 547 U.S. at p. 62, italics added.) *FAIR* concluded that such compelled speech withstands First Amendment scrutiny because it does not force a school to speak the government's message or otherwise affect a school's ability to express its own viewpoints (*id.* at pp. 62–65) and because the speech is "only 'compelled' if, and to the extent, the school provides such speech for other recruiters" (*id.* at p. 62).

In *Riley*, the high court invalidated a North Carolina statute that, among other things, required professional fundraisers to disclose, "'[d]uring any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution,'" the percentage of charitable collections actually remitted to charities over the past 12 months. (*Riley*, *supra*, 487 U.S. at p. 786, fn. 3, quoting N.C. Gen. Stat. § 131C-16.1.) In describing this requirement, the high court said: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." (*Riley*, at p. 795.) The high court then addressed the parties' dispute as to whether the disclosure requirement should be analyzed under the intermediate scrutiny standard applicable to commercial speech or under the strict scrutiny standard applicable to fully protected expression. In that discussion, the high court said that "even assuming, without deciding, that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech," i.e., charitable solicitations. (*Id.* at p. 796.) Accordingly, *Riley* concluded that although "here we deal with compelled statements of 'fact' " and not "compelled statements of opinion," the disclosure requirement "burdens protected speech" and "is subject to exacting First Amendment scrutiny." (*Id.* at pp. 797–798.)

Contrary to the Ninth Circuit panel's suggestion (*Beeman II*, *supra*, 652 F.3d at pp. 1098–1099), *Riley* did not hold that the compelled factual disclosure at issue was subject to First Amendment scrutiny only

because it was "inextricably intertwined with otherwise fully protected speech," i.e., charitable solicitations. (*Riley*, *supra*, 487 U.S. at p. 796.) The high court in *Riley* made the latter observation in the course of addressing what level of First Amendment scrutiny should apply to the disclosure requirement, not whether First Amendment scrutiny should apply at all. Before addressing what level of scrutiny should apply, the high court had already concluded that the disclosure requirement was "a content-based regulation of speech" because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." (*Riley*, at p. 795.)

The high court's analyses in the cases discussed above support the conclusion that the principle of freedom of speech protects "'[e]ven dry information, devoid of advocacy, political relevance, or artistic expression . . . .' [Citation.]" (*DVD Copy Control Assn. v. Bunner* (2003) 31 Cal.4th 864, 876.) The express compass of California's free speech clause — "Every person may freely speak, write and publish his or her sentiments *on all subjects* . . . ." (Cal. Const., art. I, § 2, subd. (a), italics added) — reflects this principle. Accordingly, we conclude that section 2527 implicates the right to free speech under article I.

III.

A determination that a statute "implicates [the] right to freedom of speech under article I does not mean that it violates such right." (*Gerawan I*, *supra*, 24 Cal.4th at p. 517.) We now consider what level of judicial scrutiny applies to section 2527's requirement that prescription drug claims processors transmit to their clients a biennial study report on pharmacy fees.

The free speech jurisprudence of our court and the United States Supreme Court reveals no simple formula for deciding what level of scrutiny to apply to a particular speech regulation. Instead, the case law has distinguished carefully among various contexts in which compelled speech occurs and has sensitively considered the effects of compelled speech on both speakers and their audiences. (See *Riley*, *supra*, 487 U.S. at p. 796 ["Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."].) In the compelled speech context, we have looked to First Amendment case law for persuasive guidance when confronted with a paucity of state constitutional doctrine. In *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 11–22 (*Gerawan II*), we found it "critical" to examine several high court precedents on compelled subsidy of private speech in the course of concluding, partly in reliance on Justice Souter's dissenting opinion in *Glickman*, *supra*, 521 U.S. 457, that the proper test for evaluating the California Plum Marketing Program under article I's free speech clause was the intermediate scrutiny standard of *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566 (*Central Hudson*). Here, as in *Gerawan II*, we find instructive "the cornerstones of United States Supreme Court jurisprudence" that have set forth principles relevant to the novel state constitutional claim before us. (*Gerawan II*, *supra*, 33 Cal.4th at p. 11.) Informed by those principles and by basic notions of judicial restraint, we conclude that section 2527 is subject to rational basis review, not heightened scrutiny, under California's free speech clause.

A.

The leading cases on compelled speech reflect the principle that no law may require a speaker to adopt a political or ideological viewpoint imposed by government. In *Board of Education v. Barnette*, *supra*, 319 U.S. 624 (*Barnette*), the high court struck down a West Virginia law requiring children in public schools to salute the flag and recite the Pledge of Allegiance. The court explained that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at pp. 633–634.) *Barnette* famously said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*Id.* at p. 642.)

Three decades later, the high court in *Wooley v. Maynard*, *supra,* 430 U.S. 705 (*Wooley*) applied similar reasoning to invalidate a New Hampshire law prohibiting persons from covering up the state motto "Live Free or Die" on their car license plates. The appellees, who were Jehovah's Witnesses, claimed that the motto violated their moral and religious beliefs, and "New Hampshire's statute in effect require[d] that appellees use their private property as a 'mobile billboard' for the State's ideological message — or suffer a penalty . . . ." (*Id.* at p. 715.) Citing *Barnette*, the high court explained: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the

concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' " (*Wooley*, at p. 714.)

And just recently, the high court in *Agency for International Development v. Alliance for Open Society International, Inc.* (2013) 570 U.S. __ [133 S.Ct. 2321] held unconstitutional a federal law requiring nongovernmental organizations, as a condition of receiving federal funds to combat HIV/AIDS, to have a policy explicitly opposing prostitution. Again citing *Barnette*, the high court said the law offends the First Amendment because it "requires [organizations] to pledge allegiance to the Government's policy of eradicating prostitution." (*Alliance for Open Society*, at p. __ [133 S.Ct. at p. 2332]; see *id.* at p. __ [133 S.Ct. at p. 2330] [the law "demand[s] that funding recipients adopt — as their own — the Government's view on an issue of public concern"].)

In addition to invalidating laws that require speakers to adopt or endorse the government's political or ideological message, the high court's compelled speech jurisprudence has struck down laws requiring a speaker to carry another person's message with which the speaker disagrees. The paradigmatic case is *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241 (*Tornillo*), which invalidated a Florida statute requiring newspapers that criticize a political candidate to provide free and equal space for the candidate to respond. The high court explained that the statute unconstitutionally interfered with "the exercise of editorial control and judgment," which includes "[t]he choice of material to go into a newspaper" and its "treatment of public issues and public

officials — whether fair or unfair." (*Id.* at p. 258.) Under the statute, a newspaper must "print that which it would not otherwise print" (*id.* at p. 256), or "editors might well conclude that the safe course is to avoid controversy" by refraining from criticizing political candidates in the first place (*id.* at p. 257). Either way, the statute undermined the ability of newspapers to advance their own political or electoral views. (*Id.* at pp. 255–257; see also *Turner Broadcasting Systems, Inc. v. FCC* (1994) 512 U.S. 622, 640–641 ["laws that single out the press, or certain elements thereof, for special treatment . . . are always subject to at least some degree of heightened First Amendment scrutiny"].)

In *Pacific Gas & Elec. Co. v. Public Util. Comm'n* (1986) 475 U.S. 1 (*PG&E*), the high court struck down a California agency's order that required a utility company, in its billing envelopes, to include third-party materials critical of the utility's views. The plurality opinion observed that the order "discriminates on the basis of the viewpoints of the selected speakers" (*id.* at p. 12) by granting access to envelope space only "to persons or groups . . . who disagree with [the utility's] views." (*Id.* at p. 13.) Relying extensively on *Tornillo*, the four-justice plurality explained that "[w]ere the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." (*PG&E*, at p. 16.) The agency's order violated the First Amendment "because it forces [the utility] to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints." (*Id.* at pp. 20–21;

see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 574–575 [city may not require parade organizer to allow gay rights group to march in parade carrying its own banner because such "participation would likely be perceived as having resulted from the [parade organizer's] . . . determination . . . that [the gay rights group's] message was worthy of presentation and quite possibly of support as well," thus impinging on "the choice of a speaker not to propound a particular point of view"].)

In addition to "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with," the high court has applied similar reasoning to sustain First Amendment challenges in " 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." (*Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 557.) In *United States v. United Foods, Inc.* (2001) 533 U.S. 405, the high court invalidated an assessment on mushroom producers that the Secretary of Agriculture imposed to fund generic advertisements promoting mushroom sales. By expressing "[t]he message . . . that mushrooms are worth consuming whether or not they are branded," the generic advertising was at odds with "Respondent['s] [desire] to convey the message that its brand of mushrooms is superior to those grown by other producers." (*Id.* at p. 411; see *id.* at pp. 410–411 ["First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree."].) Similarly, as noted, this court in *Gerawan II* held under the California free speech clause that intermediate scrutiny applied

to a plum marketing order that compelled a plum producer with a distinctive brand to fund speech — again, generic advertising — with which it disagreed. (See *Gerawan II*, *supra*, 33 Cal.4th at p. 10 [plaintiff plum grower alleged that " 'it "disagrees" with, and indeed "abhors," the generic advertising, otherwise undescribed, both on political and ideological grounds, as "socialistic" and "collectivist," and also on commercial grounds, as "grouping all . . . plums as though they are the same" and as "embarrassingly silly, idiotic and/or totally ineffective" ' "], quoting *Gerawan I*, *supra*, 24 Cal.4th at pp. 480–482.)

The statute at issue in this case, section 2527, does not implicate the free speech concerns that animate the cases above. Each of those cases involved a law requiring a speaker to adopt, endorse, accommodate, or subsidize a moral, political, or economic viewpoint with which the speaker disagreed. Compulsory allegiance to, association with, or subsidization of a viewpoint strikes at the heart of freedom of expression. Section 2527, which requires prescription drug claims processors to transmit a study report on pharmacy fees to insurance companies, does not compel speech reflecting any viewpoint, belief, or ideology. The study report required by section 2527 discloses objective facts and statistics about pharmacy fees. The speech requirement here "is simply not the same as" forcing a speaker to support or accommodate an idea, belief, or opinion, and "it trivializes the freedom protected in *Barnette* and *Wooley* [and the other cases discussed above] to suggest that it is." (*FAIR*, *supra*, 547 U.S. at p. 62.)

In attempting to analogize this case to the compelled speech precedents above, defendants argue that section 2527 requires them to associate with

speech with which they disagree. Further, defendants contend that because "the pharmacist plaintiffs have argued that they intend to use the reports to lobby for mandatory higher reimbursement rates from claims processors," the statute "forces prescription claims processors to support a political position that is directly adverse to their interests." These contentions are not persuasive.

Although defendants object to transmitting the study reports to their clients, they do not identify any disagreement with the study reports themselves. As noted, section 2527, subdivision (c) prescribes a method for computing pharmacy fees for purposes of the study reports and specifies that the study reports shall include information about pharmacy fees presented in the form of particular facts, statistics, and comparisons. In pressing their free speech claim, defendants do not object to having to conduct or obtain the studies, nor do they claim that the statutory method of computing pharmacy fees, the specified format for presenting the data, or any information contained in the study reports is incorrect, misleading, or otherwise objectionable. Unlike the aggrieved speakers in all of the compelled speech precedents discussed above, defendants do not point to any speech with which they disagree.

Nor do defendants convincingly argue that section 2527 forces them to support a political position adverse to their interests. The possibility that pharmacists may use the study reports to influence public debate over reimbursement rate regulation does not mean that section 2527 makes prescription drug claims processors into conduits for the pharmacists' political message. For one thing, the study reports are not public documents; section 2527, subdi-

vision (d) requires prescription drug claims processors to transmit the studies only to their clients, not to pharmacists or to the general public. Further, defendants cite no evidence that pharmacists have used the reports to influence public debate, even though section 2527 has been the law for three decades.

More importantly, even if pharmacists were to use the study reports to advance their own policy views on reimbursement rates, the objective data in the reports are not themselves reasonably construed as conveying a political position that reimbursement rates are too low. The study reports may reveal that pharmacy fees charged to private customers are typically higher than network reimbursement rates. But this fact, which is already known and undisputed by the parties, entails no particular view on whether reimbursement rates should be increased, decreased, or kept the same — an issue implicating broader questions of health care economics and the proper balance among policy objectives such as ensuring access and containing costs.

Nor do we believe that defendants' transmission of the reports would cause their clients or anyone else to believe that defendants support the pharmacists' policy views. Justice Corrigan notes that although defendants "may have no quarrel regarding the *accuracy* of the data required to be reported," "they vehemently disagree that this data is at all *relevant* in determining proper reimbursement rates . . . ." (Conc. & dis., *post*, at pp. 14–15.) But section 2527 does not require defendants to affirm the relevance of the study reports to reimbursement rates, and mandatory transmission of the reports does not connote that defendants endorse their relevance.

Nothing about the study reports suggests that defendants agree with the policy views of pharmacists or anyone else, and nothing in the statute restricts or compels any speech by defendants about the pharmacists' views, the relevance or irrelevance of the study reports, or reimbursement rates in general. (Cf. *FAIR*, *supra*, 547 U.S. at p. 65 ["Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."].) Defendants' clients and the public at large "can appreciate the difference between speech [a company] sponsors and speech [a company engages in] because legally required to do so." (*Ibid.*)

Defendants further contend, relying on *Riley*, that the same level of scrutiny applies to compelled statements of fact as to compelled statements of opinion. As noted, the high court in *Riley* applied "exacting First Amendment scrutiny" to invalidate a state law requiring professional fundraisers, before or during any solicitation, to make a specific factual disclosure: the percentage of charitable collections actually remitted to charities over the past 12 months. (*Riley*, *supra*, 487 U.S. at p. 798.) Crucial to *Riley*'s analysis, however, was the high court's observation that the required disclosure was "inextricably intertwined with otherwise fully protected speech," namely, the advocacy and persuasive speech characteristic of charitable solicitations. (*Id.* at p. 796; see *Schaumburg v. Citizens for Better Environ.* (1980) 444 U.S. 620, 632 [charitable solicitations typically involve "persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues"].) The high court in

Riley explained that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected speech." (*Riley*, at p. 796.) It was on that basis that *Riley* found applicable the principles governing "compelled speech . . . in the context of fully protected expression" established in cases like *Barnette*, *Wooley*, *Tornillo*, and *PG&E*. (*Riley*, at p. 797.) *Riley*'s conclusion that "[t]hese cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact' " (*ibid.*) followed directly from the court's "refus[al] to separate the component parts of charitable solicitations from the fully protected whole" (*id.* at p. 796).

Unlike the disclosure requirement at issue in *Riley*, section 2527 involves a compelled statement of facts that is not temporally, tangibly, or otherwise linked to other fully protected speech. *Riley* did not hold that such compelled speech is subject to heightened scrutiny. Indeed, the high court said that, "as a general rule," requiring professional fundraisers to make financial disclosures to the state, which the state may itself publish, would be unproblematic because compelled speech of that sort would avoid "burdening a speaker with unwanted speech *during the course of a solicitation*." (*Riley*, *supra*, 487 U.S. at p. 800, italics added.) Section 2527 does not require prescription drug claims processors to transmit the study reports to their clients during the course of negotiating reimbursement rates, renewing a contract, or processing claims. The statute does not re-

quire transmission of the study reports at any particular time or in any particular context, so long as it occurs every two years. (§ 2527, subd. (d).) Unlike the professional fundraisers in *Riley*, prescription drug claims processors can satisfy the statutory mandate independently of any other speech they wish to undertake. Although defendants object to being *compelled* to transmit the study reports to their clients, the fact of compulsion alone, which exists in equal measure when government requires a public disclosure (see *Riley*, at p. 800), is not sufficient to trigger the "exacting" scrutiny applied in *Riley* (*id.* at p. 798).

B.

Although section 2527 does not implicate the core concerns that have motivated searching judicial scrutiny of compelled speech regulations, the Court of Appeal in *ARP Pharmacy* nonetheless concluded that section 2527 must be evaluated under strict scrutiny because it is a content-based regulation of noncommercial speech. (*ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*, *supra*, 138 Cal.App.4th at pp. 1315–1317 (*ARP Pharmacy*).) It is true that section 2527 "requires transmission of specific content" in a study report. (*ARP Pharmacy,* at p. 1315.) But the fact that "[n]othing about the content of this report proposes a commercial transaction between the speaker . . . and its audience" (*id.* at p. 1317) does not necessarily mean the report is not commercial speech. And although *ARP Pharmacy* said the study report "does not affect the economic interests of the required speakers" (*ibid.*), we conclude otherwise, as explained below.

Section 2527 operates in a commercial setting; it prescribes a specific communication that a business

entity must make to its clients. The prescribed communication is purely factual in nature, but it is information that defendants would rather not provide because, as they acknowledge, it could potentially affect prescription drug reimbursement rates. Although commercial speech is often described as "speech proposing a commercial transaction" (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 456 (*Ohralik*)), the high court has also referred to commercial speech more broadly as "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson*, *supra*, 447 U.S. at p. 561). The study reports required by section 2527, though not proposing a commercial transaction, readily qualify as expression related to the economic interests of prescription drug claims processors and their clients. (See *Kasky*, *supra*, 27 Cal.4th at p. 963 [characterizing speech as commercial speech where it involved "a commercial speaker," "an intended commercial audience," and "representations of fact of a commercial nature"].) Further, as we observed in *Kasky*, one reason for drawing a constitutional distinction between commercial and noncommercial speech is that "governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is '"linked inextricably" to those transactions.' " (*Kasky*, *supra*, 27 Cal.4th at p. 955, quoting *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 499 (*44 Liquormart*) (plur. opn.).) The communication required by section 2527 is linked inextricably to government-regulated health insurance transactions, further confirming its commercial nature.

Labeling the study reports "commercial speech," however, does not dispositively determine the level of

judicial scrutiny applicable to section 2527. In *Gerawan II*, we held under article I that the proper standard for evaluating a compelled subsidy of generic advertising was intermediate scrutiny, but as noted, the marketing order there required a commercial speaker to subsidize a public message with which it disagreed. (See *Gerawan II*, *supra*, 33 Cal.4th at p. 10.) We had no occasion in *Gerawan II* or in any subsequent case to consider a compelled speech regulation that requires a commercial speaker to privately transmit purely factual information containing no message with which it disagrees.

Just as we have consulted First Amendment doctrine to inform our determination of the boundary between commercial and noncommercial speech under article I (see *Kasky*, *supra*, 27 Cal.4th at pp. 959–962, 969), here we examine First Amendment case law to inform our determination of the level of scrutiny applicable to the compelled commercial speech in this case under article I. Although regulation of commercial speech is conventionally understood to trigger intermediate scrutiny under the First Amendment (*Central Hudson*, *supra*, 447 U.S. at p. 566), the United States Supreme Court has not automatically applied intermediate scrutiny to all regulations affecting commercial speech. This is perhaps unsurprising given the breadth and elasticity of what is commercial speech, as well as the diversity of regulations arising in the commercial setting. (See *Ohralik*, *supra*, 436 U.S. at p. 456 [commercial speech "occurs in an area traditionally subject to government regulation"].) As explained below, the principles that motivate the commercial speech doctrine lead us to conclude that section 2527 is proper-

ly analyzed under rational basis review, not intermediate scrutiny.

At the outset, we observe that the intermediate scrutiny standard for commercial speech arose in the context of *restrictions* on truthful, nonmisleading statements about products and services, and the high court has consistently applied intermediate scrutiny to *prohibitions* on such speech used for marketing or advertising. (See *Va. Pharmacy Board v. Va. Consumer Council* (1976) 425 U.S. 748, 761–770 (*Virginia Pharmacy Board*); *Central Hudson, supra*, 447 U.S. at pp. 563–566; *44 Liquormart*, 517 U.S. at pp. 501–504; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 553–554; *Sorrell*, *supra*, 564 U.S. at pp. __–__ [131 S.Ct. at pp. 2667–2668].) In stating the rationale for heightened scrutiny of laws restricting commercial speech, the high court has emphasized the importance of the "free flow of commercial information" (*Virginia Pharmacy Board*, at p. 765), "the informational function of advertising" (*Central Hudson*, at p. 563), and "consumer choice" (*44 Liquormart*, at p. 503). The commercial speech doctrine looks skeptically upon the paternalistic "assumption that the public will respond 'irrationally' to the truth." (*Ibid.*; see *Sorrell*, at p. __ [131 S.Ct. at p. 2670] ["the fear that speech might persuade provides no lawful basis for quieting it"]; *Central Hudson*, at p. 562 ["In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them . . . .' [Citations.]"].)

Section 2527 does not impede the free flow of commercial information. It does not interfere with consumer choice, nor does it reflect paternalism toward participants in the marketplace. To the contrary, the Legislature enacted section 2527 in order to make available commercial information that was previously unavailable and potentially could not be provided by pharmacies because of antitrust constraints. (See *ante*, at pp. 5–6.) The statutorily specified consumers of the information — insurance companies, HMOs, and other third-party payors — are sophisticated business entities capable of acting on or ignoring the information as they see fit. If anything, section 2527 furthers the objectives of the commercial speech doctrine by enhancing the flow of information potentially relevant to commercial transactions among pharmacies, prescription drug claims processors, and third-party payors. In challenging section 2527, defendants here — unlike the complainants in cases that have invalidated laws *restricting* commercial speech — seek not to promote the free flow of commercial information for the benefit of the marketplace, but to vindicate their asserted right to provide their clients with only the information they wish to provide.

In evaluating regulations on commercial speech, the high court has distinguished between speech restrictions and compelled disclosures, and has adjusted its level of scrutiny accordingly. In *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626 (*Zauderer*), an Ohio attorney placed an advertisement in various newspapers offering to represent, on a contingent fee basis, women who had suffered injuries from using a contraceptive device. The Office of Disciplinary Counsel of the Supreme Court of Ohio

filed a complaint against the attorney, alleging that the advertisement was deceptive and thus violated a state disciplinary rule because it failed to inform clients they would be liable for costs, as opposed to legal fees, even if their claims were unsuccessful. The attorney argued that Ohio's disciplinary rule violated the First Amendment by requiring him to include information in his advertisement that he did not wish to include. The high court disagreed, explaining that the attorney's arguments "overlook[ed] material differences between disclosure requirements and outright prohibitions on speech." (*Id.* at p. 650.) "In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses," the high court reasoned, "Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." (*Ibid.*) The First Amendment interests implicated by Ohio's disclosure requirement were therefore "substantially weaker than those at stake when speech is actually suppressed." (*Id.* at p. 651, fn. 14.)

Declining to apply either the strict scrutiny applicable to compelled political speech or the intermediate scrutiny applicable to prohibitions on commercial speech, the high court in *Zauderer* explained: "Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' [(*Barnette*, *supra*, 319 U.S. at p. 642.)] The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a re-

quirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see [(*Virginia Pharmacy Board*, *supra*, 425 U.S. 748)], appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.' " (*Zauderer*, *supra*, 471 U.S. at p. 651.)

The *Zauderer* court concluded: "We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." (*Zauderer*, *supra*, 471 U.S. at p. 651.) Noting that "restraints on commercial speech" are subject to " 'least restrictive means' analysis" under *Central Hudson*'s intermediate scrutiny standard, the high court made clear that the level of scrutiny applicable to disclosure requirements is less rigorous: "we do not think it appropriate to strike down such requirements merely because

other possible means by which the State might achieve its purposes can be hypothesized" or because a disclosure requirement "is 'underinclusive' — that is, . . . it does not get at all facets of the problem it is designed to ameliorate." (*Zauderer*, at p. 651, fn. 14.) The Ohio disciplinary rule, the court held, "easily passes muster" under the rational basis standard. (*Id.* at p. 652.)

Zauderer is not directly analogous to the present case because the record before us does not indicate that the purpose or effect of section 2527 is to prevent deception or misleading statements. But we find persuasive the distinction the high court drew "between disclosure requirements and outright prohibitions on speech" (*Zauderer*, *supra*, 471 U.S. at p. 650), and we agree that the free speech interests implicated by compelled disclosure of "purely factual and uncontroversial information" are "substantially weaker than those at stake when speech is actually suppressed" (*id.* at p. 651 & fn. 14). Moreover, although *Zauderer* addressed a disclosure requirement designed to prevent deception, the plurality opinion in *44 Liquormart* subsequently explained that not "*all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. . . . [¶] When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, *or requires the disclosure of beneficial consumer information*, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech" and thus justifies the application of judicial review less strict than the standard applicable to suppres-

sion of commercial speech. (*44 Liquormart*, *supra*, 517 U.S. at p. 501, second italics added.)

We find the reasoning above to be sound: Laws requiring a commercial speaker to make purely factual disclosures related to its business affairs, whether to prevent deception or simply to promote informational transparency, have a "purpose . . . consistent with the reasons for according constitutional protection to commercial speech." (*44 Liquormart*, *supra*, 517 U.S. at p. 501.) Because such laws facilitate rather than impede the "free flow of commercial information" (*Virginia Pharmacy Board*, *supra*, 425 U.S. at p. 765), they do not warrant intermediate scrutiny. Instead, we hold that rational basis review is the proper standard for evaluating such laws under California's free speech clause.

C.

Justice Corrigan says we cite "no *California* case applying rational basis review to a law implicating free speech under our Constitution." (Conc. & dis. opn., *post*, at p. 2.) But that simply reflects "[t]he absence, over many years, of free speech challenges" to the "hundreds of [California] statutory provisions and regulations . . . enacted or adopted in a great variety of contexts that require individuals or entities to ascertain and disclose factual information that the individual or entity might otherwise choose not to disclose." (Conc. opn., *post*, at pp. 3–4.) Apparently there is a first time for everything, including this novel claim under California's free speech clause.

Although the issue is one of first impression for us, our holding today is consistent with the reasoning of numerous courts that have applied rational basis review to disclosure requirements that serve to better inform a commercial audience, whether or not

also intended to prevent deception. In *National Electrical Manufacturers Assn. v. Sorrell* (2d Cir. 2001) 272 F.3d 104 (*National Electrical*), the Second Circuit considered a First Amendment challenge to a Vermont statute requiring manufacturers of mercury-containing products to label their products and packaging to inform consumers that the products contain mercury. A manufacturers association argued that the statute "'"indisputably require[d] them to speak when they would rather not."'" (*Id.* at p. 113.) In rejecting this claim, the Second Circuit explained that "within the class of regulations affecting commercial speech, there are 'material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions on speech.' [(*Zauderer*, *supra*, 471 U.S. at p. 650.)] . . . [¶] . . . [M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.' Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal." (*National Electrical,* at pp. 113–114.) "Additionally, the individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state, [citation], are not ordinarily implicated by compelled commercial disclosure, [citation]. Required disclosure of accurate, factual commercial information presents little risk that the state

is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." (*Id.* at p. 114.)

Applying rational basis review, the Second Circuit held that the required labeling of mercury-containing products did not violate the First Amendment. "Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal," the court held. (*National Electrical*, *supra*, 272 F.3d at p. 115.) Although the compelled disclosure "was not intended to prevent 'consumer confusion or deception' per se," it was "rationally related to the state's goal of reducing mercury contamination" because it would increase consumer awareness of the need to properly dispose of mercury-containing products. (*Ibid.*) The court distinguished its prior holding in *International Dairy Foods Assn. v. Amestoy* (2d Cir. 1996) 92 F.3d 67 (*Amestoy*), which applied intermediate scrutiny to a Vermont law that required labeling of products from cows treated with growth hormone. In that case, the *National Electrical* court explained, the "state disclosure requirement [was] supported by no interest other than the gratification of 'consumer curiosity.' " (*National Electrical*, at p. 115, fn. 6, quoting *Amestoy*, at p. 73; cf. *Amestoy*, at p. 81 (dis. opn. of Leval, J.) [*Zauderer* and *44 Liquormart* send "a clear message" that "[t]he benefit the First Amendment confers in the area of commercial speech is the provision of accurate, nonmisleading, relevant information to consumers. Thus, regulations designed to prevent the flow of

such information are disfavored; regulations designed to provide such information are not."].)

The Second Circuit reaffirmed its reasoning in *National Electrical* eight years later in *New York State Restaurant Assn. v. New York City Board of Health* (2009) 556 F.3d 114, which rejected a First Amendment challenge to a city regulation requiring restaurants to post calorie content information on their menus. The court again held that rational basis review applies to factual disclosure requirements designed to inform consumers, whether or not also designed to prevent deception. (See *id.* at pp. 132–133 [neither *Zauderer* nor subsequent authority limits rational basis review only to disclosures designed to prevent deception].)

The District of Columbia Circuit similarly applied rational basis review to uphold the disclosures required by section 13(f) of the Securities and Exchange Act of 1934 against a First Amendment challenge. (See *Full Value Advisors, LLC v. S.E.C.* (D.C. Cir. 2011) 633 F.3d 1101 (*Full Value*).) The statute mandates that "institutional investment managers such as Full Value file quarterly reports — a 'Form 13F Report' — with the [Securities and Exchange] Commission, disclosing, among other things, the names, shares, and fair market value of the securities over which the institutional managers exercise control." (*Id.* at p. 1104.) Unless one of two statutory exemptions applies, the Securities and Exchange Commission must make the Form 13F Report publicly available. (*Id.* at pp. 1104–1105.) Managers seeking an exemption "must submit enough information on Form 13F for the Commission to make an informed judgment as to the merits of the request." (*Id.* at p. 1105.)

The plaintiff argued that "its inability to control what the Commission does with investment information divulged in the course of an application for confidential treatment or an exemption request [was] a form of compelled speech." (*Full Value*, *supra*, 633 F.3d at p. 1108.) While acknowledging that "[t]he freedom of thought protected by the First Amendment against state action 'includes both the right to speak freely and the right to refrain from speaking at all' " (*ibid.*, quoting *Wooley*, *supra*, 430 U.S. at p. 714), the court concluded that the required disclosures did not raise serious constitutional concerns: "Here the Commission — not the public — is Full Value's only audience. The Act is an effort to regulate complex securities markets, inspire confidence in those markets, and protect proprietary information in the process. It is not a veiled attempt to 'suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.' [Citation.]" (*Full Value*, at p. 1108.) The court likened the disclosure to the mandatory "submi[ssion] of income tax information to the IRS" (*ibid.*) and upheld the disclosure as "a rational means of achieving" Congress's goal (*id.* at p. 1109, citing *Zauderer*, *supra*, 471 U.S. at p. 651).

The Ninth Circuit took a similar approach in upholding a federal Clean Water Act regulation that requires municipal separate storm sewer systems (MS4s) "to 'distribute educational materials to the community . . . about the impacts of stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff' " and "to '[i]nform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.' " (*Envi-*

ronmental Defense Center, Inc. v. U.S. E.P.A. (9th Cir. 2003) 344 F.3d 832, 848 (*Environmental Defense*).) The petitioners argued that the rule violated the First Amendment because it compels "small MS4s to communicate messages that they might not otherwise wish to deliver." (*Ibid.*)

The Ninth Circuit disagreed: "We conclude that the purpose of the challenged provisions is legitimate and consistent with the regulatory goals of the overall scheme of the Clean Water Act, [citation], and does not offend the First Amendment. The State may not constitutionally require an individual to disseminate an ideological message, [citation], but requiring a provider of storm sewers that discharge into national waters to educate the public about the impacts of stormwater discharge on water bodies and to inform affected parties, including the public, about the hazards of improper waste disposal falls short of compelling such speech." (*Environmental Defense*, *supra*, 344 F.3d at p. 849, fn. omitted.) Relying on *Zauderer*, the court contrasted the public education requirement with the compelled speech in *Barnette* and *Wooley*, and said that "[i]nforming the public about safe toxin disposal is non-ideological; it involves no 'compelled recitation of a message' and no 'affirmation of belief.' [Citation.]" (*Environmental Defense*, at pp. 849–850.) The court further observed that the rule did not "prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the [rule] itself. Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law, or from making available federally produced informational materials on the subject and identifying them as such." (*Id.* at p. 850.)

Another example is *Pharmaceutical Care Management Assn. v. Rowe* (1st Cir. 2005) 429 F.3d 294 (*Rowe*), where a national association of pharmacy benefit managers (PBMs) claimed that Maine's Unfair Prescription Drug Practices Act violated the First Amendment by requiring PBMs to disclose information about various financial arrangements and conflicts of interest. Maine enacted the law because PBMs, in their role as intermediaries, "have the opportunity to engage in activities that may benefit the drug manufacturers and PBMs financially to the detriment of the health benefit providers," and a health benefit provider may have "no idea that a PBM may not be working in its interest." (*Rowe*, at p. 298.) The First Circuit determined that the compelled disclosure "does indeed implicate the First Amendment" and that the disclosure was " 'expression related solely to the economic interests of the speaker and its audience' " and thus qualified as commercial speech. (*Id.* at p. 309.) Then, applying *Zauderer*, the court found the law reasonably related to the state's interest not only in "preventing deception of consumers" but also in "increasing public access to prescription drugs" by "'creat[ing] incentives within the market for the abandonment of certain practices that are likely to unnecessarily increase cost without providing any corresponding benefit to the individual whose prescription is being filled and that appear to be designed merely to improve a drug manufacturer's market share.'" (*Rowe*, at p. 310, quoting district court opinion.)

In a concurring opinion, Chief Judge Boudin said, "What is at stake here . . . is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes — in

this case, protecting covered entities from questionable PBM business practices. There are literally thousands of similar regulations on the books — such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer. [¶] The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." (*Rowe*, *supra*, 429 F.3d at p. 316 (conc. opn. of Boudin, C.J.).)

We find the authorities above persuasive. The same reasons that federal appellate courts have given for applying rational basis review under the First Amendment to laws like section 2527 apply with equal force to our interpretation of article I's free speech clause. Basic principles of judicial restraint counsel against making the free speech clause into a warrant for courts to superintend the Legislature's economic policy judgments. Yet that is the risk we would run if we were to make heightened scrutiny applicable to factual disclosure requirements in the commercial context, for such requirements are as ubiquitous in the California Codes as they are in federal law. (See, e.g., Pub. Resources Code, § 21000 et seq. [Cal. Environmental Quality Act requires disclosures to inform the public about environmental effects of proposed projects]; Pub. Resources Code, § 14549, subd. (a) [requiring every glass container manufacturer to report monthly the total tons of new glass food, drink, and beverage containers made in California]; Health & Saf. Code, § 38530 [authorizing regulations to require greenhouse gas emission sources to monitor and report greenhouse gas emis-

sions]; Health & Saf. Code, § 1339.56, subd. (a) [requiring hospitals to annually compile and disclose a list of 25 common outpatient procedures and average charges for those procedures]; Health & Saf. Code, § 1385.03, subd. (a)(1) [requiring health care service plans to disclose rate information for individual and small group contracts at least 60 days before implementing any rate change]; Civ. Code, § 1785.10, subd. (b) [requiring consumer reporting agencies, upon contact by a consumer, to advise the consumer of statutory rights]; Civ. Code, § 1812.509, subd. (b) [requiring employment agencies to notify a jobseeker whether a labor contract exists and whether union membership is required at the establishment to which the jobseeker is being sent]; Civ. Code, § 1714.43, subd. (a)(1) [requiring every retail seller and manufacturer doing business in California with worldwide gross receipts over $100 million to disclose its efforts to eradicate slavery and human trafficking from its direct supply chain].)

Like section 2527, the statutes above and many others do not require regulated entities to adopt or support any viewpoint or opinion. They are not designed to inform or prescribe any specific business or policy outcome, nor are they predicated on any particularized interest in preventing deception or confusion. They simply require disclosure of factual information in order to inform private or public decisionmaking in the economic or political marketplace. We may assume that the regulated entities would prefer not to make these disclosures, many of which run counter to their business interests. But the Legislature has determined that the information should be made available in order to promote informed

choice in the free market and in the development of sound public policy.

Defendants contend that section 2527 aims merely to alter a private contractual relationship and thus differs from disclosure laws having clear public welfare, safety, or consumer protection objectives. But there is no question that laws requiring nutrition labeling, energy labeling, or calorie disclosures, among others, also aim to alter private contractual relationships by making available what legislatures believe to be salient information for market participants to consider. At the same time, it is inaccurate to say that the only objective of section 2527 is to alter a private contractual relationship. As the court in *ARP Pharmacy* observed: "The legislative history suggests that the governmental purpose in enacting section 2527 was to urge third party payors, by the use of statistical information, to compensate pharmacists at a fairer rate for providing pharmaceutical services to their insureds. While increased payment would benefit pharmacists, it also would potentially benefit insured consumers. The theory was that if insurers paid the pharmacies dispensing fees closer to the amount paid by uninsured consumers, pharmacies would be more likely to continue to contract with insurers, and insured consumers would be able to have their prescriptions filled at the pharmacies of their choice." (*ARP Pharmacy*, *supra*, 138 Cal.App.4th at p. 1320.) Like myriad laws requiring informational disclosures in private transactions, section 2527 is easily described as having a public purpose. And the public purpose is not qualitatively different from the "public health" purpose of other disclosure laws that do not trigger heightened scrutiny. (Conc. & dis. opn., *post*, at pp. 10, 14.)

Justice Corrigan contends that "[w]hether one large, sophisticated corporate entity provides such information to a similarly sophisticated entity within the context of a private agreement should be a matter left to negotiation between them, just like any other provision of a contract between corporations. . . . Simply put, the government has taken sides, resorting to compelled speech to promote its vision of what this private contract should look like." (Conc. & dis. opn., *post*, at p. 12.) Justice Corrigan says this is "paternalism writ large" (*id.* at p. 15), even as she urges this court to erect a constitutional shield to protect sophisticated business entities from a state-mandated report that they are entirely free to ignore.

The reality is that section 2527 is not "a unique and unprecedented statute" that "is nothing like any other disclosure statute." (Conc. & dis. opn., *post*, at p. 14.) Disclosure requirements are commonplace even for commercial transactions between sophisticated business entities, and all such laws reflect legislative judgments as to what information should be available for market participants to consider when negotiating or agreeing to a contract, even when one party "could easily contract to secure that information" from the other party. (*Ibid.*; see, e.g., Pub. Resources Code, § 25402.10, subd. (d)(1) [requiring owners and operators of nonresidential buildings to disclose data on energy consumption "to a prospective buyer, lessee of the entire building, or lender that would finance the entire building"]; Health & Saf. Code, § 25359.7, subd. (a) [requiring owners of nonresidential real property to give written notice to buyers, lessors, or renters regarding the presence of hazardous substances]; Civ. Code, § 1101.5, subd. (e)

[requiring sellers of commercial real property, starting in 2019, to disclose in writing to prospective purchasers the statutory requirement to replace noncompliant plumbing fixtures with water-conserving fixtures and "whether the property includes any noncompliant plumbing fixtures"]; Civ. Code, § 1938 [requiring commercial property owners and lessors to state on every lease form or rental agreement whether the property meets applicable standards for making new construction and existing facilities accessible to persons with disabilities].) If such laws are held to trigger heightened scrutiny because of their "paternalism" toward private actors despite the legitimate public interests they are intended to serve, then our courts will be very busy indeed.

To hold that section 2527 and countless similar laws must be subject to heightened scrutiny, including least restrictive means analysis (*Central Hudson*, *supra*, 447 U.S. at pp. 564–565), would open the door to intrusive and persistent judicial second-guessing of legislative choices in the economic sphere. "Such a result is neither wise nor constitutionally required." (*National Electrical*, *supra*, 272 F.3d at p. 116.) History casts doubt on the notion that courts applying heightened scrutiny can sort out which disclosure requirements are sufficiently well justified and which are not — or which requirements "tip the scale" and which merely "level the playing field" between market actors (conc. & dis. opn., *post*, at pp. 11, 12) — without serious risk of constitutionalizing the economic theories or policy views of individual judges. (See *Lochner v. New York* (1905) 198 U.S. 45, 75–76 (dis. opn. of Holmes, J.).) Just as we have long repudiated judicial second-guessing of legislative judgments concerning economic means and ends under

principles of due process of law (see *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 278), we see no basis to resurrect such an approach and improperly aggrandize the power of courts at the expense of the Legislature under state constitutional principles of free speech.

Our holding today does not "all but eviscerate the commercial speech protections of article I." (Conc. & dis. opn., *post*, at p. 14.) Laws that restrict commercial speech remain subject to heightened scrutiny, as do laws that compel a commercial speaker to adopt, endorse, or subsidize a message or viewpoint with which it disagrees. (See *Gerawan II*, *supra*, 33 Cal.4th at p. 10.) Further, there is nothing " 'incongruous' " (conc. & dis. opn., *post*, at p. 5) about holding that section 2527 implicates the right to free speech under article I while also holding that section 2527 is subject to deferential judicial review. This approach parallels the settled understanding of due process and equal protection principles as applied to economic regulations. To say that the Legislature has broad discretion to enact economic regulations is not to say that the Legislature may, willy-nilly, impose burdens on private persons or entities. The exercise of legislative power must not be arbitrary, irrational, or motivated by a bare desire to harm a particular class; the Legislature must always act within constitutional bounds. However, the boundaries with respect to the Legislature's prerogative to require factual disclosures in the commercial setting are necessarily broad. Were it otherwise, the constitutional claims of litigants seeking to avoid duly enacted reporting or disclosure obligations would routinely invite judges to substitute their policy judgments for those of the people's representatives.

D.

Under rational basis review, a statute "comes to us bearing a strong presumption of validity." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314.) "So long as the challenged [regulation] 'bear[s] some rational relationship to a conceivable legitimate state purpose' [citations], it will pass muster; once we identify ' " 'plausible reasons' for [the regulation] 'our inquiry is at an end' " ' [citation]." (*California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 209.)

Defendants do not contend that section 2527 is invalid under rational basis review, and for good reason. The Legislature enacted section 2527 to make certain information on pharmacy fees available to participants in private negotiations over prescription drug reimbursement rates and for potential use in legislative or regulatory forums. The biennial transmittal of study reports on pharmacy fees from prescription drug claims processors to their clients is reasonably related to the legitimate purpose of promoting informed decisionmaking about prescription drug reimbursement rates. Like calorie content information on restaurant menus, nutritional labels on packaged foods, energy labels on home appliances, information about stormwater discharge impacts, and many other required disclosures, the study reports required by section 2527 contribute to the free flow of information in the economic and political marketplace. Accordingly, section 2527 passes rational basis review.

CONCLUSION

For the reasons above, we answer the Ninth Circuit's question as follows: Section 2527 is subject to

rational basis review under California's free speech guarantee (Cal. Const., art. I, § 2, subd. (a)) and satisfies that standard because it is reasonably related to a legitimate policy objective. We disapprove *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*, *supra*, 138 Cal.App.4th 1307, to the extent it applied strict scrutiny to hold that section 2527 violates the free speech rights of prescription drug claims processors under the California Constitution.

LIU, J.

WE CONCUR: KENNARD, J.
BAXTER, J.
WERDEGAR, J.

CONCURRING OPINION BY CANTIL-SAKAUYE, C. J.

I concur fully in the majority opinion's conclusion that Civil Code section 2527 (section 2527) does not violate the state constitutional right of free speech embodied in article I, section 2 of the California Constitution (article I, section 2). Unlike the majority, however, I would base that determination on the ground that the provisions of section 2527 do not even implicate the protections afforded by the state constitutional free speech clause.

In finding that section 2527 implicates the state free speech clause, the majority relies heavily on a passage from this court's opinion in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491 (*Gerawan I*) that indicates that a statute that requires the disclosure of factual information an individual or entity would otherwise not choose to disclose implicates the right to freedom of speech protected by article I, section 2. In my view, however, the relied-upon language in *Gerawan I* — which was not necessary to the holding in that case — is overbroad and misleading insofar as it suggests that the state constitutional right of free speech encompasses not only a right to speak but also a parallel and coextensive right not to speak. I would take this opportunity to clarify and narrow the language in question. As explained, I believe it is more faithful to both the language and historic understanding of the California free speech clause to hold that section 2527 and similar statutory provisions requiring the disclosure of factual information do not implicate (or, in other words, do not fall within the reach of) the state constitutional free speech clause.

As the majority opinion recognizes, article I, section 2 provides in relevant part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Art. I, § 2, subd. (a).) By its terms, article I, section 2 declares the right protected by this constitutional provision is the right to "freely speak, write and publish his or her sentiments on all subjects." On its face, the provision does not purport to afford a constitutional right to refuse to disclose information.

I acknowledge that there are unquestionably circumstances in which a statute that compels speech will implicate the protections of article I, section 2 — for example, when a statute requires an individual to pledge allegiance to or express belief in a political, ideological, or philosophical position with which he or she disagrees, or when the compelled disclosure is so intertwined with protected speech that it is likely to chill such protected speech. In my view, however, it is not accurate to state that, *as a general matter*, article I, section 2 was intended, or should be interpreted, to afford a broad constitutional right to withhold information. There are other state constitutional provisions that are ordinarily associated with a right of nondisclosure — the privilege against self-incrimination and the right of privacy, for example — but it strains credulity to suggest that an individual who refuses to provide factual information when questioned at trial or at a legislative hearing or who declines to provide information required on a tax return or in order to obtain a permit is, by such refusal, exercising his or her *right of free speech*. As the earliest California cases applying the state constitution-

al free speech clause make clear, "[t]he purpose of this provision of the constitution was the abolishment of censorship" (*Daily v. Superior Court* (1896) 112 Cal. 94, 97; see also *In re Shortridge* (1893) 99 Cal. 526, 533-535), *not* to establish a fundamental constitutional right to decline to provide information.

As noted, the source of the majority's contrary conclusion lies in a passage contained in *Gerawan I*, *supra*, 24 Cal.4th 468, that states: "Article I's right to freedom of speech, like the First Amendment's, is implicated in speaking itself. Because speech results from what a speaker chooses to say and what he chooses not to say, *the right in question comprises both a right to speak freely and also a right to refrain from doing so at all, and is therefore put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say*." (*Id*. at p. 491, italics added.) In my view, the emphasized language is overbroad and misleading insofar as it suggests that, as a general matter, the state constitutional right of free speech encompasses not only a right to speak but a parallel and coextensive right not to speak.

In the past, article I, section 2 has been interpreted expansively to protect the right to speak freely (see, e.g., *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908-911; *Daily v. Superior Court*, *supra*, 112 Cal. at pp. 97-99), but the state free speech clause has not historically been understood or interpreted as affording a parallel broad constitutional right "not to speak" when an individual or entity is required by a statute or regulation to disclose factual information. Throughout California's history, hundreds of statutory provisions and regulations have been enacted or adopted in a great

variety of contexts that require individuals or entities to ascertain and disclose factual information that the individual or entity might otherwise choose not to disclose. For example, disclosure of a significant amount of information is required whenever an individual or entity seeks to obtain a permit or license (see, e.g., Bus. & Prof. Code, § 10151), attain admission to a public university (see, e.g., Code Cal. Reg., tit. 5, § 40753), or qualify for a tax exemption or other public benefit (see, e.g., Rev. & Tax. Code, § 17131 et seq.); a refusal to disclose such required information has never been viewed as the exercise of the right of free speech. Similarly, statutes and regulations routinely require disclosure of, for example, the ingredients and nutritional value of packaged food (see, e.g., Health & Saf. Code, § 110100), the total interest and fees applicable to a credit card or loan (Civ. Code §§ 1748.10-1748.14, 1748.20-1748.23, 1917.712; Bus. & Prof. Code, § 10240 et seq.), the presence of potentially carcinogenic chemicals on business premises (Health & Saf. Code, § 25249.6 et seq. [Prop. 65]), the condition of real property upon sale of the property (Civ. Code, § 1102 et seq.), any breach of security experienced by a business maintaining computerized personal information data (Civ. Code, §§ 1798.29, 1798.82), or the nature and investment risk of any insurance product or annuity (Ins. Code, § 762). (See also, maj. opn., *ante*, at p. 36 [listing additional California disclosure statutes].) Although such widespread statutory and regulatory disclosure requirements have sometimes been challenged on other constitutional grounds — for example, as violating the right of privacy, due process, or equal protection (see, e.g., *Hays v. Wood* (1979) 25 Cal.3d 772, 783, 786-795; *Fendrich v. Van de Kamp*

(1986) 182 Cal.App.3d 246, 258-264; *Gerling Global Reinsurance Corp. v. Low* (9th Cir. 2002) 296 F.3d 832, 844-848, 851) — such requirements have not been viewed as implicating the state constitutional right of free speech and historically have not been challenged on that ground. The absence, over many years, of free speech challenges to the numerous California disclosure statutes and regulations speaks volumes regarding the well understood meaning of the state constitutional free speech guarantee.

This is not to say that there are no instances in which a statute that compels speech will implicate the interests that the state free speech clause is intended to protect and will therefore properly be analyzed under the principles generally applicable to other free speech claims. For example, a statute that requires an individual to express belief in an ideological or philosophical precept with which the individual disagrees (cf., e.g., *Board of Education v. Barnette* (1943) 319 U.S. 624, 631-642 [compulsory flag salute and pledge of allegiance]), or that requires a commercial entity to financially subsidize a promotional advertisement that the entity does not endorse and that is drafted by the entity's competitors (*Gerawan I*, *supra*, 24 Cal.4th at pp. 510-511 [required subsidizing of generic plum marketing campaign]), are properly found to implicate the interests protected by the free speech clause. Similarly, a statute that requires the disclosure of information under circumstances that realistically pose a chilling effect on the exercise of constitutionally protected speech is also properly subject to evaluation under constitutional free speech principles. (Cf., e.g., *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 460-463

[disclosure of membership list of controversial political organization].)

But I believe it is not accurate to maintain, as the language in *Gerawan I* suggests, that *every* statute that requires an individual or entity to disclose factual information that the individual or entity would not otherwise disclose falls within the bounds of the state free speech clause. Instead, because the overwhelming majority of statutes or regulations that require an individual or entity to ascertain and disclose factual information do not threaten or otherwise put at risk the protection that the state free speech clause was intended to provide, I believe that a statute that simply requires the ascertainment and disclosure of factual information should be viewed, presumptively, as not implicating the state constitutional free speech clause. Only when there are special circumstances indicating that the required disclosure potentially threatens an interest that the free speech clause was intended to protect should the statute be scrutinized under the free speech guarantee embodied in article I, section 2.

If a statute such as section 2527 is viewed as falling within the reach of the state free speech clause, I would agree with the majority's conclusion that the validity of the statute would properly be evaluated under the deferential rational basis standard. In my view, however, it is not only more faithful to the language and history of article I, section 2, but also more analytically coherent to conclude that the state free speech clause is not implicated when a statute requiring disclosure of factual information does not threaten any of the interests that the free speech clause was intended to protect, rather than to conclude, as the majority does, that such a statute im-

plicates the free speech clause but is nonetheless subject to no greater scrutiny than if the statute did not implicate the right of free speech.

CANTIL-SAKAUYE, C. J.

CONCURRING AND DISSENTING OPINION BY CORRIGAN, J.

I agree with the majority that Civil Code section 2527 (hereafter section 2527, the statute, or the provision) implicates the right of free speech under article I, section 2, subdivision (a) of our state Constitution (article I), which provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." As we explained in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*), "the right in question comprises both a right to speak freely and also a right to refrain from doing so at all, and is therefore put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say." (*Id*. at p. 491.) In light of the history and broad language of article I, "[t]he reference to 'all subjects' obviously included commercial speech . . . ." (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 15 (*Gerawan II*).) Even in the First Amendment context, the United States Supreme Court has held "that the creation and dissemination of information are speech" within the meaning of that provision. (*Sorrell v. IMS Health Inc.* (2011) __ U.S. __ [131 S.Ct. 2653, 2667].) Under our precedent, forcing someone to speak implicates the free speech right under article I, even in a commercial context. By compelling preparation and dissemination of a report about pricing, the statute implicates the state constitutional right *not* to speak under compulsion.

My disagreement with the majority concerns the appropriate standard of review, which is more than simply a dry legal formalism. When the government seeks to prohibit or compel speech, the standard of review is an important safeguard. It requires the government to justify, to varying degrees of rigor, why it should be permitted to do so. In my view, the majority sets the bar for this safeguard too low. There are, broadly, three potential standards: strict scrutiny, intermediate scrutiny, and, least protective, a rational basis justification.

Although recognizing that our state free speech right is implicated, the majority selects a rational basis standard of review. But that standard is generally applicable when a statute does *not* implicate free speech. The majority reasons: "Laws requiring a commercial speaker to make purely factual disclosures related to its business affairs, whether to prevent deception *or simply to promote informational transparency*, have a 'purpose . . . consistent with the reasons for according constitutional protection to commercial speech.' [Citation.] Because such laws facilitate rather than impede the 'free flow of commercial information' [citation], they do not warrant intermediate scrutiny." (Maj. opn., *ante*, at p. 30, italics added.) This reasoning is flawed. It is also inconsistent with the history of article I and our cases construing that provision.

At the outset, it is important to be clear as to our task. We are interpreting a provision of the *California* Constitution that has governed free speech in this state since its inception. We are not bound, in this regard, by United States Supreme Court or lower federal court rulings that interpret the federal constitutional provision. In deciding this case, we

are adopting as a matter of California law and policy, the restrictions to be placed on the government when it seeks to control how its citizens speak or remain silent during the conduct of their own affairs.

Initially, the majority cites no *California* case applying rational basis review to a law implicating free speech under our Constitution. It relies instead on various federal authorities. However, in determining the proper standard of review, we must first examine our *Gerawan* cases, which addressed both the protections afforded commercial speech and the relevant standard of review. There, we considered the constitutionality of a government marketing program that required plum growers to fund generic advertising for plums. We acknowledged in *Gerawan I* that the United States Supreme Court in *Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457, had held that a similar program did not implicate the First Amendment's free speech clause. However, we declined to follow *Glickman*'s reasoning in construing our own state's protection of free speech. We initially observed that article I's free speech clause did not derive from the First Amendment and is generally broader than that provision. (*Gerawan I, supra,* 24 Cal.4th at pp. 489-493; *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366, fn. 9.)

Gerawan I explained that the state free speech provision, from its inception, protected commercial speech, many decades before the United States Supreme Court recognized any commercial speech right in the First Amendment. This was due both to the breadth of its language, providing a right to speak freely "on all subjects," and the history of its origins. (Art. I.) *Gerawan I* observed that, at the time of the

founding of our state, both American legislatures and courts had a history of keeping commercial speech free of regulation, except in cases of unlawful activity or to curb fraud or misleading statements. (*Gerawan I, supra,* 24 Cal.4th at p. 494.) *Gerawan I* described this period in our history: "In California itself in 1849, the prevailing political, legal, and social culture was that of Jacksonian democracy. [Citations.] Jacksonian democracy was animated by 'ideals of equality and open opportunity.' [Citation.] Those ideals worked themselves out in a 'liberal, market-oriented, economic individualism.' [Citation.] What such individualism presupposed, and produced, was wide and unrestrained speech about economic matters generally, including, obviously, commercial affairs." (*Id*. at p. 495.)

Protection of economic speech is not absolute. "[A]rticle I's right to freedom of speech allows compelling one who engages in commercial speech to say through advertising what he otherwise would not say, even about a lawful product or service, in order to render his message truthful and not misleading." (*Gerawan I, supra,* 24 Cal.4th at p. 509.) However, *Gerawan I* concluded that the marketing program at issue compelled funding of "generic advertising that is intended not to prevent or correct any otherwise false or misleading message in the interest of consumer protection, but solely to develop markets and promote sales in the interest of producer welfare." (*Id*. at p. 510.) We remanded the matter to the Court of Appeal, leaving undetermined the proper standard of review. (*Id*. at p. 517.)

We addressed that issue in *Gerawan II* and concluded the proper standard was "the intermediate scrutiny standard articulated by the United States

Supreme Court in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557." (*Gerawan II, supra,* 33 Cal.4th at p. 6.) We observed that "[i]n light of our recognition in *Gerawan I* that the generic advertising program does in fact implicate the free speech clause, . . . we believe it would be incongruous to subject the program to only minimal scrutiny." (*Id*. at p. 21.) Finding persuasive Justice Souter's dissenting opinion in *Glickman*, we stated "the conclusion of the *Glickman* majority that the compelled funding of generic advertising requires only minimal scrutiny is at variance with the general rule that intrusion into free speech rights requires substantial justification, even when the intrusion is incidental to the enforcement of a content-neutral law. [Citation.] The requirement of substantial justification is further supported by the fact that the right to free speech under the California Constitution is in some respects ' "broader" and "greater" ' than under the First Amendment. [Citation to *Gerawan I*]." (*Ibid*.) "Because generic advertising was not self-evidently incidental to the functioning of some important, legislatively established institution, such as a union shop or an integrated state bar as in *Abood* [*v. Detroit Board of Education* (1977) 431 U.S. 209] and *Keller* [*v. State Bar of California* (1990) 496 U.S. 1], Justice Souter argued for treating compelled funding of such advertising the same as any other regulation implicating the right of commercial speech, subjecting it to the test articulated in *Central Hudson* . . . . That standard asks (1) 'whether the expression is protected by the First Amendment,' which means that the expression 'at least must concern lawful activity and not be misleading'; (2) 'whether the asserted governmental interest is sub-

stantial'; if yes to both, then (3) 'whether the regulation directly advances the governmental interest asserted'; and (4) 'whether it is not more extensive than is necessary to serve that interest.' " (*Id*. at p. 22.) *Gerawan II* also noted that "the right Gerawan seeks to exercise has nothing to do with untruthful or misleading speech on its part." (*Ibid*.)

The majority's application of the rational basis standard is inconsistent with the language and history of article I's free speech provision. The language of our constitutional provision is broader than the First Amendment, and it originated during a period in our history when legislatures and courts alike did not interfere with commercial speech, save to correct fraud or misleading statements. As *Gerawan I* observed, our Constitution has a history of protecting commercial speech that long predated its federal counterpart. We observed in *Gerawan II* that if we find a statute implicates the right of free commercial speech, in light of the broad language of our constitutional provision and its strong history of protecting commercial speech, it would be "incongruous" to apply "only minimal scrutiny." (*Gerawan II, supra,* 33 Cal.4th at p. 21.)

The reasoning of the *Gerawan* cases cannot simply be distinguished away on their facts. Although the present case involves the compulsion to speak rather than the compulsion to fund speech, *Gerawan I* made no distinction between the two. (See *Gerawan I, supra,* 24 Cal.4th at p. 491.) Indeed, the funding of speech was objectionable there *because* it implicated the right not to speak. (*Id*. at p. 514 ["One does not speak freely when one is restrained from speaking. But neither does one speak freely when one is compelled to speak."].) That is precisely the

right implicated here, as the majority acknowledges. (See maj. opn., *ante*, at pp. 9-16.)

Because free speech is implicated, *Gerawan II* teaches that the applicable standard is intermediate scrutiny. In formulating the proper test for intermediate scrutiny under our constitution, *Gerawan II* concluded the test of *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557 (*Central Hudson*), "appropriately protects the free speech rights article I was designed to safeguard" in the commercial speech context, which "neither warrants application of the strictest scrutiny reserved for such matters as the censorship or compelled utterance of noncommercial speech [citations], nor can it pass muster simply because it is rationally based." (*Gerawan II, supra,* 33 Cal.4th at p. 22.) Thus, rather than create a new formulation, we adopted the test articulated in *Central Hudson* because it was a workable standard that adequately protected the right of free commercial speech under article I's free speech provision.

The *Gerawan* cases noted some narrow exceptions to this rule, but none apply here. As the majority acknowledges (see maj. opn., *ante*, at p. 30), section 2527 does not compel speech for the purpose of correcting false or misleading statements. (See *Gerawan II, supra,* 33 Cal.4th at p. 22.) *Gerawan I* observed, if "the commercial speaker's message is already truthful and nonmisleading, however, compulsion of speech is not supported by the consumer protection rationale, but must be supported, if at all, by some rationale applicable to all speech, noncommercial as well as commercial." (*Gerawan I, supra,* 24 Cal.4th at p. 498.)

No such general rationale exists here. Section 2527 is "not self-evidently incidental to the functioning of some important, legislatively established institution, such as a union shop or an integrated state bar . . . ." (*Gerawan II, supra,* 33 Cal.4th at p. 22.) In the First Amendment context, the United States Supreme Court in *United States v. United Foods, Inc.* (2001) 533 U.S. 405 (*United Foods*), distinguished its decision in *Glickman*. *United Foods* noted the marketing program in *Glickman* was part of a greater statutory scheme that "used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. The mandated cooperation was judged by Congress to be necessary to maintain a stable market. Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller,* in furtherance of an otherwise legitimate program." (*United Foods*, at pp. 414-415.) By contrast, *United Foods* concluded the assessment there was not part of a " 'broader regulatory system' " and "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." (*Id*. at p. 415.)

There is no question here that section 2527 is *not* part of a greater regulatory scheme. It is a standalone statute enacted, as the majority acknowledges, only because the Legislature could not pass a bill directly regulating pharmacy reimbursement rates. (See maj. opn., *ante*, at pp. 5-7.) Thus, the provision's *only* purpose is directed at speech, to compel speech in the particular context of a contractual rela-

tionship between prescription drug claims processors and third party payers.

The majority suggests another exception to the application of intermediate scrutiny with respect to a statute compelling speech: The promotion of "informational transparency." (Maj. opn., *ante*, at p. 30.) But no such exception exists. Even assuming the federal cases cited by the majority are relevant here, they do not support this exception. The majority quotes *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, which stated: "When a State regulates commercial messages to protect *consumers* from misleading, deceptive, or aggressive sales practices, or *requires the disclosure of beneficial consumer information*, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." (*Id*. at p. 501, italics added; see maj. opn., *ante*, at p. 30.) The majority reads too much into the italicized language. *44 Liquormart* had nothing to do with any type of disclosure, involving instead a complete *ban* on price advertising of alcohol. The plurality cited other recognized exceptions to the application of intermediate scrutiny, including regulation designed to curb "misleading, deceptive, or aggressive sales practices." (*44 Liquormart*, at p. 501.) Thus, its reference to the "disclosure of beneficial consumer information" (*ibid*.) must also have been a reference to an established exception to the ordinary intermediate scrutiny standard, namely, consumer protection. However, that established exception is not as broad as this statement would suggest.

The examples cited by the majority bear this out. The five lower federal court cases discussed by the

majority (see maj. opn., *ante*, at pp. 31-36) purported to apply *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626 (*Zauderer*). That case involved an attorney disciplinary rule requiring that "any advertisement that mentions contingent-fee rates must 'disclos[e] whether percentages are computed before or after deduction of court costs and expenses,' . . ." (*Id.* at p. 633.) In applying rational basis review rather than intermediate scrutiny, *Zauderer* reasoned: "The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information *about the terms under which his services will be available*. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [citation] appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.' [Citations.]" (*Id.* at p. 651, italics added, original italics removed.)

Under *Zauderer*, the principal rationales for applying a lower standard of review for compelled commercial speech are that speakers had no compelling right to refrain from disclosing accurate information about their goods or services, and such disclosures aided consumers by forestalling misleading

or fraudulent statements. Indeed, *Zauderer* held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest *in preventing deception of consumers*." (*Zauderer, supra,* 471 U.S. at p. 651, italics added.) Thus, *Zauderer* did not contemplate that all disclosures of factual information should be subject to the lowest standard of review, but only those principally designed to protect consumers.

Contrary to the majority's reasoning, section 2527 is not a disclosure statute warranting application of the *Zauderer* rationale. As described by the dissenting opinion in the Ninth Circuit's panel decision, the provision is "an unusual law without clear analogies in existing precedent. . . . Essentially, it requires Business A to speak about Business B to Business C. Unlike a disclosure law, it does not require that regulated entities divulge information about themselves to the public, but rather that they privately produce information about third parties to their clients. [Citation.] Moreover, § 2527 is a stand-alone law that does nothing more than mandate speech. It is not ancillary to any comprehensive economic regulatory scheme. [Citation.]" (*Beeman v. Anthem Prescription Management* (9th Cir. 2011) 652 F.3d 1085, 1108 (dis. opn. of Wardlaw, J.), opn. vacated (9th Cir. 2011) 661 F.3d 1199.)

Nothing in the language or spirit of *Zauderer* justifies deviating from intermediate scrutiny as required by *Gerawan II*. Section 2527 does not require a disclosure intended to prevent misleading or fraudulent speech.[1] Nor does it

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[1] See *Zauderer, supra,* 471 U.S. at page 651; see also *Milavetz, Gallop & Milavetz, P. A. v. United States* (2010) 559 U.S.

require a disclosure aimed at consumer protection or public health.[2] Further distinguishing it from a traditional consumer disclosure statute, the provision does not require information about the entity compelled to speak or about the underlying transaction at issue. The statute compels prescription drug claims processors to compile data concerning prices charged by unrelated third parties, in transactions involving uninsured patients at retail. These trans-

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229, 250 ("The challenged provisions of § 528 share the essential features of the rule at issue in *Zauderer*. As in that case, § 528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements . . . ."); *United Foods, supra,* 533 U.S. at page 416 ("There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers."); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 146 (declining to apply *Zauderer* standard to a ban on attorneys using specialist designations: "We express no opinion whether, in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing 'unduly burdensome disclosure requirements [that] offend the First Amendment.' ").

[2] See *Gerawan I, supra,* 24 Cal.4th at page 498; see also *New York State Restaurant v. New York City Bd.* (2d Cir. 2009) 556 F.3d 114, 134 (restaurant calorie disclosure regulation enacted to "(1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it"); *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832, 850 ("[i]nforming the public about safe toxin disposal is non-ideological"); *National Elec. Mfrs. Ass'n v. Sorrell* (2d Cir. 2001) 272 F.3d 104, 115 ("Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal.").

actions have nothing to do with insurance claims or reimbursements. Indeed, the *sole* purpose of requiring the transmittal of this data is to "persuade insurers to increase their reimbursement rates to pharmacies to more closely match the private-pay fees." (*ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1320 (*ARP Pharmacy Services*).)

The majority's attempt to analogize section 2527 to various consumer disclosure statutes is not sustainable. At their core, ordinary disclosure laws are intended to level the playing field between economic actors of uneven strength. These disclosure laws usually require businesses to provide pertinent information to consumers, information about the businesses or their products that are readily and easily ascertained by the businesses themselves but would be prohibitively difficult for consumers to obtain on their own. These disclosures give consumers information that illuminate and clarify the nature of the transactions they face, i.e., they attempt to tell consumers what they are getting themselves into *before* they do so. Armed with this type of information, consumers are placed in a position closer to equal footing with those businesses.

Rather than leveling the scale, section 2527 serves to tip the scale in one direction. The statute is not intended to make two unequal actors more equal, but rather is intended to affect the *outcome* of negotiations between two *equal* actors. There is no doubt that the parties affected by the provision, prescription drug claims processors and payers, are sophisticated business entities. If insurance companies deemed information regarding retail drug pricing relevant to their business, they could easily contract

to secure that information from prescription drug claims processors. Whether one large, sophisticated corporate entity provides such information to a similarly sophisticated entity within the context of a private agreement should be a matter left to negotiation between them, just like any other provision of a contract between corporations. Section 2527 requires one party to the contract to engage in speech *for the sole purpose of potentially modifying a term of a privately negotiated contract*. This imposition serves no leveling function and has absolutely nothing to do with protecting consumers or providing the public with relevant information. It is an attempt by the government to put its thumb on the scale, with the goal of achieving indirectly what it could not accomplish directly. Simply put, the government has taken sides, resorting to compelled speech to promote its vision of what this private contract should look like. Such a purpose hardly warrants deviating from the historical protection of commercial speech as embodied in article I and articulated in our *Gerawan* decisions.

The majority seeks to bolster its position by asserting that section 2527 has a "public purpose," noting that increased reimbursement rates might increase pharmacy participation, thus providing consumers more choice. (Maj. opn., *ante*, at p. 38; *ARP Pharmacy Services, supra,* 138 Cal.App.4th at p. 1320.) One would hope that when the Legislature passes any law it does so with appropriate public regard. Simply because a provision has some kind of perceived public interest does not transform it into a consumer or public protection statute justifying a lower standard of review under *Zauderer*. The Legislature may determine that having higher reim-

bursement rates would ultimately benefit the public. The Legislature may pass any number of laws to this end, including directly regulating reimbursement rates. But the Legislature's preference, by itself, does not justify intrusion into protected speech rights. For example, the government's stance against prostitution, while supporting the passage of criminal laws prohibiting prostitution,[3] does not justify conditioning government funding upon adopting a policy against prostitution. (See *AID v. Alliance for Open Society Internat.* (2013) __ U.S. __ [133 S.Ct. 2321, 2327-2332].) The government's stance against smoking, while supporting increased taxes on cigarettes or a ban on cigarette smoking in certain public places,[4] does not justify compelled speech in the form of graphic images intended to further "an ongoing effort to discourage consumers from buying" cigarettes. (*R.J. Reynolds Tobacco Co. v. Food and Drug Admin.* (D.C. Cir. 2012) 696 F.3d 1205, 1216 (*R.J.*

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[3] See *People v. Pulliam* (1998) 62 Cal.App.4th 1430, 1438 (statute criminalizing loitering to commit prostitution "does not prohibit protected speech"); *People v. Maita* (1984) 157 Cal.App.3d 309, 316 ("It has been flatly held that '[t]he governmental interest in preventing [prostitution] is unrelated to speech or press.' ").

[4] See *Roark & Hardee LP v. City of Austin* (5th Cir. 2008) 522 F.3d 533, 549-550 (rejecting 1st Amend. challenge against an ordinance banning smoking in enclosed public spaces); *U.S. ex rel. Kneepkins v. Gambro Healthcare, Inc.* (D.Mass. 2000) 115 F.Supp.2d 35, 43 ("the tax codes are filled with examples of taxes intended precisely to get people to avoid them, thus discouraging certain unwanted activities (such as excessive smoking or the early withdrawal of retirement savings)"); see also *Department of Revenue of Mont. v. Kurth Ranch* (1994) 511 U.S. 767, 782 (noting that "[b]y imposing cigarette taxes . . . a government wants to discourage smoking").

Reynolds) [applying intermediate scrutiny].) In short, a public purpose that may justify a general law not implicating speech does not necessarily fall within the narrow *Zauderer* rationale justifying a lower standard of review with respect to a law that *does* implicate speech. Indeed, any other conclusion would all but eviscerate the commercial speech protections of article I.

The majority suggests that applying intermediate scrutiny here would "mak[e] the free speech clause into a warrant for courts to superintend the Legislature's economic policy judgments." (Maj. opn., *ante*, at p. 36.) Not so. Section 2527 is a unique and unprecedented statute. It is nothing like any other disclosure statute and does not serve the leveling function usually provided by such statutes. It does not require a disclosure to prevent consumer confusion or fraud, further public health or safety, or inform the public about a particular transaction or entity. Nor is it part of a comprehensive regulatory scheme; it is a single statute directed only at speech, in one industry, designed to influence contractual bargaining between sophisticated business entities. The statute involves *none* of the factors previously cited to warrant a lesser standard of review. The majority fails to explain how application of the intermediate scrutiny standard of *Gerawan II* under such circumstances would call into question the legitimacy of any other true disclosure statute. Contrary to the majority's reasoning, judicial restraint counsels against deviating from our precedents by applying a lesser and unwarranted standard of review.

The majority asserts that section 2527 does not "reflect paternalism toward participants in the marketplace" (maj. opn., *ante*, at p. 27), but merely re-

quires prescription drug claims processors to provide objective information with which "they do not identify any disagreement" (maj. opn., *ante*, at p. 21). The latter assertion is somewhat misleading. Prescription drug claims processors may have no quarrel regarding the *accuracy* of the data required to be reported. However, they vehemently disagree that this data is at all *relevant* in determining proper reimbursement rates and that they can be forced to compile and disseminate it. The statute's requirement reflects the *government's* conclusion that such information *is* relevant in setting reimbursement rates and should be considered, even when these contractual entities have not seen fit to compile and consider such information on their own. Concluding that the government knows better than sophisticated actors in the marketplace as to how best they might protect their own interests is paternalism writ large.

Applying the *Central Hudson* standard to our constitutional free speech provision, intermediate scrutiny review asks: (1) Is the speech protected under article I? (2) Is the asserted governmental interest substantial? If one gives affirmative answers to these questions, then: (3) Does the law directly advance the asserted governmental interest? (4) Is it more extensive than required to serve that interest? (*Gerawan II, supra,* 33 Cal.4th at p. 22; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952; see *Central Hudson, supra,* 447 U.S. at p. 566.)

Section 2527 fails this test. With respect to the first prong, the statute involves protected speech, as the majority agrees.

Whether the asserted governmental interest supporting the provision is substantial may be debated. As noted, "[t]he theory was that if insurers

paid the pharmacies dispensing fees closer to the amount paid by uninsured consumers, pharmacies would be more likely to continue to contract with insurers, and insured consumers would be able to have their prescriptions filled at the pharmacies of their choice." (*ARP Pharmacy Services, supra,* 138 Cal.App.4th at p. 1320.)

Even assuming the government's interest in raising reimbursement rates is substantial, section 2527 fails to directly advance this interest. There is no question that the Legislature has the authority to directly regulate the rate paid by insurance companies to pharmacies, without any impingement upon free speech. As the majority acknowledges, the Legislature declined to pass such a law. (Maj. opn., *ante*, at pp. 5-7.) Failing at that, the Legislature passed a statute that compelled speech in a way that the majority acknowledges "could potentially affect prescription drug reimbursement rates." (Maj. opn., *ante*, at p. 25.) "The mere transmission of the information, unaccompanied by any requirement that it be considered, utilized, or even read by the insurers, seems poorly designed to accomplish the state's goal." (*ARP Pharmacy Services, supra,* 138 Cal.App.4th at p. 1320.) Such an ineffectual law hardly justifies the statute's intrusion into free speech rights.

Further, the fit between the governmental goal of increasing reimbursement rates and section 2527's speech requirement is not sufficiently close to pass muster under intermediate scrutiny. The fit need not be perfect, only reasonable; " ' "not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a

means narrowly tailored to achieve the desired objective." ' [Citation.]" (*Gerawan II, supra,* 33 Cal.4th at p. 23.) The majority asserts that the statute made available "commercial information that was previously unavailable and potentially could not be provided by pharmacies because of antitrust constraints." (Maj. opn., *ante*, at p. 27.) This assertion seems doubtful. As *ARP Pharmacy Services* observed, "a restraint on direct negotiation is not a prohibition on gathering and reporting the statistical information called for by section 2527." (*ARP Pharmacy Services, supra,* 138 Cal.App.4th at p. 1321.) No law precludes pharmacies from compiling data *regarding their own charging practices*, or from disseminating such information to the public at large. Compelling speech from an unwilling party when the same speech can easily be voluntarily provided by a *willing* party hardly provides a proper fit between the government's objectives and the intrusion into protected speech rights. Rather than making available previously unavailable data, section 2527 does two things. (1) It shifts the cost of compiling and disseminating such data from pharmacies to prescription drug claims processors. (2) It increases the likelihood that the data will be seen by insurance companies and other third party payers because it is specifically targeted at them, as opposed to the public generally. There is simply no justification for the former. As for the latter, the vague hope that payers will consider the data because it is directed at them hardly warrants requiring compelled speech. (Cf. *R.J. Reynolds, supra,* 696 F.3d at pp. 1217-1221 [concluding that rules requiring graphic warnings on cigarette packages did not pass intermediate scrutiny, in part because they went beyond disclosing

health effects of smoking and were intended to discourage smoking].)

In sum, our Constitution has a rich history of protecting commercial speech, one that predates the protections of the First Amendment. The free speech right includes the right *not* to be compelled to speak. Under our precedents, any law infringing upon that right must be evaluated under intermediate scrutiny, unless it falls within some narrow exceptions. Those recognized exceptions, including statements required to prevent fraud, cure misleading statements, protect consumers, or protect public health and safety, do not apply to section 2527. The provision is a unique statute requiring speech by one contractual party to another in the hope of altering a term of their contract in a way deemed preferable by the government. It is doubtful that our state's founding fathers, adherents to the principles of Jacksonian democracy and economic individualism, would have countenanced such government-compelled speech within private, arms-length negotiations between sophisticated business entities, for the purpose of promoting a particular outcome. I would hold that section 2527 is subject to intermediate scrutiny under article I and that it fails such scrutiny.

CORRIGAN, J.

I CONCUR:
CHIN, J.

APPENDIX D

Ninth Circuit Nos. 07-56692; 07-56693
S203124
IN THE SUPREME COURT OF CALIFORNIA
En Banc
[Filed July 18, 2012]

JERRY BEEMAN AND PHARMACY SERVICES et al., Plaintiffs and Respondents,

v.

ANTHEM PRESCRIPTION MANAGEMENT et al., Defendants and Appellants.
AND CONSOLIDATED CASE.

The court grants the request, made pursuant to California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. For the purposes of briefing and oral argument, appellants Anthem Prescription Management, LLC et al., and appellants TDI Managed Care Services, Inc. et al., are deemed the petitioners in this court. (Cal. Rules of Court, rule 8.520(a)(6).)

Chin, J., was recused and did not participate.

Cantil-Sakauye
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC., doing business as Finleys Rexall Drug; CHARLES MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC., doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of themselves and all others similarly situated and on behalf of the general public; doing business as Pearson Medical Group Pharmacy, *Plaintiffs-Appellees*,	No. 07-56692 D.C. No. CV-04-00407-VAP Central District of California, Riverside

v.

ANTHEM PRESCRIPTION MANAGEMENT, LLC; ARGUS HEALTH SYSTEMS, INC.; BENESCRIPT SERVICES, INC.; FFI RX MANAGED CARE; FIRST HEALTH SERVICES CORPORATION; MANAGED PHARMACY BENEFITS, INC., formerly known as Cardinal Health MPB Inc.; NATIONAL MEDICAL HEALTH CARD SYSTEMS, INC.; PHARMACARE MANAGEMENT SERVICES, INC.; PRIME THERAPEUTICS; RESTAT CORPORATION; RX SOLUTIONS, INC.; TMESYS, INC.; WHP HEALTH INITIATIVES, INC.; MEDE AMERICA CORP., *Defendants-Appellants*.

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC, doing business as Finleys Rexall Drug; CHARLES MILLER, doing business

No. 07-56693

D.C. No. CV-02-01327-VAP Central District of California, Riverside

ORDER

as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC., doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of themselves and all others similarly situated and on behalf of the general public; doing business as Pearson Medical Group Pharmacy,
Plaintiffs-Appellees,

v.

TDI MANAGED CARE SERVICES, INC., doing business as ECKERD HEALTH SERVICES; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; ADVANCE PCS, Advance PCS Health, L.P.; RX SOLUTIONS, INC.,
Defendants-Appellants.

Filed June 6, 2012

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Diarmuid F. O'Scannlain, Sidney R. Thomas, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton and N. Randy Smith, Circuit Judges.

ORDER

This appeal requires us to decide whether a California statute, Civil Code section 2527, compels speech in violation of the California Constitution. The statute requires drug claims processors to generate studies about pharmacy pricing, summarize the results and disseminate the information to their clients. The three intermediate California appellate courts and the two state trial courts that have addressed this question have held that the reporting requirement of section 2527 violates article I, section 2 of the California Constitution. *See ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.*, 138 Cal. App. 4th 1307 (2006); *A.A.M. Health Grp., Inc. v. Argus Health Sys., Inc*., No. B183468, 2007 WL 602968 (Cal. Ct. App. Feb. 28, 2007); *Bradley v. First Health Servs. Corp.*, No. B185672, 2007 WL 602969 (Cal. Ct. App. Feb. 28, 2007). Ordinarily, the *Erie* doctrine, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), would have required our court to "follow the decisions of [the] intermediate state courts," *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940), but here the panel majority was convinced that the California Supreme Court would decide the question different-

ly. The panel majority concluded that the California Supreme Court would interpret its free speech clause by relying on federal judicial interpretations of the First Amendment to the U.S. Constitution, and conclude that the "statute is constitutional under the First Amendment." *See Beeman v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1095, *reh'g en banc granted*, 661 F.3d 1199 (9th Cir. 2011). Where there is no conflict between state courts of appeal, "[d]ecisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962). Therefore, were the panel holding to stand without the California Supreme Court deciding the question, plaintiffs would be able to sue in federal court to enforce the state statute, but could not sue in state court to enforce the very same statute.

To resolve the classic pre-*Erie* problems of forum shopping and inconsistent enforcement of state law, a majority of the active judges of our court voted to rehear this appeal *en banc*, for the principal purpose of certifying the question to the California Supreme Court. Because the constitutionality of a California legislative enactment under the California Constitution's liberty of speech clause will determine the outcome of this appeal, we respectfully request that the California Supreme Court exercise its discretion to accept and decide the certified question below.

I. Question Certified

Pursuant to Rule 8.548 of the California Rules of Court, we request that the California Supreme Court answer the following question:

> Does California Civil Code section 2527 compel speech in violation of article I, section 2 of the California Constitution?

We understand that the Court may reformulate our question, and we agree to accept and follow the Court's decision.

II. Background

The California legislature enacted California Civil Code sections 2527 and 2528 in 1982 at the behest of the California Pharmacists Association. These stand-alone statutory provisions mandate research and reporting requirements for prescription drug claims processors. But unlike disclosure laws, they do not mandate disclosure to the public; rather, section 2527 requires claims processors to privately generate and produce information about third parties to their clients. "A 'prescription drug claims processor,' [is] any nongovernmental entity which has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and which processes, consults, advises on, or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof." Cal. Civ. Code § 2527(b). The statute requires prescription drug claims processors to "identif[y] the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for phar-

maceutical dispensing services to private consumers," every two years. *Id.* § 2527(c). It also requires them to transmit that information "to the chief executive officer or designee, of each client for whom it performs claims processing services." *Id.* § 2527(d). Section 2528 specifies remedies for section 2527 violations.

Plaintiffs are the owners of five California retail pharmacies. Plaintiffs filed class action complaints against defendant prescription drug claims processors[1] in the Central District of California in 2002 and 2004 (the *Beeman* cases) alleging, among other things, that Defendants failed to comply with the reporting requirements of section 2527. The district court dismissed the cases for lack of standing without reaching the merits. While Plaintiffs' appeal of the standing issue was pending in our court, three of the five plaintiffs sued some, but not all, of the defendants in Los Angeles Superior Court, again alleging violations of section 2527. The California Court of Appeal affirmed the trial court's dismissal of the suit in an unpublished opinion and declared section 2527 unconstitutional under article I, section 2 of the California Constitution. *See Bradley*, 2007 WL 602969. The *Bradley* court relied on *ARP Pharmacy*, 138 Cal. App. 4th at 1312, in which the Court of Appeal also found section 2527's reporting requirements unconstitutional. The California Supreme Court denied review of *Bradley* on June 13, 2007.

In the *Beeman* cases, the Ninth Circuit panel concluded that Plaintiffs had standing, reversed the

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[1] Defendants dispute the allegation that they are "prescription drug claims processors" under section 2527(b), but that issue is not contested in this appeal.

district court and remanded for further proceedings. *See Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1037 (9th Cir. 2006). On remand, Defendants moved for judgment on the pleadings, arguing that section 2527 unconstitutionally compels speech in violation of both the United States and California Constitutions. Defendants based their constitutional arguments on the decisions in *Bradley*, *ARP*, and *A.A.M*. Each of those California Court of Appeal decisions holds the reporting requirement of section 2527 unconstitutional under article I, section 2 of the California Constitution. Denying Defendants' motions, the district court concluded that there was "convincing evidence" that the California Supreme Court would not follow the holdings of the intermediate appellate courts. Defendants then filed this interlocutory appeal.

The majority of a three-judge panel of this court also declined to follow the intermediate California court decisions striking down section 2527 as unconstitutional under California's free speech clause. Instead, it independently assessed the constitutionality of the statute under First Amendment principles, reasoning that the California Supreme Court would decide the state constitutional question "by relying, primarily, if not exclusively, on First Amendment precedent." *Beeman*, 652 F.3d at 1094. The majority identified two critical errors in the Court of Appeal decisions that it was convinced the California Supreme Court would not make: (1) giving insufficient weight to *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"); and (2) misinterpreting *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

The dissent argued (1) we were bound by the *Erie* doctrine to follow the California Court of Appeal decisions; (2) the California Supreme Court would not necessarily rely upon First Amendment jurisprudence to interpret its own state's constitutional free speech clause, which "enjoys existence and force independent of the First Amendment," *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 489 (2000), and is "broader and more protective" than the First Amendment, *L.A. Alliance for Survival v. City of L.A.*, 22 Cal. 4th 352, 366 (2000); and (3) the California Courts of Appeal had in fact correctly analyzed First Amendment law and incorporated those principles into the decisions to strike down section 2527 under the California Constitution.

III. Explanation of Certification

The outcome of this appeal is dictated by the scope of the free speech clause of the California Constitution as applied to section 2527. This constitutional question is critical to California's interest in consistent enforcement and interpretation of its constitution and laws in both state and federal courts. It is only because the panel's *Beeman* decision has been withdrawn that the result that section 2527 is enforceable in federal, but not state, courts has been avoided. The majority of the three judge panel acknowledged that this situation, if left in place, would lead to forum shopping and the inconsistent enforcement of state law. *See Erie*, 304 U.S. at 74-78. Without the California Supreme Court's examination of this question, the risk remains that the *en banc* court would follow the lead of the panel majority to the same end. If, of course, the California Supreme

Court itself were to agree with the panel majority, then it too would conclude that the statute is constitutional, and its decision would control in California state and federal courts. The conflicting views of the law in the panel opinion illustrate the importance of this question in the con- text of (1) whether our court is bound to follow the precedent of *ARP Pharmacy*, and (2) to what degree, if any, federal First Amendment precedent affects the constitutionality of section 2527 under California's free speech clause.

A.

The California Court of Appeal, in a published opinion, held that "the reporting requirement in Civil Code section 2527 violates the free speech rights of prescription drug claims processors." *ARP Pharmacy*, 138 Cal. App. 4th at 1312. Two unpublished opinions of the Court of Appeal reach the same conclusion.[2] "Where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts." *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) (quotation, alteration and citation omitted).

The panel majority (and the district court) found that there was "convincing evidence" that the California Supreme Court would find section 2527's re-

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[2] Although they are not precedent under California Rule of Court 977(a), we may nonetheless rely on the unpublished opinions in *A.A.M.* and *Bradley* to "lend support" to the contention that *ARP Pharmacy* "accurately represents California law." *Emp'rs Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003).

porting requirement constitutional because it would apply First Amendment freedom of expression principles to interpret the free speech clause of the California Constitution. Free speech "[d]ecisions of the United States Supreme Court . . . are entitled to respectful consideration and ought to be followed unless persuasive reasons are presented for taking a different course." *Gallo Cattle Co. v. Kawamura*, 159 Cal. App. 4th 948, 959 (2008) (quoting *People v. Teresinki*, 30 Cal. 3d 822, 836 (1982)). One persuasive reason to deviate from federal precedent is if the "language and history" of the free speech clause suggests a different result than the First Amendment. *Gerawan*, 24 Cal. 4th at 511-13 (discussing, in a compelled speech case, the broad language of California's free speech clause as a persuasive reason not to follow federal First Amendment precedent). The panel majority did not analyze the language and history of the free speech clause, or give any weight to the fact that section 2527 presents a constitutional issue of first impression. *Cf. Gerawan*, 24 Cal. 4th at 511 (finding persuasive reasons not to follow federal precedent where "the precise issue . . . is one of first impression"). Instead, the majority decided that First Amendment law controlled. This conclusion was largely based on the *ARP Pharmacy* court's discussion of First Amendment commercial speech cases in its analysis of section 2527, despite numerous holdings that "[t]he state Constitution's free speech provision is at least as broad as and in some ways is broader than the comparable provision of the federal Constitution's First Amendment." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 958-59 (2002) (quotation and citations omitted). The panel majority analyzed section 2527 under First Amendment precedent, found

that it was not a restriction on speech that merited *any* level of constitutional scrutiny, and concluded that the *ARP Pharmacy*, *A.A.M.* and *Bradley* appeals were all decided incorrectly. Accordingly, the majority held that this court should not follow *ARP Pharmacy*.

The panel dissent argued that the government-mandated private speech required by section 2527 is unique and not squarely within the ambit of any federal or state precedent. For that reason, federal courts should be wary of constraining the scope of California's free speech clause, which "enjoys existence and force independent of the First Amendment." *Gerawan*, 24 Cal. 4th at 489; *L.A. Alliance*, 22 Cal. 4th at 366 ("This court, and the California Courts of Appeal, likewise have indicated that the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment."); *see also, e.g.*, *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop. LLC*, 193 Cal. App. 4th 168, 174 (2011) ("Even though the First Amendment does not protect the right to free speech in a privately owned shopping mall, the California Constitution does."). Even assuming that First Amendment law controls on this California constitutional matter, as explained below, the dissent concluded that there is no "convincing evidence" that the Supreme Court of California would uphold the constitutionality of section 2527 under federal precedent.

B.

The panel majority held that the Courts of Appeal, and particularly the *ARP Pharmacy* panel, made two errors that the Supreme Court of Califor-

nia would not repeat. But for those errors, the majority posited that the California courts, including the Supreme Court, would find 2527 valid without engaging in any level of constitutional scrutiny.

1.

The first error identified by the panel majority was the failure of the *ARP Pharmacy* court to acknowledge *FAIR*, 547 U.S. at 47. The *ARP Pharmacy* court reviewed the constitutionality of section 2527 under the strict scrutiny standard. 138 Cal. App. 4th at 1317. In contrast, the panel majority here held that under *FAIR* the compelled disclosure of pricing information under section 2527 was not subject to First Amendment analysis at all because it did not chill speech or affect the content of the purely factual speech at issue.

The dissent argued that the California courts had not erred in their analysis, because *FAIR* does not stand for the broad proposition that compelled statements of fact are immune from analysis under the First Amendment. *See FAIR*, 547 U.S. at 62 ("[T]hese compelled statements of fact ('The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.'), like compelled statements of opinion, are subject to First Amendment scrutiny."). Furthermore, the law at issue in *FAIR*, the Solomon Amendment, did not "dictate the content of the speech at all." *Id.* The law compelled schools to give military recruiters the same access to students as other recruiters, and any resulting compelled speech on behalf of military recruiters was "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* Here, section 2527 is not part of a regu-

latory scheme. Its only purpose is to compel prescription drug claims processors to obtain or undertake studies about pharmacy pricing, summarize the results and supply them to their clients every two years. Cal. Civ. Code § 2527(c)-(d). Section 2527 is a stand-alone law that does nothing more than mandate the content and transmission of speech. The question is whether section 2527 is subject to some level of constitutional review because it compels speech in violation of California's free speech clause and the First Amendment. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."); *id*. (citing Supreme Court cases holding that information on beer labels and credit reports is "speech").

2.

The panel majority also faulted the *ARP Pharmacy* court for determining, based on First Amendment precedent, that compelled disclosure of statistical information is a content-based regulation of speech. The *ARP Pharmacy* court reached this conclusion by applying Supreme Court precedent identifying compelled "speech that a speaker would not otherwise make" as a "content-based regulation of speech." *See ARP Pharmacy*, 138 Cal. App. 4th at 1315 (quoting *Riley*, 487 U.S. at 795). Because section 2527 requires "transmission of specific content," the Court of Appeal held that it was content-based regulation, and "[t]he fact that it is essentially statistical information does not make it less entitled to First Amendment scrutiny." *Id.* The majority reject-

ed this interpretation of *Riley*, and held that it was constitutionally permissible to compel factual speech as long as there was no direct chilling effect on protected speech.

The dissent argued that this conclusion by the majority was unsupported by any precedent and amounted to an assertion that the compelled dissemination of factual speech is not subject to any First Amendment scrutiny. Allowing the government free reign to compel speech as long as the speech is factual would open up almost all speech to regulation—"Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *See, e.g.*, *Sorrell*, 131 S. Ct. at 2667. No federal or California precedent supports the conclusion that compelled, factual, non-commercial speech is beyond the ambit of California's constitution.

We respectfully submit that the disagreement between the three-judge panel majority and district court on one hand, and the panel dissent and the California Courts of Appeal on the other hand, highlights the need for an authoritative decision on this question of California constitutional law.

IV. Administrative Information

The names and addresses of counsel for the parties are listed in the appendix attached to this order. Cal. R. Ct. 8.548(b)(1). If the Supreme Court of California accepts this request, Appellants should be deemed the Petitioners. *Id.*

The Clerk shall file this order and ten copies, along with all briefs in this appeal with the Supreme Court of California; provide certificates of service to

the parties; and provide additional record materials if so requested by the Supreme Court of California. *See* Cal. R. Ct. 8.548(c) and (d).

All further proceedings in our court are stayed pending receipt of the Supreme Court of California's decision. The en banc panel retains jurisdiction over further proceedings in this court. The parties shall notify the Clerk of this court within one week after the Supreme Court of California accepts or declines this request, and again within one week after it renders its decision.

IT IS SO ORDERED.

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC., doing business as Finleys Rexall Drug; CHARLES MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC., doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of	No. 07-56692 D.C. No. CV-04-00407-VAP **ORDER** [Filed October 31, 2011]

themselves and all others similarly situated and on behalf of the general public; doing business as Pearson Medical Group Pharmacy,

Plaintiffs - Appellees,

v.

ANTHEM PRESCRIPTION MANAGEMENT, LLC; ARGUS HEALTH SYSTEMS, INC.; BENESCRIPT SERVICES, INC.; FFI RX MANAGED CARE; FIRST HEALTH SERVICES CORPORATION; MANAGED PHARMACY BENEFITS, INC., formerly known as Cardinal Health MPB Inc.; NATIONAL MEDICAL HEALTH CARD SYSTEMS, INC.; PHARMACARE MANAGEMENT SERVICES, INC.;

PRIME THERAPEUTICS; RESTAT CORPORATION; RX SOLUTIONS, INC.; TMESYS, INC.; WHP HEALTH INITIATIVES, INC.; MEDE AMERICA CORP., Defendants - Appellants.	
JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC, doing business as Finleys Rexall Drug; CHARLES MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC., doing business as American Surgical	No. 07-56693 D.C. No. CV-02-01327-VAP

Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of themselves and all others similarly situated and on behalf of the general public; doing business as Pearson Medical Group Pharmacy,

Plaintiffs - Appellees,

v.

TDI MANAGED CARE SERVICES, INC., doing business as ECKERD HEALTH SERVICES; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; ADVANCE PCS, Advance PCS Health, L.P.; RX SOLUTIONS, INC.,

Defendants - Appellants.

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Within seven days from the date of this order, the parties shall forward to the Clerk of Court twenty-five additional paper copies of the original briefs and excerpts of record.

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC, doing business as Finleys Rexall Drug; CHARLES MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC, doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of themselves and all others similarly situated and on behalf of the general public; doing business as Pearson Medical Group Pharmacy, *Plaintiffs-Appellees*,	No. 07-56692 D.C. No. CV-04-00407-VAP

v.

ANTHEM PRESCRIPTION MANAGEMENT, LLC; ARGUS HEALTH SYSTEMS, INC.; BENESCRIPT SERVICES, INC.; FFI RX MANAGED CARE; FIRST HEALTH SERVICES CORPORATION; MANAGED PHARMACY BENEFITS, INC., formerly known as Cardinal Health MPB Inc.; NATIONAL MEDICAL HEALTH CARD SYSTEMS, INC.; PHARMACARE MANAGEMENT SERVICES, INC.; PRIME THERAPEUTICS; RESTAT CORPORATION; RX SOLUTIONS, INC.; TMESYS, INC.; WHP HEALTH INITIATIVES, INC.; MEDE AMERICA CORP., *Defendants-Appellants*.

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beemans Pharmacy; ANTHONY HUTCHINSON AND ROCIDA INC, doing business as Finleys Rexall Drug; CHARLES

No. 07-56693
D.C. No.
CV-02-01327-VAP

OPINION

MILLER, doing business as Yucaipai Valley Pharmacy; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY INC, doing business as American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of themselves and all others similarly situated and on behalf of the general public; doing business as Pearson Medical Group Pharmacy,
Plaintiffs-Appellees,

v.

TDI MANAGED CARE SERVICES, INC., doing business as ECKERD HEALTH SERVICES; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; ADVANCE PCS, Advance PCS Health, L.P.; RX SOLUTIONS, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the
Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
March 8, 2011—Pasadena, California

Filed July 19, 2011

Before: Betty B. Fletcher, Stephen Reinhardt, and
Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Wardlaw

COUNSEL

Thomas M. Peterson (argued), Morgan Lewis & Bockius, LLP, San Francisco, California, for the defendants-appellants.

Michael A. Bowse (argued), Browne Woods George LLP, Los Angeles, California, for the plaintiffs-appellees.

OPINION

B. FLETCHER, Circuit Judge:

In this consolidated appeal, defendants-appellants (collectively "Defendants") appeal the denial by the district court of their motions for judg-

ment on the pleadings. Plaintiffs-appellees (collectively "Plaintiffs") brought this diversity suit against Defendants to enforce California Civil Code §§ 2527 and 2528. These statutes require Defendants to supply the results of bi-annual studies of California pharmacies' retail drug pricing for private uninsured customers to their clients, who are third-party payors such as insurance companies and self-insured employer groups. In their motions for judgment, Defendants argued that California Civil Code § 2527 (herein-after "§ 2527") compels speech in violation of the United States and California Constitutions. The district court denied the motions, first reasoning that it was not bound by the state appellate court decisions striking down the statute under the California Constitution, and then holding that § 2527 does not unconstitutionally compel speech. Defendants obtained permission to file an interlocutory appeal. We accordingly have jurisdiction under 28 U.S.C. § 1292(b).

In this appeal, we must decide (1) whether we are bound by the *Erie* doctrine to follow the state appellate court decisions striking down § 2527, and, if not, (2) whether § 2527 violates the First Amendment or the California Constitution's free speech provision. We conclude that *Erie* does not require us to follow the state appellate court decisions, and that § 2527 does not unconstitutionally compel speech under either the United States or California Constitution. We therefore affirm.

I.

A. Factual Background

Plaintiffs own five independent retail pharmacies licensed in California. Defendants are current or former pharmacy benefit managers ("PBMs"). They "contract with third-party payors or health plan administrators such as insurers, HMOs, governmental entities, and employer groups to facilitate cost-effective delivery of prescription drugs to health plan members or other persons to whom the third-party payors provide prescription drug benefits." PBMs assist in the "processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof." In other words, PBMs act as intermediaries between pharmacies and third-party payors such as health insurance companies. Pursuant to this role, PBMs may create networks of retail pharmacies that agree to accept certain reimbursement rates when they fill prescriptions for health plan members. According to Defendants, network reimbursements "generally are lower than what pharmacies would charge uninsured, cash-paying customers."

Section 2527, the challenged statute, requires "prescription drug claims processors"[1] to conduct or obtain studies every 24 months identifying the fees California pharmacies charge to private customers for pharmaceutical dispensing services. Cal.

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[1] Although Defendants maintain that they are not "prescription drug claims processors" under the statute, the issue is not contested for purposes of this appeal.

Civ.Code § 2527(c).[2] The claims processors must send the results of these studies to "each client for whom [they] perform[ ] claims processing services," or, in other words, to third party payors such as insurers. *Id.* § 2527(d).[3] Section 2528 imposes civil

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[2] California Civil Code § 2527(c) reads:

> On or before January 1, 1984, every prescription drug claims processor shall have conducted or obtained the results of a study or studies which identifies the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to private consumers. The study or studies shall meet reasonable professional standards of the statistical profession. The determination of the pharmacy's fee made for purposes of the study or studies shall be computed by reviewing a sample of the pharmacy's usual charges for a random or other representative sample of commonly prescribed drug products, subtracting the average wholesale price of drug ingredients, and averaging the resulting fees by dividing the aggregate of the fees by the number of prescriptions reviewed. A study report shall include a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th). This study or these studies shall be conducted or obtained no less often than every 24 months.

Cal. Civ.Code § 2527(c).

[3] California Civil Code § 2527(d) reads:

> The study report or reports obtained pursuant to subdivision (c) shall be transmitted by certified mail by each prescription drug claims processor to the chief executive officer or designee, of each client for whom it performs claims processing services. Consistent with subdivision (c), the processor shall transmit the study

penalties ranging from $1,000 to $10,000 for violations of § 2527. Cal. Civ.Code § 2528.

The legislative history of § 2527 reveals that the original bill, introduced by the California Pharmacists Association in 1981, required pharmacies to be reimbursed according to their "customary charges" rather than according to rates "unilaterally set by PBMs." *Beeman v. TDI Managed Care Services, Inc.,* 449 F.3d 1035, 1038 (9th Cir.2006) ("*TDI Managed Care* "). The bill was then amended in committee to substitute the reimbursement requirements with the current PBM reporting requirements. According to legislative staff comments, the "purpose of this [amended] bill is to require claims processors to present objective data on the range and percentiles of usual and customary charges of pharmacists in the hope that at a time in the future this information will become the basis for reimbursement." In recommending that the Governor sign the bill, California's Department of Insurance advised that § 2527 "is fairly innocuous in its impact, since it merely requires a study to be made and distributed to clients, and does not require any action to be taken on the basis of that study." The Department further noted that the statute could "help identify areas for cost-containment in the future."

B. Procedural Background

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or studies to clients no less often than every 24 months.

Cal. Civ.Code § 2527(d).

In 2002, Plaintiffs filed a class action complaint in the Central District of California (*Beeman* 02) alleging, *inter alia,* that Defendants failed to conduct the fee studies mandated by § 2527(c). In 2004, Plaintiffs filed a second complaint (*Beeman* 04) alleging the same violation against a second group of Defendants. Both cases were assigned to Judge Virginia Phillips, but have not been consolidated. The district court has diversity jurisdiction over both cases pursuant to 28 U.S.C. § 1332.[4]

The district court granted Defendants' motions to dismiss both cases, concluding that Plaintiffs lacked an injury-in-fact sufficient to confer Article III standing. *See TDI Managed Care,* 449 F.3d at 1038. The district court found it unnecessary to reach Defendants' alternative grounds for seeking dismissal, including that § 2527 violated their right to free speech under the United States and California Constitutions. Plaintiffs appealed.

While the appeal of the district court's standing decision was pending in this court, three of the five Plaintiffs filed suit against some but not all of the *Beeman* 02 and *Beeman* 04 Defendants in Los

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[4] In their Complaints, Plaintiffs allege violations of only state law. Defendants aver that § 2527 violates the United States Constitution as an affirmative defense to Plaintiffs' allegations. Under the well-pleaded complaint rule, therefore, there is no federal question jurisdiction, and the district court's jurisdiction is based solely on diversity of citizenship. See *Vaden v. Discover Bank*, 556 U.S. 49 (2009) ("Under the long-standing well-pleaded complaint rule, however, a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." (internal citations, quotation marks, and alterations omitted)).

Angeles County Superior Court. Like the federal actions, that suit alleged that Defendants failed to comply with the requirements of § 2527. In *Bradley v. First Health Services Corp.,* No. B185672, 2007 WL 602969 (Cal.Ct.App. Feb. 28, 2007), the California Court of Appeal affirmed the state trial court's dismissal of the suit, declaring § 2527 unconstitutional under article I, section 2 of the California Constitution. The Supreme Court of California denied review on June 13, 2007.

Meanwhile, in *TDI Managed Care,* 449 F.3d at 1040, we overturned the district court's standing decisions in *Beeman* 02 and *Beeman* 04 and remanded the case for further proceedings. We did not reach Defendants' argument that § 2527 is unconstitutional because the issue was not fully argued before the district court. *Id.*

On remand, the Defendants moved for judgment on the pleadings in *Beeman* 02 and *Beeman* 04, arguing that § 2527 unconstitutionally compels speech in violation of both the United States and California Constitutions. The Defendants cited three California state appellate court decisions, including *Bradley,* all of which held that § 2527 violates the California Constitution's free speech provision. The district court denied the motions for judgment, reasoning that, under the *Erie* doctrine, it was not bound by the California appellate court decisions because (1) the single published state court decision relied entirely on interpretations of federal, not state, law; and (2) there was persuasive evidence that the Supreme Court of California would not follow the state appellate courts' holding. The district court accordingly conducted its own constitutional analysis and held that § 2527 does not compel speech in viola-

tion of the First Amendment or the California Constitution's free speech provision. The district court then granted Defendants' requests to file a petition for interlocutory appeal. Defendants in *Beeman* 02 and *Beeman* 04 successfully petitioned this court for permission to appeal under 28 U.S.C. § 1292(b), and the cases were consolidated into the current appeal.

Since this appeal was filed, the district court has granted in part Defendants' motions for summary judgment based on res judicata. The court held that the three Plaintiffs who brought suit in *Bradley* are precluded by the final judgment in that case from pursuing their overlapping claims in federal court. The district court further held, however, that the Plaintiffs who were not parties in that state court suit are not so precluded, and can continue to pursue their federal action. On February 25, 2008, we stayed the district court proceedings pending our decision in this appeal.

II.

"In an interlocutory appeal, we review de novo the district court's denial of a motion for judgment on the pleadings." *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.,* 423 F.3d 1056, 1063 (9th Cir.2005). Here, we must decide whether Defendants' motions for judgment should have been granted on the ground that § 2527 violates either the United States or California Constitution.

A. *Erie* Doctrine

[1] We first determine whether, in exercising diversity jurisdiction over this case, we are bound by

the California state appellate courts' holdings that § 2527 is unconstitutional under the California Constitution's free speech provision. The seminal case of *Erie Railway Co. v. Tompkins,* 304 U.S. 64, 71–80 (1938), held that federal courts exercising diversity jurisdiction must apply as their rules of decision the substantive law of the states. Generally, state law is determined by statutes or by pronouncements from the state's highest court. *See West v. American Telegraph & Telephone Co.,* 311 U.S. 223, 236–37 (1940); *Vestar Dev. II, LLC v. General Dynamics Corp.,* 249 F.3d 958, 960 (9th Cir.2001). In cases where a state supreme court has not addressed the presented issue of state law, "a federal court is obligated to follow the decisions of the state's intermediate appellate courts" unless the court finds "convincing evidence that the state's supreme court likely would not follow [them]." *Ryman v. Sears, Roebuck and Co.,* 505 F.3d 993, 994 (9th Cir.2007) (internal quotation marks and citations omitted). As the inquiry is one purely of law, we determine de novo whether *Erie* requires us to follow the reasoning of the state appellate courts on the issue of § 2527's constitutionality.

Three California appellate court decisions have concluded that § 2527 violates the free speech clause of the California Constitution. The first of these decisions, *ARP Pharmacy Servs. Inc. v. Gallagher Bassett Servs., Inc.,* 138 Cal.App.4th 1307, 42 Cal.Rptr.3d 256 (2006), is set forth in a published opinion. The two subsequent decisions—*A.A.M. Health Group, Inc. v. Argus Health Systems, Inc.,* No. B183468, 2007 WL 602968 (Cal.Ct.App. Feb. 28, 2007) and *Bradley*—decided on the same day, relied heavily on *ARP* and remain unpublished. All three decisions came out of California's second appellate district;

none of the state's five other appellate districts has opined on the issue.

The district court, in concluding that it was not bound by the state appellate court holdings, considered only the *ARP* decision. It declined to consider the two unpublished decisions, citing California Rule of Court 977(a).[5] Defendants correctly argue that we are not precluded from considering these unpublished decisions as a possible reflection of California law, although they have no precedential value. *See Employers Ins. of Wausau v. Granite State Ins. Co.,* 330 F.3d 1214, 1220 n. 8 (9th Cir.2003). Therefore, we consider all three California appellate court decisions in our analysis.

1.

[2] First, the district court reasoned that it was not bound by the state appellate court decisions because they "rest entirely on interpretations of federal, not state law." It is true that *ARP,* the first state appellate court opinion on the issue of § 2527 's constitutionality, "applied legal principles derived exclusively from federal constitutional law." The state court decisions to which *ARP* cites either were similarly decided under the federal Constitution or serve only as duplicate references to analogous federal decisions. Nonetheless, the ultimate conclusion reached

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[5] California Rule of Court 977(a) reads: "[Unpublished opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding...."

in *ARP* is one of state law, not federal law. *See ARP,* 42 Cal. Rptr. 3d at 267 ("We conclude that the reporting requirement in section 2527 and the related penalty and enforcement provisions in section 2528 violate the free speech provision of the California Constitution."). We note that the state court did not apparently reach its conclusion under the First Amendment and then simply extend it to California's free speech provision; its opinion purports to analyze the statute only under article I, section 2 of the California Constitution. Accordingly, the current operative law in the State of California's second appellate district is that § 2527 is unconstitutional under the California Constitution.

[3] No authority supports the premise that, when a state court relies primarily on federal cases to reach a conclusion under state law, its decision is exempt from *Erie.* Thus, the state court's exclusive reliance upon and application of federal case law does not automatically allow federal courts to disregard its holding as the substantive law of the state. Pursuant to *Erie, ARP*'s holding as to § 2527 's constitutionality under the California Constitution's free speech provision is the rule of decision that a federal court sitting in diversity must apply (subject to the "convincing evidence" exception discussed below).[6]

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[6] *A.A.M. Health* and *Bradley* rely heavily on *ARP*, in addition to federal case law, in reaching the same conclusion. Like *ARP*, those decisions interpret only California's free speech provision, and not the First Amendment.

2.

[4] The district court alternatively reasoned that, even if *ARP's* holding was one under state law, "there is convincing evidence that the Supreme Court of California" would not follow them. We agree. We hold that there is convincing evidence that, in assessing the constitutionality of § 2527, the Supreme Court of California would construe article I, section 2 of the California Constitution as coextensive with the First Amendment. Because, as we explain in Part B below, § 2527 does not violate the First Amendment, we believe that the Supreme Court of California would deem § 2527 constitutional under the state constitution as well. Accordingly, we conclude that, in this case, the state supreme court would not follow the holdings of the state appellate courts. *Erie* does not, therefore, require us to apply *ARP, A.A.M. Health,* or *Bradley* in deciding whether Defendants' motions should have been granted.

California courts generally "follow the United States Supreme Court in matters concerning free speech doctrine ... unless persuasive reasons are presented for taking a different course." *Gallo Cattle Co. v. Kawamura,* 159 Cal.App.4th 948, 959 (2008) (internal citations and quotation marks omitted). California courts have identified and applied "four categories of potential sources of such persuasive reasons":

> (1) something "in the language or history of the California provision suggests that the issue before us should be resolved differently than under the federal Constitution"; (2) "the high court 'hands down a decision which limits rights established by earlier precedent in

> a manner inconsistent with the spirit of the earlier opinion' "; (3) there are vigorous "dissenting opinions [or] incisive academic criticism of those decisions"; or (4) following the federal rule would "overturn established California doctrine affording greater rights."

Id. at 959, 72 Cal.Rptr.3d 1 (quoting *People v. Teresinski,* 30 Cal.3d 822, 836–837 (Cal. 1982)); *see Gerawan Farming, Inc. v. Lyons,* 24 Cal.4th 468, 510-12 (Cal. 2000) (applying these factors).

Considering these limited categories, we find no reason to believe that the California Supreme Court would not, in accordance with its general practice, decide the issue before us by relying primarily, if not exclusively, on First Amendment precedent. The California Supreme Court has interpreted free speech protections under the California Constitution to be "in some ways broader" than those under the First Amendment. *Kasky v. Nike, Inc.,* 27 Cal.4th 939, 958–59 (Cal. 2002). No statutory language, authoritative decision, or California legal doctrine, however, suggests that, to the extent that California's free speech provision can be broader than the First Amendment, such additional breadth operates in the context of compelled speech. *Gerawan,* a recent case in which the California Supreme Court interpreted its Constitution more expansively than the First Amendment, dealt only with the narrow issue of compelled subsidies for commercial speech, rather than compelled speech more broadly.[7] As discussed

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[7] Notably, *Gerawan* came down before *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), another commercial speech subsidy decision by the U.S. Supreme Court. *United Foods* approaches and distinguishes prior compelled subsidy cases in a

more fully below, cases dealing with commercial speech and compelled subsidies are of little relevance here.[8] Finally, there has been no noteworthy criticism of the First Amendment compelled speech jurisprudence on the basis of which the California Supreme Court would choose to depart from those cases. Thus, we find no persuasive basis on which to assume that the Supreme Court of California would read the state's free speech provision differently or more expansively than the First Amendment in the compelled speech context.

Indeed, none of the state appellate court decisions opining on § 2527 's constitutionality even suggests that its holding turns on a more expansive reading of California's free speech provision than of the First Amendment. Instead, these opinions rely exclusively on federal First Amendment doctrine to reach their conclusions. *ARP* mentions the U.S. Supreme Court by name six times, and the key parts of its holdings are expressly based on its purported adoption of federal precedent. *See, e.g., ARP,* 138

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similar manner as does *Gerawan*. Therefore, the distinction between the United States and California Constitutions, even on the narrow subject of subsidies for commercial speech, probably no longer exists after United Foods further clarified the scope of First Amendment protection in this area.

8 ARP cites to *Gerawan* only in conjunction with federal precedent and for the general proposition that, "like the First Amendment [ ]," the California Constitution protects against compelled speech. *Gerawan*, 24 Cal.4th at 491. *ARP* does not suggest that *Gerawan* serves as independent state authority for its actual holding that § 2527 compels speech in a manner that infringes upon the California Constitution. In fact, *ARP* expressly distinguishes compelled subsidy cases and concludes, as we do, that they are inapposite. *See* 42 Cal.Rptr.3d at 262.

Cal.App.4th at 1314–15 (discussing *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005) and holding that "[*u*]*nder this definition* [of compelled speech], section 2527, which requires drug claims processors to obtain and transmit drug processing cost reports to [their] clients, is properly classified as 'true' compelled speech" (emphasis added)). *A.A.M. Health* is even more explicit on this point. *A.A.M. Health,* 2007 WL 602968, at *3 (assuming for purposes of analyzing *FAIR* that "the freedom of speech in the federal and state constitutions are coextensive"). Although the state appellate courts' application of First Amendment precedent was erroneous, those opinions nonetheless make clear that they are attempting to follow federal law.

It is evident that the California Supreme Court, like the state appellate courts, would analyze the issue of § 2527 's constitutionality under article I, section 2 of the California Constitution by following First Amendment doctrine. And because, as discussed below, § 2527 is constitutional under the First Amendment, we believe that the California Supreme Court would reach the same conclusion under its own constitution.

Conversely, we conclude that the Supreme Court of California would reject the holdings of *ARP, A.A.M. Health,* and *Bradley*. Indeed, in analyzing and applying First Amendment law, the state appellate courts committed several critical errors. First, the *ARP* court ignored the Supreme Court's most recent case on compelled speech, *Rumsfeld v. Forum for Academic and Institutional Rights,* 547 U.S. 47 (2006) ("*FAIR*"), in its discussion and application of federal law. Because *FAIR* clarifies the line between compulsion of speech that does and does not infringe

upon the First Amendment, its analysis is highly relevant and directly undermines the conclusion reached in *ARP*. Second, the *ARP* court incorrectly interpreted and applied the federal case law that it did cite. Specifically, the opinion fails to recognize the key distinctions between the speech at issue in this case and that in *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988), a decision on which *ARP* heavily relies. The compelled disclosure in *Riley* had a direct chilling effect on protected First Amendment speech, and it was on this basis that the disclosure was struck down. No such chilling effect exists here.[9]

Citing *ARP* extensively, neither subsequent unpublished state appellate court decision offers any significant analytic support for its conclusion. *Bradley* relies almost exclusively on *ARP,* and does little to fill the gaps in that opinion's reasoning. *A.A.M. Health,* at least, acknowledges the Supreme Court's holding in *FAIR*. 2007 WL 602968, at *3. Nonetheless, *A.A.M. Health* fails to examine or appreciate *FAIR's* significance, simply concluding without analysis that it does not apply because "section 2527 is not analogous to a law that governs a course of conduct." *Id.* This purported distinction, however, is based on an overly superficial reading of the *FAIR* decision.

Thus, all three state appellate decisions are fatally flawed in their analysis of federal precedent. These errors provide further evidence that the Supreme Court of California would not reach the same

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[9] The state court's errors in applying federal law are more fully discussed in our First Amendment analysis in Part B, below.

result. *Cf. Briceno,* 555 F.3d at 1080–82 (reasoning that the Supreme Court of California would not adopt state appellate court decisions interpreting a provision of the California Penal Code); *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1482–83 (9th Cir.1986) (concluding that the Supreme Court of California would not follow the decision of an appellate court because its analysis was "flawed"); *Owen By and Through Owen v. United States,* 713 F.2d 1461, 1465–66 (9th Cir.1983) (pointing out "defects" in a state appellate court's interpretations of a California statute governing settlement agreements, and concluding that the California Supreme Court would follow this circuit's interpretation instead).

[5] We are convinced that the California Supreme Court would, consistent with this opinion, rely primarily on (and correctly apply) First Amendment jurisprudence when presented with the question of § 2527 's constitutionality under the California Constitution. And because, as explained below, the statute is constitutional under the First Amendment, the California Supreme Court would not follow the holdings of the state appellate courts, but rather would uphold the statute's constitutionality. *Erie* does not, therefore, require us to apply to this case the state courts' holding that § 2527 is unconstitutional under the California Constitution.[10]

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[10] Defendants and our dissenting colleague place great weight upon the fact that, after the district court's decision on the motions for judgment on the pleadings, the Supreme Court of California denied Plaintiffs' petition for review of *Bradley*. According to Defendants, the Supreme Court of California's refusal to reject *ARP*, *A.A.M. Health*, and *Bradley* in favor of the district court's constitutional analysis is the best evidence that it would

B. First Amendment

[6] As we are not bound under *Erie* to follow the state appellate decisions, we now independently assess the constitutionality of § 2527. Because the result under both the United States and California Constitutions turns on First Amendment law, we start our analysis there. It is a well-established principle that freedom of speech not only protects the right to speak, but also "prohibits the government from telling people what they must say." *FAIR,* 547 U.S. at 61. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of

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not decide the constitutionality of § 2527 differently from the California appellate courts.

A state's highest court's refusal to grant discretionary review of a lower court decision is not dispositive of whether it agrees with the lower court's holding. *See Ryman*, 505 F.3d at 995 n.2. Indeed, the Supreme Court of California has instructed that its refusal to grant a hearing in a particular case is not to be construed as an affirmative approval of an intermediate appellate court opinion. *See, e.g.*, *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 925 n.3 (9th Cir. 2000) ("The California Supreme Court's denial of our certification request is in no way an expression of its opinion on the correctness of the judgments in those two cases.") (citing *Trope v. Katz*, 11 Cal.4th 274, 287 n.1 (Cal. 1995)). Moreover, in *Bradley*, three of the seven California Supreme Court Justices recused themselves from ruling on the petition for review. Finally, the Supreme Court denied review in *Bradley* after the district court in this case refused to follow the holdings of the state appellate courts. Thus, in declining to review the decision in *Bradley*, the Supreme Court declined not only to reverse the lower courts, but also to affirm them in the face of a contrary federal holding. We therefore decline to give the Supreme Court of California's refusal to hear *Bradley* the significance for which Defendants advocate.

mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (internal citation and quotation marks omitted). Here, Defendants argue that § 2527 's requirements violate their First Amendment right to be free from compelled speech.

1.

As a preliminary matter, we must decide whether Defendants mount a facial or an as applied challenge to § 2527. Plaintiffs argue that Defendants' argument is based on nothing more than "the words of the statute," and is therefore a facial challenge. Defendants respond that, because they raise the statute's unconstitutionality in response to Plaintiffs' attempts to enforce the statute against them, this is an as applied challenge.

We conclude that this case presents a facial challenge. The thrust of Defendants' argument is that neither they nor any other PBM should ever have to comply with § 2527 's directive because the statute itself unconstitutionally compels speech. *See Doe v. Reed,* 561 U.S. 186 (2010) (noting that the presented challenge to Washington's election law was " 'facial' in that it [was] not limited to plaintiffs' particular case, but challeng[ed] the application of the law more broadly to all referendum petitions"). Defendants challenge neither the specific manner in which the statute applies to them nor a particular instance of the statute's application. *See, e.g., Reno v. Flores,* 507 U.S. 292, 300 (1993) (noting that the case involved a facial challenge because the respondents were not challenging the regulation's application in a particular instance). Although they bring their challenge in response to an enforcement action, Defendants are

not alleging that the statute is unconstitutional only as applied in the context of Plaintiffs' suit. Rather, if we were to find in Defendants' favor, we would necessarily hold that § 2527 violates the First Amendment whenever and against whomever it is enforced.

Thus, in order to succeed in their facial challenge to § 2527, Defendants must show that "no set of circumstances exists under which the [statute] would be valid." *Reno,* 507 U.S. at 301 (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)) (internal quotation marks omitted). A facial challenge presents a "heavy" burden, and is the "most difficult challenge to mount successfully." *Salerno,* 481 U.S. at 745.

2.

Moving to the merits of Defendants' argument, we evaluate the speech compelled by § 2527 in order to determine whether it infringes on the First Amendment. The Supreme Court first established the Constitution's prohibition on compelled speech in *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624 (1943). There, the Court held unconstitutional a state law compelling students to salute the flag and recite the Pledge of Allegiance in schools. *Id.* at 642. The Court reasoned that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." *Id.* at 636. The Court again opined on the issue of compelled speech in *Wooley,* 430 U.S. at 714–15. Striking down a New Hampshire law requiring vehicles to bear license plates with the state motto "Live Free or Die," the Court reasoned

that "a state measure which forces an individual ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable" invades the sphere protected by the First Amendment. *Id.* Even as broadly construed, therefore, the holdings of both *Barnette* and *Wooley* are limited to compelled speech that affects the content of the speaker's message by touching on matters of opinion, or to compulsions that force the speaker to endorse a particular viewpoint.

In the wake of these seminal decisions, the Court has further developed the doctrine of compelled speech in several specific contexts. As relevant here, *ARP* and Defendants rely heavily on *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988), to support their argument that, although it compels only facts rather than an express opinion, § 2527 is subject to the highest First Amendment scrutiny. In *Riley,* the Court struck down the North Carolina Charitable Solicitations Act, which required professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. *Id.* at 784–801. As was well-established in the Court's precedent, charitable solicitations "involve a variety of speech interests ... that are within the protection of the First Amendment." *Id.* at 788.[11] The Court

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[11] As the Supreme Court has held, "charitable appeals for funds ... involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Such appeals are inextricably "intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particu-

reasoned that the "predictable result" of the compelled disclosure at issue would be to discourage fundraisers from "engaging in solicitations that result in an unfavorable disclosure." *Id.* at 800. The Court therefore concluded that this law was subject to "exacting First Amendment scrutiny" and that its prophylactic rule applicable to all professional solicitations was not "narrowly tailored" to the State's interest in full disclosure. *Id.* at 798–801. The *Riley* Court's reasoning was thus consistent with the Court's earlier precedent applying strict First Amendment scrutiny to statutes regulating charitable solicitations. *See id.* at 796.

[7] Notably, then, under *Riley,* compelled disclosures of fact, like compelled matters of opinion, *may* infringe upon the First Amendment. But the decision there turned on the Court's finding that the compelled disclosure at issue had a direct and chilling effect on speech that was otherwise cloaked in First Amendment protection—charitable solicitations. Contrary to the Dissent's analysis, *Riley,* in deciding to apply First Amendment scrutiny to the compelled disclosures, expressly reasons that *Wooley* and *Barnette* could not be distinguished on the grounds that they involved compelled opinion as opposed to compelled fact, because "either form of compulsion *burdens protected speech.*" *Riley,* 487 U.S. at 797–98 (emphasis added); *see also id.* at 798 (noting other examples of compelled factual disclosures that would "clearly and substantially burden protected speech"). The burden placed on protected speech, therefore, is

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lar views on economic, political, or social issues," because "without solicitation the flow of such information and advocacy would likely cease." *Id.*

precisely why *Riley's* holding with respect to compelled facts is consistent with the content-based compulsion of speech doctrine established by *Wooley* and *Barnette.* By chilling protected speech, the compelled disclosure "necessarily alter[ed] the content of the speech." *Id.* at 795. Thus, although it required only the disclosure of factual information, the statute at issue in *Riley* nonetheless altered the speaker's message and thereby constituted a content-based regulation subject to "exacting" First Amendment scrutiny.

Recently, the Court further clarified the line between content-based compulsion of speech that infringes upon the First Amendment (as in *Barnette* and *Wooley*), and that which does not. In *FAIR,* 547 U.S. at 60–65, 126 S.Ct. 1297, the Supreme Court upheld against a First Amendment challenge the constitutionality of the Solomon Amendment, which withholds federal funding from colleges and universities that deny equal access to military and nonmilitary recruiters. *FAIR* recognizes that, in providing recruiting assistance to the military pursuant to the statute, schools may be compelled to provide "statements of fact" in the form of notices or emails. *Id.* at 61–62, 126 S.Ct. 1297. *FAIR* recognized that compelled factual statements, like compelled statements of opinion, may affect the content of the speaker's message and thereby trigger First Amendment scrutiny. *Id.* at 62 (citing *Riley,* 487 U.S. at 797–98). The Court, however, declined to apply any such scrutiny, expressly distinguishing the speech compelled by the Solomon Amendment from that in *Barnette* and *Wooley*. *Id*. As the Court noted, the Solomon Amendment does not "dictate the content of speech at all" and does not involve a "Government-

mandated pledge or motto that the school must endorse." *Id.* Its requirements, therefore, did not warrant constitutional scrutiny.

[8] Consistent with *Barnette, Wooley,* and *Riley, FAIR* makes clear that not all fact-based disclosure requirements are subject to First Amendment scrutiny.[12] Instead, such requirements implicate the First Amendment only if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make.

[9] We now apply this precedent to the statute at issue here. Defendants argue that § 2527 constitutes a content-based compulsion of speech because it forces PBMs to advocate for pharmacies "in the hope that the insurance companies will provide greater remuneration to [them]." This argument, however, significantly mischaracterizes the nature of § 2527 's

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[12] We readily acknowledge, as both *FAIR* and our dissenting colleague point out, that compelled disclosures are not immune from First Amendment scrutiny merely because they involve facts rather than opinions. *See FAIR*, 547 U.S. at 62. But *FAIR* makes clear that the inquiry requires an additional step: whether a compelled factual disclosure requires First Amendment scrutiny depends on whether it involves anything like the "Government-mandated pledge or motto" at issue in *Barnette* and *Wooley*. *Id.* The *FAIR* Court reasoned that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.* Our own precedent is entirely consistent with this point. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 848–51 (9th Cir. 2003).

requirement. The statute requires PBMs merely to conduct or obtain the results of studies of the prices charged by pharmacies to their private customers and to report the objective data revealed by these studies to the third-party health plan managers for whom they process claims. The "compelled speech" at issue, therefore, is nothing more than the reporting of the purely statistical facts that these studies yield. The statute does not in any way regulate the *content* of the speech—content is instead dictated solely by the results of the studies themselves. *See id.* at 57 (noting that the Solomon Amendment does not focus on the content of the school's recruiting policy, but only on results achieved by the policy).

[10] Like the speech in *FAIR,* the compelled speech here does not in any way resemble the type of political messages at issue in *Barnette* and *Wooley.* Nothing in the statutory scheme forces the PBMs to advocate any position or "endorse" any "pledge or motto" that is contrary to their beliefs. *See FAIR,* 547 U.S. at 62. In fact, § 2527 does not require Defendants to convey any "message" at all; Defendants are not compelled to convey a viewpoint or perform any subjective analysis of the numbers they report.[13] Instead, § 2527 requires only a purely objective, infor-

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[13] The statute does require, in addition to the data, "a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th)." Cal. Civ.Code § 2527(c). This analysis, however, is entirely objective, and does not carry with it a particular message or viewpoint.

mational exercise, the results of which PBMs must report to their clients.[14]

We note that Defendants' and the state appellate courts' repeated emphasis on the purpose for which § 2527 was enacted—in hopes that the reported pricing information could serve as the basis for future increases in pharmacy reimbursements—is of limited significance. That the legislation was motivated by political considerations does not mean that the obligations that it places on the speaker are, in fact, political or ideological in nature.[15] Indeed, nearly every piece of proposed and enacted legislation is generated by some sort of political motive. Our inquiry, however, is limited to whether the requirements con-

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[14] The Dissent argues that our "interpretation of the First Amendment contradicts decades of Supreme Court precedent extending constitutional protection to communications containing truthful information." But this assertion misapprehends our position. We agree, of course, that the government may not prohibit speakers from disseminating facts. The cases that the Dissent cites all make this basic point. For the government to compel factual speech, however, is quite different from its prohibiting factual speech. This case deals only with the former. *See Riley*, 487 U.S. at 796 (noting that "[t]here is certainly some difference between compelled speech and compelled silence" but recognizing that the difference has no constitutional significance when protected expression is affected).

[15] As was noted in *ARP*, the purpose of the enacted bill may have been for the benefit not only of pharmacies, but also insurers and insured consumers. *See ARP*, 42 Cal.Rptr.3d at 265 (discussing the purpose of § 2527 and noting that "if insurers paid the pharmacies dispensing fees closer to the amount paid by uninsured consumers, pharmacies would be more likely to continue to contract with insurers, and insured consumers would be able to have their prescriptions filled at the pharmacies of their choice").

tained *within the enacted text* infringe on the First Amendment.[16] We conclude that they do not.

Furthermore, in contrast to the factual reporting requirement in *Riley,* the pricing study results compelled by § 2527 in no way alter, chill, or otherwise affect a PBM message that enjoys First Amendment protection. Whereas the law in *Riley* threatened to interfere with core protected speech, by "hamper[ing] the legitimate efforts of professional fundraisers to raise money for the charities they represent," 487 U.S. at 799, § 2527 does not in any way burden a PBM's ability to say whatever it chooses about pharmacy reimbursements. *Cf. FAIR,* 547 U.S. at 60 (noting that "[l]aw schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy"). If, for example, a PBM wanted actively to engage in lobbying efforts to directly discourage its clients from increasing reimbursements to pharmacies, its simultaneous compliance with § 2527 would in no way chill or impede this message. Indeed, it is quite possible that the pricing survey results could serve to enhance this or any other message related to

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[16] Indeed, most disclosure requirements, from nutritional facts on packaged foods to the financial details of publicly traded companies, are designed to remedy information asymmetries and potentially alter individuals' behavior as they become more well-informed market participants. As long as those who are compelled to disclose are not required to endorse the possible result of a better-informed market, just as the law schools in *FAIR* were not required to "endorse" the military's hiring policies, the fact that legislators may desire the resulting behavior is irrelevant. In such cases, the disclosing party is required only to provide the raw facts that others may use to make their own decisions.

pharmacy reimbursements; the content of the reported data can be known only after the studies are actually conducted. *See TDI Managed Care,* 449 F.3d at 1040 (noting the mere *possibility* that the information will improve reimbursement rates in the future). Simply put, PBMs remain free, in reporting survey results under § 2527, to assert any viewpoint they would like. They may encourage action or inaction on the basis of the statistics, or they may say that the report is worthless, sent only under government mandate. Because § 2527 does not alter or burden speech otherwise protected under the First Amendment, it is readily distinguishable from the compelled factual disclosures in *Riley*. The state appellate courts failed to appreciate this critical distinction.[17]

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[17] The Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653 (2011), which struck down a Vermont law that restricts health care-related entities' dissemination of information, offers little guidance in the compelled speech context. Recognizing, nonetheless, that the underlying inquiry in any First Amendment case is whether the challenged regulation burdens protected speech, we note why *IMS Health* is entirely consistent with our holding. In that case, because the Vermont law restricted the ability of the regulated entities to disseminate and use the information for a particular purpose, the Court concluded that the statute "imposed a burden based on the content of speech and the identity of the speaker." *Id.* at 2663–64. As a content-based restriction on speech, therefore, the law in *IMS Health* placed a burden on protected expression and therefore required heightened constitutional scrutiny. *Id.* As discussed, § 2527 neither directly restricts nor results in the chilling of protected speech, and accordingly places no such burden on any expression. The absence of any such burden is what saves § 2527 from the Vermont law's fate.

Defendants aver that the reasoning in *FAIR* is inapposite because the Solomon Amendment primarily regulates conduct, rather than speech. It is true that, in distinguishing its compelled speech precedent, the *FAIR* Court notes that "[t]he compelled speech to which the [plaintiffs] point is plainly incidental to the Solomon Amendment's regulation of conduct." 547 U.S. at 62. Nonetheless, *FAIR* analyzes whether the Solomon Amendment's compulsion of speech implicates the First Amendment by applying *Wooley* and *Barnette,* as a court would in any compelled speech case. *Id.* Its observation that the speech at issue was "incidental" to conduct, though perhaps further supportive of its conclusion, was evidently not dispositive as a matter of law.

Moreover, even if this part of *FAIR's* reasoning was controlling, it applies similarly to the statute here. The primary prescription of § 2527 is conduct-based: it requires PBMs to conduct, or obtain the results of, pharmacy pricing studies. The statute also requires that the results of these studies, that is, a document containing the results of the performed conduct, be transmitted to a third party. This "compelled speech," or the transmission of the study results, is not the main thrust of the statute's requirement—this speech is required only as the method by which PBMs' clients are to become informed of the study mandated by the statute.[18] Therefore, even if we limit *FAIR's* holding to statutes that primarily

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[18] Notably, Defendants do not allege that § 2527 is unconstitutional because it impermissibly regulates conduct.

regulate conduct, it remains controlling as to § 2527.[19]

[11] We hold that, under the applicable precedent, § 2527 does not offend the First Amendment by compelling speech that affects the content of the speaker's message. Therefore, we need not apply to it any level of constitutional scrutiny. *See Envtl. Def. Ctr., Inc., v. EPA,* 344 F.3d 832, 848–51 (9th Cir.

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[19] Consistent with the cases cited by the Dissent, we readily agree that the transmission of the pricing survey results constitutes speech. The § 2527–regulated conduct to which we refer, and that we believe is the statute's primarily regulatory effect, is the actual performance of the pricing studies, as distinguished from the transmission of their results. We fully accept that the transmission, even to the extent that it involves some conduct, constitutes speech. We also recognize that the performance of pricing surveys is not completely devoid of speech. Our point is simply that the § 2527 is effectuated primarily through conduct rather than through speech, just as, under FAIR, the Solomon Amendment's equal access requirement primarily regulates the schools' conduct, even while such conduct might inherently contain speech.

Moreover, the Dissent incorrectly asserts that to consider § 2527 "as conduct-based ... is akin to considering the laws in *Wooley* and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), as primarily regulating conduct because they require the physical display of a license plate and the tangible allocation of newspaper column inches." In *Wooley* and *Tornillo*, the compulsion of speech was the obvious, central purpose of the laws in question. Any effect on conduct was simply a means to that end. Here, by contrast, the PBMs' transmission of survey results—the compelled speech in question—is the means to the statute's ultimate, conduct-based end: the reduction of information costs in the prescription drug market. The Dissent's formalistic reasoning misses the point of *FAIR*'s reasoning: the question is not whether speech is compelled at all, but whether that compulsion is the law's primary purpose or only "incidental" to the conduct-based purpose. *FAIR*, 547 U.S. at 62.

2003) (upholding an EPA regulation requiring storm sewer providers to distribute educational materials to the community about potential pollution, noting that this requirement involved no "compelled recitation of a message" and no "affirmation of belief" and was therefore a non-ideological public information mandate that did not impermissibly compel speech or offend the First Amendment).[20]

3.

The parties debate several other theories under which § 2527 could raise First Amendment concerns and thereby require constitutional scrutiny. We discuss briefly why each theory is unavailing or inapplicable here.

a.

First, though they do not clearly raise the argument in their briefs, Defendants refer to a line of cases that concern forced accommodation of another's

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[20] Defendants argue that *Environmental Defense Center* and cases like it are inapposite because the disclosure requirements at issue there were part of a "comprehensive regulatory scheme." This argument misses the mark. In *Environmental Defense Center*, we did note that the disclosure requirements at issue were "consistent with the overall regulatory program of the Clean Water Act," 344 F.3d at 851, but this observation was separate from our First Amendment holding, which was explicitly based on our conclusion that the regulation did not "compel endorsement of political or ideological views" or impose "restraint on the freedom of any [regulated entity] to communicate any message to any audience." 344 F.3d at 850. *Environmental Defense Center*, therefore, serves as applicable precedent, and the district court correctly relied upon it.

speech. The First Amendment limits the government's power to force individuals to accommodate a third party's message that would interfere with their own expression of ideas. *FAIR,* 547 U.S. at 63. Rather than looking at whether the challenger himself is being compelled to speak, forced accommodation cases consider whether a party is being made involuntarily to accommodate the expressive speech of another.

Forced accommodation was first considered in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 254–58 (1974). There, the Court held that a statute that required newspapers to print free of charge political candidates' replies to critical editorials violated the First Amendment because it forced newspapers to disseminate certain views, thereby exacting "a penalty on the basis of the content of a newspaper," and because it violated the newspaper's right to determine the content of the paper. *Id.* at 256–58; *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of California,* 475 U.S. 1, 9–18 (1986) (holding that a state utilities commission could not require a utility company to include a third-party newsletter in its billing envelope because the utility company had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents" (internal citation omitted)); *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 566–70 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send because parades are "a [protected] form of expression, not just motion").

There is a considerable measure of overlap between the forced accommodation cases and the com-

pelled speech analysis in *Riley*. Both focus on how the compulsion of speech or the compelled accommodation of another's speech effectively chills or frustrates the speaker's own ability to express his views pursuant to his First Amendment rights. *See FAIR,* 547 U.S. at 63 ("The compelled-speech violation in each of our prior [forced accommodation] cases ... resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate.").

[12] Here, Defendants argue that § 2527 requires them to provide their clients with surveys that further the "compensation-enhancing goals" of the pharmacies, which are at odds with Defendants' own desired message to their clients that they provide the most cost-effective administration of any benefit program. Reports of pharmacy price surveys, however, "lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," and, more importantly, do not "sufficiently interfere with any message" of the PBMs. *FAIR,* 547 U.S. at 64. Should the PBMs choose, they could report the pricing survey results while simultaneously or more vigorously advocating that their clients do nothing to change their pharmacy reimbursement rates or offer only the most cost-effective rates. In other words, § 2527 in no way chills or hampers PBMs' independent ability to speak their views on the subject of pharmacy reimbursements, even if these views are at direct odds with those of the pharmacies. Moreover, even if the reporting of objective data could be construed as advocacy for increases in pharmacy reimbursements, insurance companies "can appreciate the difference between" voluntary advocacy and statistical information that Defendants must convey because they

are "legally required to do so." *Id.* at 65. And as in *FAIR,* there is little chance that the recipient of a report will mistakenly associate its contents with the PBM that sends it, when that PBM can so easily dissociate itself. *Id.*; *see also PruneYard Shopping Center v. Robins,* 447 U.S. 74, 87–88 (1980). Defendants' forced accommodation argument is therefore unavailing.

b.

Defendants also argue that the court should invalidate § 2527 under *United States v. United Foods, Inc.,* 533 U.S. 405 (2001), in which the Supreme Court struck down a law mandating that fresh mushroom handlers pay fees used to fund advertisements promoting mushroom sales. Under *United Foods* and its predecessors, the First Amendment prevents the government in some instances from compelling individuals to pay subsidies for speech to which they object. 533 U.S. at 409–16; *see also Keller v. State Bar of California,* 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977). The line of cases deals only with compelled funding, rather than compelled speech in the literal sense. *See United Foods,* 533 U.S. at 417 (Stevens, J., concurring) (noting that the regulation in *United Foods* was distinguishable from that in *Wooley* and *Barnette* because it did not compel speech itself, but rather the payment of money). *United Foods* reasons that the mushroom producers, who were not voluntarily collectivized, were being forced to fund the message to which they were opposed—that any mushroom is worth consuming regardless of its brand. 533 U.S. at 411. In striking down the law, *United Foods* is care-

ful to distinguish *Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457 (1997)—a case that upheld mandatory advertising contributions—noting that the requirements at issue there were incidental to a "valid scheme of economic regulation" in which "the producers were bound together and required by the statute to market their products according to cooperative rules" and had therefore already surrendered many individual liberties to a collective entity. 533 U.S. at 412. In the case of the mushroom law, by contrast, collective advertising was "the principal object of the regulatory scheme." *Id.*

[13] Here, Defendants challenge § 2527 for unconstitutionally compelling speech, not for compelling subsidies for commercial speech. And unlike the regulations at issue in the *United Foods* line of cases, § 2527 in no way requires Defendants to subsidize a particular message, let alone one to which they are principally opposed. While the reported data could, at some point, serve as the basis for political lobbying efforts, it does not inherently support one message or agenda over another. Therefore, to the extent that Defendants are expending resources to comply with § 2527's requirements, such expenditures are not analogous to the subsidies at issue in *United Foods*.[21]

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[21] Notably, as a matter of state law, the *ARP* decision expressly distinguishes *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), a compelled subsidy case that followed *United Foods*, and holds that it is inapposite because "the issue [before the court] is compelled speech by drug processors, not compelled subsidy of government speech." 42 Cal.Rptr.3d at 262.

c.

The parties devote some portion of their briefs to discussing whether the speech compelled under § 2527 constitutes "commercial speech." Compelled "commercial speech" cases generally involve challenges to disclosure requirements designed to prevent deceptive consumer advertising. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading...."); *see also United Foods,* 533 U.S. at 406 (distinguishing *Zauderer* because the regulation at issue was not "necessary to make voluntary advertisements non-misleading for consumers"). Accordingly, although these types of disclosure requirements implicate the First Amendment by potentially chilling the advertiser's protected commercial speech, *Zauderer,* 471 U.S. at 651, courts subject them to a lower form of constitutional scrutiny resembling rational basis review. *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229 (noting that the "required disclosures [regarding debt relief assistance] are intended to combat the problem of inherently misleading commercial advertisements" and therefore applying *Zauderer* scrutiny); *Zauderer,* 471 U.S. at 650–51 (disclosure requirements on advertisers are lawful if "reasonably related to the state's interest in preventing deception of consumers"); *see also Pharmaceutical Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294, 316 (1st Cir. 2005) (financial disclosure requirements imposed on PBMs were designed to protect against questionable PBM business practices and, therefore, require only a *Zauderer* lev-

el of scrutiny akin to rational basis review); *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 113–16 (2d Cir. 2001) (because disclosure of "accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions" and furthers the First Amendment protection of "the free flow of accurate information," it requires less exacting scrutiny).

Though the disclosures mandated by § 2527 are similar to commercial disclosures in that they contain factual information related to commerce, Defendants and *ARP* correctly recognize that the disclosures required by § 2527 do not constitute commercial speech. *ARP,* 138 Cal.App.4th at 1317. The Supreme Court has suggested that "commercial speech" is not merely "on a commercial subject" or "[p]urely factual matter of public interest." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761–62 (1976). Rather, commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557, 561 (1980). In summarizing federal commercial speech jurisprudence, the Supreme Court of California has noted that these cases generally involve "a speaker engaged in the sale or hire of products or services conveying a message to a person or persons likely to want, and be willing to pay for, that product or service[,]" that is, speech related to a commercial transaction. *Kasky,* 27 Cal.4th at 960.

[14] Section 2527 neither aims to reduce deceptive advertising to consumers nor compels disclosures in the context of a commercial transaction. Therefore, its requirements do not qualify as com-

pelled "commercial speech" subject to a lower form of scrutiny. This conclusion, however, is of little significance in our analysis. Because the reporting requirements of § 2527 do nothing to compel or affect the content of *any* protected speech, commercial or otherwise, they are not subject to *any* form of First Amendment scrutiny.

[15] Pursuant to the foregoing analysis, we conclude that Defendants are not entitled to a judgment that § 2527 violates the First Amendment.

C. Article I, section 2 of the California Constitution

Finally, we must decide whether Defendants' motion should have been granted on the ground that the statute violates article I, section 2—the free speech provision—of the California Constitution. Because the California Supreme Court has not decided this question or one analogous to it, we must "predict how the highest state court would decide the issue," using any relevant material as guidance. *Vestar Dev.,* 249 F.3d at 960; *see also West,* 311 U.S. at 237; *Air–Sea Forwarders, Inc. v. Air Asia Co.,* 880 F.2d 176, 186 (9th Cir. 1989) (the duty of the federal courts in a diversity case is to "predict how the state high court would resolve" the issue (internal citation and quotation marks omitted)).

[16] As we have held, the California Supreme Court would construe the state free speech provision as being coextensive with the First Amendment with respect to § 2527. Therefore, in accordance with our First Amendment analysis, we believe that California's highest court would hold that § 2527 is consti-

tutional under the California Constitution's free speech provision. We therefore hold the same.

We realize that, in so holding, we are creating a degree of disparity between the federal and state courts that could temporarily result in forum-shopping. Plaintiffs and others similarly situated may now sue in federal court to enforce what we have held to be a constitutional statute, while their ability to do so in state court remains subject to question. This is the unavoidable result of our faithful application of the "convincing evidence" standard under *Erie.*

As a practical matter, however, this concern is a minor one. *ARP, A.A.M. Health,* and *Bradley* were all decided in California's second appellate district. This is the only one of California's six appellate districts in which an erroneous interpretation of federal precedent on this issue operates as the current law. The other districts are not bound by that position and are free to resolve the question de novo. *See* 9 Witkin, Cal. Proc. 5th, Appeal, § 498 (2008) ("A decision of a Court of Appeal is not binding in the Courts of Appeal. One district or division may refuse to follow a prior decision of a different district or division...."). We are confident that, in light of this opinion, California courts will henceforth apply federal precedent in the area of compelled speech as we have here, thereby alleviating any forum-shopping incentives.

If the Supreme Court of California eventually considers § 2527 and decides to construe the California free speech provision more broadly than the First Amendment in this context, then we will, of course, be bound by its decision. Our decision today is based on our analysis of First Amendment compelled speech precedent, or the body of law upon which *eve-*

ry single judge to have opined on § 2527 's constitutionality has relied. The California Supreme Court may choose to depart from that analysis; at this stage, however, we have no basis on which to believe that it would. Thus, as we are currently charged with predicting how the Supreme Court of California would decide, we must conclude that § 2527 is constitutional under article I, section 2 of the California Constitution.

III.

[17] Because the statute that Plaintiffs seek to enforce is constitutional under both the United States and California Constitutions, the district court's denial of Defendants' motions for judgment on the pleadings is hereby **AFFIRMED.**

WARDLAW, Circuit Judge, dissenting:

It has been more than seven decades since the Supreme Court ended the "mischievous" regime of *Swift v. Tyson,* 41 U.S. 1 (1842), in which federal courts sitting in diversity disregarded state court decisions and independently determined the meaning of state law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 74 (1938). The *Erie* doctrine has long required federal courts to "follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner v. New York Life Ins. Co.,* 311 U.S. 464, 467 (1940); *see also Ryman v. Sears, Roebuck & Co.,* 505 F.3d 993, 994 (9th Cir. 2007). Today the

panel majority returns us to the era of *Swift v. Tyson,* openly acknowledging that its opinion will lead to forum shopping and the inconsistent enforcement of state law, the very evils that the *Erie* Court sought to eradicate. *See Erie,* 304 U.S. at 74–78.

The majority disregards not one but three intermediate California appellate decisions holding that California Civil Code § 2527 violates Article I, section 2 of the California Constitution. *See ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.,* 138 Cal.App.4th 1307 (2006); *A.A.M. Health Group, Inc. v. Argus Health Sys., Inc.,* No. B183468, 2007 WL 602968 (Cal. Ct. App. Feb. 28, 2007); *Bradley v. First Health Servs. Corp.,* No. B185672, 2007 WL 602969 (Cal. Ct. App. Feb. 28, 2007). It does so not because of any convincing evidence that the state high court would rule differently, but because it has convinced itself that its interpretation of federal constitutional law is correct, that the three panels of the Second District Court of Appeal got it wrong, and that the California Supreme Court would side with the views of two federal judges over the seven state appellate judges and two state trial judges who have all ruled to the contrary.

In point of fact, the California Supreme Court denied review of the last of the appellate court decisions, leaving the precedent intact. The failure to follow the intermediate state courts violates the *Erie* doctrine and offends important principles of federalism and comity. Even worse, however, it is the majority that fails to correctly apply First Amendment principles to fact-based expression, while endorsing unfettered government authority to compel "objective" speech. Not only am I not convinced that the California Supreme Court would utilize the majori-

ty's flawed analysis of the federal right of free speech to interpret the distinct, and more protective, state constitutional right, I find it highly doubtful. Therefore, I respectfully dissent.

I.

We confront in § 2527 an unusual law without clear analogies in existing precedent. The statute requires drug claims processors to undertake or obtain studies about pharmacy pricing, summarize the results, and transmit the material to their clients. § 2527(c)–(d). Essentially, it requires Business A to speak about Business B to Business C. Unlike a disclosure law, it does not require that regulated entities divulge information about themselves to the public, but rather that they privately produce information about third parties to their clients. *Cf. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651 (1985). Moreover, § 2527 is a stand-alone law that does nothing more than mandate speech. It is not ancillary to any comprehensive economic regulatory scheme. *Cf. United States v. United Foods, Inc.,* 533 U.S. 405, 411–12 (2001).

As our free speech jurisprudence treats "[e]ach method of communicating ideas [as] 'a law unto itself,' " so must it afford unique treatment to each different method of government mandated communication of ideas. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 501 (1981) (adding that the "law must reflect the 'differing natures, values, abuses and dangers' of each method") (quoting *Kovacs v. Cooper,* 336 U.S. 77, 97 (1949)); *Wooley v. Maynard,* 430 U.S. 705, 714 (1977) ("The right to speak and the right to

refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' ") (quoting *Bd. of Educ. v. Barnette,* 319 U.S. 624, 637 (1943)). The parties have not identified any case that squarely controls the federal or state constitutional analysis of this unique brand of government mandated private speech about third parties.

The California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. 1 § 2. This clause "enjoys existence and force independent of the First Amendment" of the United States Constitution. *Gerawan Farming, Inc. v. Lyons,* 24 Cal.4th 468 (2000). Indeed, "the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment." *Los Angeles Alliance For Survival v. City of Los Angeles,* 22 Cal.4th 352 (2000); *see also Kasky v. Nike, Inc.,* 27 Cal.4th 939 (2002). Therefore, we should be especially hesitant to tell the California courts how to apply their own Constitution to such a unique and unprecedented state law mandating speech.[1]

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[1] The case law relied on by the majority illustrates the dangers of disregarding state court decisions and imposing our own interpretations of legal gray areas. The first case cited by the majority for the proposition that we can refuse to follow intermediate state appellate decisions that make "analytical errors" is *Briceno v. Scribner,* 555 F.3d 1069 (9th Cir. 2009). There a divided panel of our court declined to follow two California Court of Appeal decisions interpreting a gang sentencing enhancement statute. *Id.* at 1080–82. However, the California Supreme Court subsequently disagreed with the *Briceno* major-

II.

The majority identifies two "critical errors" in the Court of Appeal panel decisions that it believes the California Supreme Court would not make: giving insufficient weight to *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47 (2006) ("*FAIR* "), and misinterpreting *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988). However, the California Court of Appeal panels reasonably interpreted both cases, and thus there is no convincing reason to believe that the California Supreme Court would rule differently.

In *FAIR,* the Court rejected a First Amendment challenge to the Solomon Amendment, a statute restricting federal funding to universities that do not grant military recruiters comparable access to other employers looking to hire at their law schools. 547 U.S. at 52–53. The Court recognized that the "recruiting assistance provided by the schools often includes elements of speech" as "schools may send e-mails or post notices on bulletin boards on an employer's behalf." *Id.* at 61–62. However, the Court concluded that this marginal compulsion of speech did not violate the constitution. The majority analogizes the pricing reports from § 2527 to the hypothetical e-mails and bulletin board postings in *FAIR,* and holds that because of its factual nature, such compelled speech does not give rise to First Amendment scrutiny. This dramatically overstates the holding of *FAIR,* as the Supreme Court specifically acknowl-

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ity, concluding that the Court of Appeal panels did not erroneously interpret state law. *People v. Albillar,* 51 Cal.4th 47 (2010).

edged that "these compelled statements of fact ... are subject to First Amendment scrutiny." *Id.* at 62.

The *FAIR* Court did not find a constitutional violation because the particular factual statements at issue were both hypothetical and ancillary to a comprehensive regulatory regime. The Court determined that the e-mails and bulletin board postings would only be " 'compelled' if, and to the extent, the school provides such speech for other recruiters," and that such compulsion would be "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* That stands in stark contrast to § 2527, where the compulsion is not contingent on any voluntary conduct by the regulated party, and where it is not ancillary to any comprehensive regulatory scheme. Rather, § 2527 is a direct, stand-alone government mandate of speech. Therefore, the Court of Appeal panels' treatment of *FAIR* in this context was not erroneous, and it does not provide convincing evidence that the California Supreme Court would rule differently.[2]

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[2] The majority's suggestion that § 2527 may primarily regulate conduct because it requires the compiling and transmission of a document, is contrary to explicit Supreme Court precedent. *See Bartnicki v. Vopper,* 532 U.S. 514, 527 (2001) ("It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of 'speech' that the First Amendment protects."). All government compulsion of speech requires some conduct incident to the expression. Labeling § 2527 as conduct-based on this ground is akin to considering the laws in *Wooley* and *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241 (1974) as primarily regulating conduct because they require the physical display of a license plate and the tangible allocation of newspaper column

As for *Riley,* the Court of Appeal decisions relied on the case for the proposition that § 2527 warrants constitutional scrutiny even though it compels "essentially statistical information." *ARP,* 42 Cal.Rptr.3d at 261. The majority argues that *Riley* stands for the narrower proposition that mandated factual speech only warrants scrutiny if the law has a direct chilling effect on other protected First Amendment speech. However, this confuses the initial inquiry into whether a regulation even implicates the First Amendment with the separate inquiry into whether it survives constitutional scrutiny.

The *Riley* Court first held quite broadly that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." 487 U.S. at 795. The Court thus established that the compulsion of factual speech triggered First Amendment analysis before

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inches. The majority's attempt to distinguish "the actual performance of the pricing studies" from "the transmission of their results" is unavailing, as both "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health,* 564 U.S. ——, 131 S.Ct. 2653, 2667 (2011); *see also Brown v. Entm't Merch. Ass'n,* 564 U.S. ——, 131 S.Ct. 2729, 2734 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."). Finally, the majority asserts that § 2527 's compulsion of speech is merely ancillary to the legislature's ultimate goal of reducing information costs. However, the majority contradicts itself, for elsewhere it correctly notes that the statute's purpose "is of limited significance." What matters is the effect of the statute on speech, and just as in *Wooley* and *Tornillo,* the sole tangible directive of this regulation is the compulsion of speech.

even considering whether the regulation burdened other protected expression. Only then did the *Riley* Court proceed to discuss *Wooley* and *Barnette,* and the broader question of whether the regulation burdened other protected speech, as part of the separate and subsequent inquiries into the precise level of scrutiny to apply and whether the regulation was sufficiently tailored to fit the state interest. *Id.* at 797–99.

In other words, the *Riley* Court held that the particular law compelling speech failed exacting scrutiny because of its chilling effect; it did not hold that a chilling effect is a prerequisite to any First Amendment scrutiny at all. The *FAIR* Court made this clear when it cited *Riley* for the proposition that "compelled statements of fact ('The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.'), like compelled statements of opinion, are subject to First Amendment scrutiny." 547 U.S. at 62. The *FAIR* Court made no mention of a chill requirement, and indeed it suggested that the potential compulsion of e-mails and bulletin board postings would draw constitutional scrutiny despite the nature of the content. *Id.*

In faulting the California courts for relying on *Riley's* holding about factual speech, the majority makes the stunning assertion that § 2527 is not subject to any First Amendment scrutiny because it requires only the dissemination of "objective" data, and "Defendants are not compelled to convey a viewpoint or perform any subjective analysis of the numbers they report." No authority is cited for the proposition that compelled speech must contain subjective analysis or overt opinion in order to implicate constitutional rights. Indeed, it is well established that "the

First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry. The constitutional harm—and what the First Amendment prohibits—is being forced to speak rather than to remain silent." *Axson–Flynn v. Johnson,* 356 F.3d 1277, 1284 n.4 (10th Cir. 2004).

The majority's narrow interpretation of the First Amendment contradicts decades of Supreme Court precedent extending constitutional protection to communications containing truthful information. For instance, the majority's reasoning fails to account for fact-based news reporting, which is considered protected speech under both the First Amendment and the California Constitution. *See, e.g., Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.,* 37 Cal.App.4th 855, 44 Cal.Rptr.2d 46, 51 (1995) (explaining that it is a "faulty premise ... that news reporting activity cannot be characterized as 'free speech.' In fact, courts have consistently described such activity as 'free speech.' ") (citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775–776 (1986), *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952), and *Daily Herald Co. v. Munro,* 838 F.2d 380, 384 (9th Cir. 1988)); *see also Bartnicki v. Vopper,* 532 U.S. 514, 527 (2001) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards.") (quoting *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 102 (1979)). Moreover, the Supreme Court has extended First Amendment protection to numerous forms of speech that communicate nothing but factual information. *See, e.g., Linmark Associates, Inc. v. Willingboro Township,* 431 U.S. 85, 96 (1977) (striking an ordinance prohibiting the display of "For Sale" and

"Sold" signs in front of houses); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976) (extending First Amendment protection to the communication of product price information).

Most recently, in *Sorrell v. IMS Health,* 564 U.S. ——, 131 S.Ct. 2653 (2011), the Supreme Court applied heightened First Amendment scrutiny to a Vermont statute that restricts how certain entities can use medical prescription information. The Court approvingly quoted the Second Circuit, which had held that the "First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression." *IMS Health,* 131 S.Ct. at 2666–67 (quoting *IMS Health Inc. v. Sorrell,* 630 F.3d 263, 271–72 (2d Cir. 2010)). The Vermont law in *IMS Health* is the flip side of California's § 2527; they involve similar speech that Vermont prohibits and California compels.

The majority asserts that the compulsion of factual speech is "quite different from" the prohibition of such speech, but in fact, "in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley,* 487 U.S. at 796. As the First Amendment protects the "concomitant" rights to speak and refrain from speaking, it follows that § 2527 does not avoid all constitutional scrutiny merely because it mandates factual speech. *Wooley,* 430 U.S. at 714. Facts, including statistics, convey messages. *See IMS Health,* 131 S.Ct. at 2667 ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to con-

duct human affairs."). The record in this case clearly "suggests that the governmental purpose in enacting section 2527 was to urge third party payors, by the use of statistical information, to compensate pharmacists at a fairer rate for providing pharmaceutical services to their insureds." *ARP,* 42 Cal.Rptr.3d at 265. The California Court of Appeal panels properly applied the holding of *Riley* to this scenario in which the Defendants complain that § 2527 compels them to disseminate a message with which they disagree. Nothing about these decisions provides convincing evidence that the California Supreme Court would decide the question differently.

III.

"[W]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts." *Vestar Dev. II, LLC v. Gen. Dynamics Corp.,* 249 F.3d 958, 960 (9th Cir. 2001). "This is especially true when the Supreme Court has refused to review the lower court's decision." *See State Farm Fire & Cas. Co. v. Abraio,* 874 F.2d 619, 621 (9th Cir. 1989). The majority gives insufficient weight to the California Supreme Court's denial of review here, relying on an inapposite citation about the meaning of the denial of a certification request from this court. *See In re K F Dairies, Inc. & Affiliates,* 224 F.3d 922, 925 n.3 (9th Cir. 2000). Here, in the context of the *Erie* doctrine, denial of review by a state high court is an appropriate and important factor to consider. *See Tenneco West, Inc. v. Marathon Oil Co.,* 756 F.2d 769, 771 (9th Cir. 1985).

The district court issued its ruling in this case on May 15, 2007, after the three California Court of Appeal panels had rendered their judgments that § 2527 violates the state constitution. However, in opting not to afford *Erie* deference to those judgments, the district court did not have the benefit of the California Supreme Court's decision to deny review of *Bradley,* which occurred on June 13, 2007. *See Bradley,* 2007 Cal. LEXIS 6365. The panel majority is at no such disadvantage, but it still substitutes its own analysis for that of every state court to consider this matter.[3]

Two important "aims of the *Erie* rule [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Kohlrautz v. Oilmen Participation Corp.,* 441 F.3d 827, 831 (9th Cir. 2006) (quoting *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 428 (1996)). As the majority acknowledges, its opinion will encourage forum shopping by creating a disparity in the administration of California law. The proffered justification for this unfortunate result is that the three California Court of Appeal panels made critical analytical errors in holding that § 2527 violates the state constitution, but in fact they properly interpreted the relevant state and federal law, and there is no convincing evidence that the California Supreme Court would rule differently. As this is a classic case re-

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[3] That the California Supreme Court denied review in *Bradley,* leaving state precedent intact in the face of a contrary federal district court holding, only further indicates that the intermediate state appellate courts correctly applied state law, and certainly does not count as convincing evidence that the California Supreme Court would uphold the statute.

quiring deference to state court judgments about a state law matter, I would reverse the decision of the district court.

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beeman's Pharmacy; et al., Plaintiffs - Respondents, v. ANTHEM PRESCRIPTION MANAGEMENT, LLC; et al., Defendants - Petitioners.	No. 07-80132 D.C. No. CV-04-00407-VAP Central District of California, Riverside

JERRY BEEMAN AND PHARMACY SERVICES, INC., doing business as Beeman's Pharmacy; et al., Plaintiffs - Respondents,	No. 07-80136 D.C. No. CV-02-01327-VAP Central District of California, Riverside

v. TDI MANAGED CARE SERVICES, INC., doing business as ECKERD HEALTH SERVICES; et al., Defendants - Petitioners.	ORDER

Before: TALLMAN and CLIFTON, Circuit Judges.

The motion to consolidate these petitions is granted. Petition Nos. 07-80132 and 07-80136 are consolidated.

The Clerk shall file respondents' answers in opposition to the petitions for permission to appeal, responses to petitioners' request to consolidate the petitions, and corporate disclosure statement with exhibits received on September 10, 2007 in petition Nos. 07-80132 and 07-80136. The Clerk shall also file petitioners' submissions of additional citations received on September 28, 2007 and October 15, 2007 in petition No. 07-80132.

Both petitions for permission to appeal pursuant to 28 U.S.C. § 1292(b) are granted. Within 10 days of this order, petitioners shall perfect the appeals pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JERRY BEEMAN AND PHARMACY SERVICES, INC., dba BEEMAN's PHARMACY; et al.,	)	Case No. EDCV 04-407-VAP (SGLx)
	)	[Motion filed on June 4, 2007]
Plaintiffs,	)	
	)	ORDER CERTIFYING
v.	)	INTERLOCUTORY
	)	APPEAL
ANTHEM PRESCRIPTION MANAGEMENT, INC.; et al.,	)	
	)	
Defendants.	)	

Defendants' Motion to Certify Interlocutory Appeal came before the Court for hearing on July 9, 2007. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS Defendants' Motion to Certify Interlocutory Appeal.

I. BACKGROUND

This case arises out of a dispute between pharmacies and pharmacy benefit managers ("PBMs") over the dissemination of certain statistical price information mandated by California Civil Code Sections 2527 and 2528.

On December 5, 2002, Plaintiffs filed a Complaint in Case No. EDCV-02-1327-VAP ("Beeman I"), alleging claims for: (1) violation of California Civil Code Section 2527; (2) unlawful, unfair, and fraudulent business acts and practices in violation of California Business and Professions Code § 17200; and (3) declaratory relief and unjust enrichment. On February 25, 2004, Plaintiffs filed a Complaint in Case No. EDCV-04-407-VAP ("Beeman II"), alleging similar claims.

On July 12, 2004, the Court granted motions to dismiss both actions, based on a lack of Article III standing. See Jerry Beeman and Pharmacy Servs., Inc. v. TDI Managed Care Servs., Inc., 2004 WL 1576610 (C.D. Cal. July 12, 2004). Plaintiffs successfully appealed to the U.S. Court of Appeals for the Ninth Circuit. See Jerry Beeman and Pharmacy Servs., Inc. v. TDI Managed Care Servs., Inc., 449 F.3d 1035 (9th Cir. 2006). On May 7 and 15, 2007, after full briefing and a hearing, the Court denied Motions for Judgment on the Pleadings filed by Defendants in both cases.[1] (Order Denying Defendants'

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[1] The Court's Order in Beeman II was issued on May 7, 2007, while an identical Order in Beeman I was issued on May 15, 2007. For the sake of simplicity, the Court will refer only to the May 7 order in Beeman II.

Motion for Judgment on the Pleadings dated May 7, 2007 ("Order").)

The Court held that (1) it was not required to follow the California Court of Appeal's decision in ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc. ("ARP"), 135 Cal. App. 4th 1307 (2006), and (2) California Civil Code Section 2527 does not violate the free speech rights of PBMs under the U.S. Constitution or the California Constitution. (Order at 6-7, 31.)

Defendants now move for certification of the May 7 and May 15 Orders under 28 U.S.C. § 1292(b). Defendants filed their Motion to Certify Interlocutory Appeal ("Mot.") on June 4, 2007. Plaintiffs filed their Opposition ("Opp'n") on June 11, 2007. Defendants filed their Reply on June 18, 2007.

II. LEGAL STANDARD

The general rule is that an appellate court does not review a district court ruling until after entry of a final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978). A district court may certify for appeal an otherwise non-appealable order, however, when the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

III. DISCUSSION

By enacting § 1292(b), Congress "confer[red] on district courts first line discretion to allow interlocutory appeals." Swift v. Chambers Country Comm'n,

514 U.S. 35, 47 (1995). An interlocutory appeal should be granted "only in exceptional situations in which allowing [such an appeal] would avoid protracted and expensive litigation." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982) (citing U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)). The party seeking certification of an interlocutory appeal has the burden to show the presence of those exceptional circumstances. Coopers & Lybrand, 437 U.S. at 474-75. Specifically, an interlocutory order is certifiable only if: (1) it involves a "controlling question of law;" (2) there are "substantial grounds for a difference of opinion;" and (3) an immediate appeal may materially advance the ultimate termination of the litigation. In re Cement, 673 F.2d at 1026.

Here, whether California Civil Code Section 2527 infringes constitutional protections accorded to free speech is a "controlling issue of law." An issue is "controlling" if reversal of the order on appeal "could materially affect the outcome of litigation in the district court." In re Cement, 673 F.2d at 1026 (citing U.S. Rubber, 359 F.2d at 785). If the constitutional issue here is resolved in Defendants' favor on appeal, then necessarily Plaintiffs' claims would fail, terminating the litigation. Thus, the Order involves a controlling issue of law.

Further, there are "substantial grounds for a difference of opinion" regarding the constitutionality of Section 2527. A party's strong disagreement with the court's ruling is not sufficient; the proponent of an appeal must make some greater showing. See Hansen v. Schubert, 459 F. Supp. 2d 973, 1000 (E.D. Cal. 2006) (citing First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996). For example, "[a]

substantial ground for dispute . . . exists where a court's challenged decision conflicts with the decisions of several other courts" or where there is no controlling precedent in the jurisdiction. In re Cintas Corp. Overtime Pay Litig., 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007) (unpublished disposition) (quoting APCC Servs., Inc. v. AT&T Corp., 297 F. Supp. 2d 101, 107 (D.D.C. 2003)).

Here, both circumstances are present. No federal court has decided the constitutionality of Section 2527, while the California Court of Appeal previously struck it down in one published decision, then followed suit in two subsequent unpublished decisions. See ARP, 135 Cal. App. 4th at 1322; see also A.A.M. Health Group, Inc. v. Argus Health Sys., 2007 WL 602968 (Cal. App. Feb. 28, 2007) (unpublished disposition); Bradley v. First Health Servs. Corp., 2007 WL 602969 (Cal. App. Feb. 28, 2007) (unpublished disposition), rev. denied, (No. S151727, Jun. 13, 2007).

With respect to the third element under § 1292(b), there are no set criteria a court is required to consider when evaluating whether an interlocutory appeal will materially advance the litigation. Courts apply pragmatic considerations to determine whether certifying non-final orders will materially advance the ultimate termination of the litigation. See, e.g., FDIC v. First Nat. Bank of Waukesha, Wis., 604 F. Supp. 616, 620 (E.D. Wis. 1985); SCM Corp. v. Xerox Corp., 474 F. Supp. 589, 593 (D. Conn. 1979). If the Ninth Circuit concludes that the Court incorrectly upheld Section 2527, then these putative class actions cannot proceed and must be dismissed forthwith. Thus, an interlocutory appeal of this issue may avoid protracted and expensive (but ultimately

unnecessary) litigation and the burdens on the litigants and court system that would result from the denial of § 1292(b) certification. See In re Cement, 673 F.2d at 1026; cf. McClelland v. Gronwaldt, 958 F. Supp. 280, 283 (E.D. Tex. 1997) (certifying for interlocutory appeal jurisdictional issues material to ultimate termination of putative class action).

In light of the procedural posture of these actions, the contrary state decisions on this significant constitutional issue, and the dearth of mandatory authority on the unique Erie issue raised by the ARP decision, the Court concludes that certification under § 1292(b) is appropriate. Thus, the Court GRANTS Defendants' Motion to Certify Interlocutory Appeal.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Defendants' Motion and **CERTIFIES** its May 7, 2007 Order in Case No. EDCV-04-407-VAP, and its May 15, 2007 Order in Case No. EDCV-02-1327-VAP for interlocutory appeal under 28 U.S.C. § 1292(b).

Dated: August 2, 2007

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JERRY BEEMAN AND PHARMACY SERVICES, INC., dba BEEMAN's PHARMACY; et al.,	)	Case No. EDCV 04-407-VAP (SGLx)
	)	[Motion filed on March 5, 2007]
Plaintiffs,	)	
	)	ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
v.	)	
ANTHEM PRESCRIPTION MANAGEMENT, INC.; et al.,	)	
Defendants.	)	

Defendants' Motion for Judgment on the Pleadings came before this Court for hearing on April 23, 2007. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court DENIES Defendants' Motion for Judgment on the Pleadings.

I. BACKGROUND

A. Procedural History

On December 5, 2002, Plaintiffs filed a Complaint in Case no. EDCV–02–1327–VAP, alleging claims for: (1) violation of California Civil Code § 2527; (2) unlawful, unfair, and fraudulent business acts and practices in violation of California Business and Professions Code § 17200; and (3) declaratory relief and unjust enrichment. On February 25, 2004, Plaintiffs filed a Complaint in Case no. EDCV–04–407–VAP, alleging similar claims.

On July 12, 2004, the Court granted motions to dismiss both actions, based on a lack of Article III standing. See Jerry Beeman and Pharmacy Servs., Inc. v. TDI Managed Care Servs., Inc., 2004 WL 1576610 (C.D. Cal. July 12, 2004). Plaintiffs successfully appealed to the U.S. Court of Appeals for the Ninth Circuit. See Jerry Beeman and Pharmacy Servs., Inc. v. TDI Managed Care Servs., Inc., 449 F.3d 1035 (9th Cir. 2006). On March 5, 2007, Defendants in both cases filed Motions for Judgment on the Pleadings ("Mot."). Plaintiffs filed an Opposition ("Opp'n") on March 20, 2007. On March 30, 2007, Defendants filed a Reply.

B. Plaintiffs' Allegations

Plaintiffs[1] own five independent retail pharma-

[1] Representative plaintiffs include: Jerry Beeman and Pharmacy Services, Inc., doing business as Beeman's Pharmacy; Anthony Hutchinson and Rocida, Inc., doing business as Finley's Rexall Drug; Charles Miller, doing business as Yucaipa Valley Pharmacy; Jim Morisoli and American Surgical Pharmacy, Inc., doing business as American Surgical Pharmacy; and Bill Pearson and Pearson and House, doing business as Pearson's Medi-

cies licensed in California. (Complaint[2] ("Compl.") ¶ 9.) Each has a contractual relationship with, or has rendered pharmaceutical services to, a beneficiary of a client of one or more of the named defendants. (Id.)

Defendants[3] are non-governmental entities that have contractual relationships with purchasers of prepaid or insured prescription drug benefits. (Compl.¶ 11.) Defendants process, consult, advise on, or otherwise assist in the processing of prepaid or insured prescription drug benefit claims submitted by licensed: California pharmacies or patrons thereof. (Id.)

Plaintiffs allege that Defendants are "prescription drug claims processors" (also "pharmacy benefit managers" or "PBMs") that (1)(a) did not conduct or obtain the results of studies which identify the fees, separate from ingredient costs, of California phar-

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cal Group Pharmacy.

[2] For simplicity's sake, all references to the Complaint relate to EDCV–04–407–VAP.

[3] Plaintiffs named the following as defendants in the EDCV–02–1327–VAP action: Caremark Inc.; TDI Managed Care Services, Inc., doing business as Eckerd Health Services; Medco Health Solutions, Inc.; Express Scripts, Inc.; and Advance PCS. In the EDCV–04–407–VAP action, Plaintiffs name the following defendants: Anthem Prescription Management, Inc.; Argus Health Systems, Inc.; Benescript Services, Inc.; Cigna Health Corporation; FFI RX Managed Care; First Health Services Corporation, doing business as First Health Services Corp.; General IPA Prescription Programs, Inc.; Managed Pharmacy Benefits, Inc.; Mede America Corp.; National Medical Health Card Systems, Inc.; Pharmacare Management Services, Inc.; Pal Laboratories, Inc., formerly known as Pharmacy Benefit Administrators, Inc.; Prime Therapeutics; Restate Corporation; RX Solutions, Inc.; Tmesys, Inc.; and WHP Health Initiatives, Inc.

macies, for pharmaceutical dispensing services to private consumers and (b) failed to distribute reports of these studies to the insurers and other third-party payors on whose behalf Defendants interact with California pharmacies; or (2) conducted flawed studies; in violation of California Civil Code § 2527. (Compl.¶¶ 26-31.) Plaintiffs also allege that, based on the above-described conduct, Defendants impermissibly entered into, engaged in, or performed contracts or transactions with Plaintiffs in the State of California. (Id. ¶ 33.)

II. LEGAL STANDARD

A motion for judgment on the pleadings is a vehicle for summary adjudication, but the standard is like that of a motion to dismiss. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Dworkin v. Hustler Magazine, 867 F.2d 1188, 1192 (9th Cir. 1989). It is "functionally identical" to a motion to dismiss for failure to state a claim; the only significant difference is that a 12(c) motion is properly brought "after the pleadings are closed and within such time as not to delay the trial." Fed. R. Civ. P. 12(c); Dworkin, 867 F.2d at 1192; see William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 9:319-323.

The Court may grant judgment on the pleadings "when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir.1996); Baker v. Citibank (S.D.) N.A., 13 F. Supp. 2d 1037, 1044 (S.D. Cal. 1998). The court must assume the truthfulness of all material facts alleged and construe all inferences reasonably

to be drawn from the facts in favor of the responding party. Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989); McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988); *see* NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

III. DISCUSSION

A. Freedom of Speech

Defendants seek judgment on the pleadings because the statute forming the basis for these actions-California Civil Code § 2527–violates the free speech provisions of both the California Constitution and the U.S. Constitution. (Mot. at 1.) According to Defendants, the Court must defer to last year's ruling by the California Court of Appeal in ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc. ("ARP"), 135 Cal. App. 4th 1307 (2006), that section 2527 violates the California Constitution's free speech provision.[4] (Mot. at 3.) In response, Plaintiffs contend that the Court need not follow "what are effectively state court interpretations of federal constitutional law," and should instead uphold section 2527 under state and federal constitutional law. (Opp'n at 15–16.)

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[4] Defendants also urge the Court to follow two other state court decisions finding section 2527 unconstitutional. (Mot. at 10–11.) These two decisions are unpublished, however, and thus California Rule of Court 977(a) prohibits a party from relying on or citing to them.

1. Deference to State Court Rulings

The Court declines to defer to the state decisions by the California Court of Appeal finding section 2527 unconstitutional, because the decisions rest entirely on interpretations of federal, not state law. Furthermore, even if it could be argued that state law provided the rule of decision, there is convincing evidence that the California Supreme Court would decide the matter differently.

"When interpreting state law, federal courts are bound by decisions of the state's highest court." Vestar Dev. II, LLC v. Gen. Dynamics Corp. ("Vestar"), 249 F.3d 958, 960 (9th Cir. 2001) (quoting Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996)). "In the absence of a pronouncement by the highest court of a state, the federal courts must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently," In re Watts, 298 F.3d 1077, 1083 (quoting Owen ex rel. Owen v. United States, 713 F.2d 1461, 1464-65 (9th Cir. 1983)); see also Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1099 (9th Cir. 2003).

Here, however, the Court is not required to "interpret[] state law" for the simple reason that *ARP* likewise did not. Vestar, 249 F.3d at 960. Defendants challenge section 2527 as impermissible compelled speech under both the federal Constitution's First Amendment and the California Constitution's article I. The California Constitution's free speech provision is "at least as broad as and in some ways is broader than" the federal Constitution's comparable provision. Kasky v. Nike, Inc., 27 Cal. 4th 939, 958-59 (2002) (internal citations and quotations omitted). In

analyzing free speech claims under the California Constitution, however, the California Supreme Court often "use[s] the tests fashioned by the United States Supreme Court." Id. at 969. Defendants fail to explain how this case implicates any of the established categories of broader free speech protection under the California Constitution. See, e.g., Robins v. PruneYard Shopping Ctr., 23 Cal. 3d 899, 909 (1979) (holding that article I, unlike the First Amendment, protects speech and petitioning in private shopping centers), aff'd, 447 U.S. 74 (1980); cf. Klein v. San Diego County, 463 F.3d 1029, 1040 (9th Cir. 2006) (declining to conduct a separate free speech analysis under the California Constitution because the plaintiff did not demonstrate that a broader protection applied).

Moreover, the substance of the ARP decision compels the conclusion that ARP represents an interpretation of federal law. The Court of Appeal held in ARP that section 2527(1) is a content-based regulation of speech under Riley v. National Federation of the Blind, 487 U.S. 781 (1988); (2) is not "intended to correct inaccurate or misleading" speech; (3) compels speech, not subsidy; (4) compels noncommercial speech under Kasky; and (5) fails both strict and intermediate scrutiny. ARP, 138 Cal. App. 4th at 1315-122. Although it nominally decided the case under the California Constitution, the ARP courts applied legal principles derived exclusively from federal con-

stitutional law.[5] See, e.g., 138 Cal. App. 4th at 1314 ("The United States Supreme Court has upheld constitutional challenges to compelled expression in two categories of cases...."), 1315 ("The fact that it is essentially statistical information does not make it less entitled to First Amendment scrutiny."), 1316 ("The constitutional validity of the regulation of commercial speech is tested under an intermediate standard, articulated by the United States Supreme Court ...."), 1317 ("A content-based regulation of noncommercial speech is valid under the First Amendment ...."), 1320 ("As the United States Supreme Court explained...."), 1321 ("Again we find Riley v. Federation of the Blind instructive.") (internal citations and quotations omitted) (emphasis added). All state court decisions cited by the *ARP* court either duplicated references to analogous federal decisions or were themselves decided under the federal Constitution. Therefore, the Court declines to defer to ARP's reading of the U.S. Supreme Court's First Amendment jurisprudence. Cf. Qwest Corp. v. City of Globe, 237 F. Supp. 2d 1115, 1117 (D. Ariz. 2002) (declining to defer to state court's holding that charges at issue were a "tax" because the issue was federal in character).

Even if the Court were to assume, *arguendo,* that ARP's invocation of the California Constitution by itself could transform somehow an analysis of federal law into an interpretation of state law, there is convincing evidence that the California Supreme Court

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[5] The ARP court stated in passing that the California Constitution's free speech right is "in some ways broader" than the federal right. ARP, 138 Cal. App. 4th at 1314. As Plaintiffs correctly point out, however, *ARP* nowhere discussed how that principle might apply in this case. (Opp'n at 16 n. 7.)

would not follow ARP. Owen, 713 F.2d at 1465. As explained below, the ARP court's undue reliance on the U.S. Supreme Court's decision in Riley -- which involved core free speech considerations not present in this case -- resulted in the application of an excessive level of scrutiny. Further, ARP made no reference to the U.S. Supreme Court's most recent compelled speech case, Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR"), 547 U.S. 47 (2006), which undermines ARP's key holdings.

Defendants assert that the California Supreme Court would follow ARP because the ARP court "heavily relied" on the California Supreme Court's decision in Kasky in deciding that section 2527 compels noncommercial speech. (Mot. at 13.) The Court disagrees for two reasons.

First, as intimated above, Kasky interpreted the, federal Constitution, and held that the California Constitution uses an identical test for determining whether a restriction reaches commercial versus noncommercial speech. 27 Cal. 4th at 959 ("This court has never suggested that the state and federal Constitutions impose different boundaries between the categories of commercial and noncommercial speech."); see also id. at 969. Second, the California Supreme Court in Kasky distinguished Riley as involving free speech considerations not at issue in that case-considerations that *ARP* ignored when it called the statute in Riley "analogous" to section 2527. Kasky, 27 Cal. 4th at 966-67.

2. Constitutional Analysis

The central dispute on the merits of Defendants' constitutional defense involves the appropriate level of constitutional scrutiny: Defendants urge the Court

to apply strict scrutiny, while Plaintiffs assert that rational basis review is sufficient. (Compare Mot. at 15 with Opp'n at 4.) Under two lines of First Amendment precedent, there are certain limits on the government's power to (1) force individuals to speak the government's message, and (2) force individuals to accommodate a third party's message that would interfere with their own message. FAIR, 126 S. Ct. at 1308-1310. To the extent that Defendants argue that section 2527 is subject to strict scrutiny under either or both of these principles, the Court disagrees. (Mot. at 16; Reply at 5, 9.)

a. Forced Expression

It is well established that the First Amendment prohibits the government not only from restricting speech, but also from "telling people what they must say." FAIR, 126 S. Ct. at 1297. This principle had its genesis in West Virginia Board of Education v. Barnette ("Barnette"), 319 U.S. 624 (1943), in which the Supreme Court held unconstitutional a state law compelling the flag salute and the Pledge of Allegiance in schools. Id. at 642. According to Justice Robert H. Jackson, speaking eloquently for the Court:

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. The Court revisited the issue of compelled speech in Wooley v. Maynard, 430 U.S. 705 (1977). The

Wooley Court struck down a New Hampshire law requiring vehicles to bear license plates with the state motto, "Live Free or Die." Id. at 717. Citing Barnette, the Court noted that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" Id. at 714 (quoting Barnette, 319 U.S. at 637). The Court applied strict scrutiny, because "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." Id. at 715.

Just last year, the Supreme Court addressed the issue of compelled speech in FAIR.[6] At issue in that case was the Solomon Amendment, which withholds federal funding from colleges and universities that deny equal access to military and nonmilitary recruiters. 126 S.Ct. at 1302. An association of law

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6 Defendants contend that FAIR was a case about conduct, not speech. In fact, however, Parts III.A.I and III.A.2 of the Court's opinion deal entirely with First Amendment freedom of speech. 126 S. Ct. at 1308. The Court's conclusory, two-sentence discussion of compelled speech incidental to regulation of conduct is best viewed as dicta, because the Court clearly does compare the compelled statements of fact in that case to the compelled speech in Barnette and Wooley. Further, Part III.A.2 does not mention conduct at all. FAIR, 126 S. Ct. at 1309-10. After "reject[ing] the view that the Solomon Amendment impermissibly regulates speech," the Court in Parts III.A.3 and III.B considered alternative arguments that the Amendment violated First Amendment protections of expressive conduct and expressive association, respectively. Id. at 1310-13. Thus, FAIR analyzed speech and expressive conduct protections separately, and the Court's inquiry here properly accounts for FAIR's speech analysis.

schools argued that the law violates the schools' right to express disagreement with the military's policies toward gays and lesbians. Id. at 1302–03. The Court determined that the Solomon Amendment was subject to First Amendment scrutiny because it compels law schools that allow on-campus recruiting to state facts such as, "The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m." Id. at 1308. As the Court stressed, however, such compelled statements of fact are

> a far cry from the compelled speech in Barnette and Wooley. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

Id. The Court further distinguished its "individual freedom of mind" cases:

> Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

Id. Here, Defendants argue that section 2527 forces PBMs to express "a political message with which they do not agree: that independent pharmacies and the public alike would benefit from increases in the fees paid to pharmacists." (Reply at 5.) The Court cannot agree. Section 2527 requires PBMs to distrib-

ute price surveys every two years to clients for whom they process claims. Nothing in the statutory scheme forces PBMs to endorse a pledge or motto contrary to their deeply-held beliefs, like the laws challenged successfully by the religious plaintiffs in Barnette and Wooley. See FAIR, 126 S. Ct. at 1308. Nor does the required factual disclosure "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Barnette, 319 U.S. at 642. Even if the Court were to accept Defendants' bare assertion that the disclosures necessarily include a message that pharmacists should be paid higher fees, this message scarcely approaches the forced endorsement of ideology previously held unconstitutional by the Supreme Court.

Defendants further argue that section 2527 is subject to heightened scrutiny because it has a political purpose. This purpose, according to Defendants, was revealed by the Ninth Circuit to be the legislature's "hope that at a time in the future this [pricing] information will become the basis for reimbursement." Beeman v. TDI Managed Care Servs., Inc., 449 F.3d 1035, 1040 (9th Cir. 2006). A purpose is not the same as an effect, however, and few pieces of legislation lack a political purpose. If any compelled statement of fact that was enacted with a political purpose was subject to strict scrutiny, then that rule would call in to question a whole host of routine disclosure laws such as mandatory food labeling. See, e.g., Pharmaceutical Care Mgmt. Ass'n v. Rowe ("Rowe"), 429 F.3d 294, 316 (1st Cir. 2005) ("What is at stake here, by contrast, is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes-in this case, protecting covered entities from questionable PBM

business practices. There are literally thousands of similar regulations on the books ...."); cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) ("When a State ... requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review,"). If anything, Defendants' "purpose" argument merely emphasizes that section 2527 is more economic regulation than prescription for orthodoxy.

Defendants' reliance on Riley also is misplaced; that decision is distinguishable on several grounds unmentioned by the *ARP* court. In Riley, the Supreme Court struck down certain provisions of a North Carolina statute that governed charitable solicitations by professional fundraisers. 487 U.S. at 784. The Court applied strict scrutiny to the statute, holding that the state's definition of a "reasonable" fundraising fee was not narrowly tailored to the state's interest in preventing fraud. More critically for our purposes, the Court also struck down the requirement that fundraisers disclose to potential donors the historical percentage of donations actually turned over to charity. Id. at 788, 794-95, 800-01. Riley declined to distinguish Barnette and Wooley as involving compelled statements of opinion rather than fact, because the actual effect of the statute was substantially to burden the fully protected speech of charitable solicitation. Id. at 797-98.

Most significantly, the statute in Riley, unlike section 2527, mandated the injection of a chilling factual disclosure into a protected First Amendment moment-charitable solicitation. As the Riley Court stressed, its prior decisions recognized that charita-

ble solicitation receives special protection because it "involve[s] a variety of speech interests-communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes-that are within the protection of the First Amendment." Village of Schaumburg v. Citizens for a Better Environment ("Schaumberg"), 444 U.S. 620, 632 (1980). Thus, Riley was consistent with the Court's earlier decisions applying strict scrutiny to strike down statutes regulating charitable solicitation. 487 U.S. at 788-89; id. at 796 ("Regulation of a [charitable] solicitation 'must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech ..., and for the reality that without solicitation the flow of such information and advocacy would likely cease.'" (quoting Schaumburg, 444 U.S. at 632)); id. at 798 ("[W]here the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself.") (citing previous charitable solicitation cases).

In particular, the decision emphasizes the North Carolina statute's chilling effect on charitable giving, especially for unpopular charities. Id. at 799–800 ("[I]f the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone. Again, the predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure."); see also id. at 794 ("This chill and uncertainty might well drive professional fundraisers out of

North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately reduce the quantity of expression." (internal quotations omitted)). Indeed, the Court noted that the state could constitutionally require fundraisers "to disclose unambiguously [their] professional status" to potential donors, without obstructing the dissemination of other protected expression. Id. at 799 n.11; see also id., at 800 (noting that the state may also require professional fundraisers to file "detailed financial disclosure forms" and could communicate that information to the public); Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003).

Here, the biannual reporting requirement of section 2527 bears more resemblance to the type of mandated disclosure approved by Riley, and it does not intrude into the context of a similarly protected First Amendment moment.

Defendants also attempt, unsuccessfully, to give overbroad effect to Riley's statement that "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." 487 U.S. at 795. For this proposition, Riley cited to Miami Herald Publishing Co. v. Tornillo ("Tornillo"), 418 U.S. 241 (1974). In that case, the Court struck down a Florida statute requiring newspapers that print editorials critical of a political candidate to print a reply by the candidate. Id. at 256. Significantly, Tornillo was decided under the "First Amendment guarantees of a free press"-not free speech. Id. at 258; see also PruneYard Shopping Ctr. v. Robins, 447

U.S. 74 ("[Tornillo] rests on the principle that the State cannot tell a newspaper what it must print."). According to the Tornillo Court, "[c]ompelling editors or publishers to publish that which reason tells them should not be published is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter." Id. at 256 (internal quotations omitted). In other words, the statute at issue, like that in Riley, was a content-based regulation because it would alter or chill other protected speech (in Tornillo, editorial control of a newspaper; in Riley, charitable solicitation). Id. at 256-57 ("[U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced."). Here, on the other hand, no similarly-protected speech is adversely affected, and the law will bestow more, not less information. Riley did not purport to extend Tornillo, and the Court declines to do so here. See Riley, 487 U.S. at 797 ("The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in [Tornillo].") (emphasis added).

Furthermore, FAIR demonstrates that Riley's application outside the context of charitable solicitation is questionable.[7] FAIR analyzed the compelled

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[7] Another case decided just one year before Riley also supports this conclusion. There, the Court upheld the Foreign Agents Registration Act of 1938, which held that it is constitutionally permissible to require foreign agents to inform American viewers that movies made by foreign governments are "political propaganda." Meese v. Keene. 481 U.S. 465, 471 (1987). In concluding that the propaganda label did not obstruct the distribution of advocacy materials, the Court noted that Congress had "simply required the disseminators of such material

statements of fact in that case without invoking the presumption that they were content-based that Defendants glean from Riley. See FAIR, 126 S. Ct. at 1308. The Court in FAIR did not apply strict scrutiny to the compelled speech, even though the law schools would have preferred not to speak because they believed that the mandated speech conflicted with their preferred message of antidiscrimination.

Accordingly, the Court concludes that section 2527 does not warrant strict scrutiny as a violation of PBMs' individual freedom of mind under Barnette, Wooley, and *FAIR,* nor does it implicate other fully protected First Amendment speech as in Riley and Tornillo.

b. Forced Accommodation of Expression

The First Amendment also limits the government's power to force individuals to accommodate a third party's message that would interfere with their own expression of ideas. FAIR, 126 S. Ct. at 1309. In Hurley v. Irish-American Gay, Lesbian and Bisexual

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to make additional disclosures that would better enable the public to evaluate the import of the propaganda." Id. at 480. According to the Court, "[d]isseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech." Id. at 481. *Meese* thus stands for the proposition, which is irreconcilable with Defendants' interpretation of Riley, that not all compelled disclosures that a speaker would not otherwise make, even those of factual information, are subject to strict scrutiny.

Group of Boston, Inc., 515 U.S. 557, 566 (1995), the Court struck down a law requiring a parade to include a group whose message the organizer did not wish to send. In Pacific Gas & Electric Co. v. Public Utilities Commission ("Pacific Gas"), 475 U.S. 1, 20-21 (1986), the Court held that a state utilities commission could not require a utility to include a third-party newsletter in its billing envelope. And in Tornillo, discussed above, the Court held that the government could not require newspaper editors to grant access to political candidates against whom the newspapers editorialized. 418 U.S. at 258.

Citing Pacific Gas, Defendants argue that the Court should apply strict scrutiny because section 2527 requires PBMs to "support and identify themselves with" Plaintiffs' message. (Mot. at 16; Reply at 5.) Once again, FAIR is instructive. In upholding the Solomon Amendment, the FAIR Court held that

> accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

126 S.Ct. at 1309-10. The Court rejected the schools'

argument that by accommodating military recruiters, "they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do." Id. at 1310. This was because students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." Id.

Here, the same rationale prevents application of the strict scrutiny test to the challenged statutory scheme. First, as discussed above, section 2527 does not require PBMs to disseminate a political or ideological message, let alone one penned by Plaintiffs. In fact, PBMs are free to collect pricing information and author the report themselves. See Cal. Civ. Code § 2527 (requiring that "every prescription drug claims processor shall have *conducted* or obtained the results of a study" (emphasis added)). Even assuming, however, that (1) Plaintiffs provide the report and (2) the report contains a message, accommodating this hypothetical message would not affect Defendants' speech, because Defendants "are not speaking" for the purposes of this inquiry when they decide to process claims for their clients. FAIR, 126 S. Ct. at 1309. As with the law school's decision to allow on-campus recruiting in FAIR, PBMs' claims processing services "lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," and accommodating Plaintiffs' pricing information "does not sufficiently interfere with any message" of PBMs. Id. at 1310; see also Pacific Gas, 475 U.S. at 9 (plurality opinion) (holding that the utility's newsletter receives the "full protection of the First Amendment" because it resembles a small newspaper and "includes the kind of discussion of 'matters of

public concern' that the First Amendment both fully protects and implicitly encourages"). Further, PBMs' clients no doubt will recognize that the reports they receive are mandated by statute, and are not sponsored by PBMs. FAIR, 126 S. Ct. at 1310. Thus, section 2527 is not subject to strict scrutiny as forced accommodation of a third-party message.

c. Appropriate Level of Scrutiny

Having concluded that section 2527 neither compels an affirmation of opinion under Barnette et al. nor forces accomodation under Pacific Gas et al., the Court must determine what level of constitutional scrutiny to apply. Plaintiffs contend that the Court should evaluate the constitutionality of section 2527 under rational basis review because it is akin to other disclosure requirements that neither included nor obstructed an ideological message. (Opp'n at 4-5.) In response, Defendants argue that section 2527 is distinguishable from the statutes that have received rational basis review, because those statutes were "designed to protect the general public from deception or harm and/or [we]re part of a comprehensive regulatory scheme." (Reply at 10.) The parties also dispute whether section 2527 invokes protections on commercial speech. The Court concludes that its inquiry ends once it determines that the government regulation neither (1) implicates individual freedom of mind under Barnette nor (2) obstructs the concurrent dissemination of protected expression-commercial or otherwise.

First, the U.S. Supreme Court has declined to subject statutes to any discernable level of constitutional scrutiny after determining that they involve no "compelled recitation of a message containing an

affirmation of belief" under Barnette. See PruneYard Shopping Ctr., 447 U.S. at 88; FAIR, 126 S. Ct. at 1308-10. The Ninth Circuit has followed suit. In Environmental Defense Center, Inc., v. EPA, 344 F.3d 832 (2003), the Circuit upheld an EPA regulation requiring storm sewer providers to distribute educational materials to the community about the impacts of stormwater discharges and how to reduce pollution from runoff. Id. at 848. After the court decided that the regulation did not impermissibly compel an ideological message under Wooley, its inquiry ended. Environmental Defense Ctr., 344 F.3d at 851. Although the panel also looked to whether the regulation was "consistent with an overall regulatory program," that finding applied to its analysis under the Supreme Court's "compelled subsidy" doctrine, not its compelled speech analysis under Barnette. Environmental Defense Ctr., 344 F.3d at 850 (citing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)).[8]

The First Circuit also has declined to undertake a meaningful inquiry into the means-end relationship between a somewhat similar statute involving

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[8] The compelled subsidy doctrine does not apply here because nothing in section 2527 requires PBMs to subsidize the dissemination of a message by a private entity. See Glickman, 521 U.S. at 469-70 (upholding a generic advertising assessment by the Department of Agriculture); U.S. Dept. of Agriculture v. United Foods, 533 U.S. 405, 410-17 (2001) (striking down a similar generic advertising campaign); Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 557 (2005) (referring to "compelled-subsidy cases" as those "in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity"). Accordingly, Defendants' discussion of United Foods is misplaced. (Mot. at 22–24.)

"routine disclosure of economically significant information designed to forward ordinary regulatory purposes" and the state's interest. See Rowe, 429 F.3d at 316. Although it purported to apply the rational basis review in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), which the Court declines to apply here as discussed below, the First Circuit declared:

> This is a test akin to the general rational basis test governing all government regulations under the Due Process Clause. The test is so obviously met in this case as to make elaboration pointless. Rowe, 429 F.3d at 316. Thus, the Rowe court performed a type of rational basis review only to the extent that it determined that the regulatory purpose of "protecting [health benefit providers] from questionable PBM business practices" qualified as "ordinary." Id. at 416. Here, even if the Court were to apply the lenient test in Rowe, section 2527 clearly is designed to further the "ordinary" regulatory purposes of supplying accurate marketplace information and increasing consumer choice in pharmacy services.

Second, strict scrutiny-and rational basis review—applies only when a statute that compels speech obstructs concurrent protected speech. As discussed above, when the affected expression receives the "full protection" of the First Amendment, as in Riley and Pacific Gas, the Court applies strict scrutiny. See Riley, 487 U.S. at 796 ("Therefore, we apply our test for fully protected expression."); id. at 800 ("requiring that the government demonstrate "compelling necessity" and "means precisely tailored");

Pacific Gas, 475 U.S. at 19 ("Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest."). As discussed above, section 2527 does not implicate fully protected expression.

When the affected or chilled expression is commercial speech, the Court applies a form of rational basis review. The principle that rational basis review applies to compelled speech that alters concurrent commercial speech was established by the Supreme Court in Zauderer, and reiterated in Riley. Riley, 487 U.S. at 796 n.9 ("Purely commercial speech is more susceptible to compelled disclosure requirements.") In Zauderer, an attorney challenged Ohio's requirement that his advertising disclose the fact that clients will have to pay litigation costs even if their cases are unsuccessful. Id. at 652. The Court distinguished the "interests at stake" from those in Wooley, Tornillo, and Barnette, because the state attempted to prescribe only "what shall be orthodox in commercial advertising." Id. at 651. It noted, however, that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." Id. at 651 (emphasis added). When protected commercial speech is adversely affected, therefore, disclosure requirements must be "reasonably related" to a sufficient state interest (for example, preventing consumer deception), not "unduly burdensome," and not "vague[ ]." Id. at 651, 653 n.15. Although the Court noted that this test was less stringent than the test for *restrictions* on commercial speech, see id. at 651 n.14, it did not specify how sufficiently important the state interest must be. See id. at 650-51 (refusing to

apply Central Hudson's "substantial government interest" requirement to truthful disclosure requirements, which involve "minimal" protected constitutional interests). For present purposes, however, it is unnecessary to determine precisely whether the interest must be "legitimate and significant," Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (applying Zauderer scrutiny and determining that "Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal"), "ordinary," Rowe, 429 F.3d at 316, or somewhere else below "substantial" on the spectrum of importance. Here, it is enough that section 2527 does not burden concurrent commercial speech because the required statistical reports are not required to be distributed with advertising materials, nor could they conceivably have a chilling effect on such speech. Accordingly, Zauderer scrutiny does not apply. The Court therefore concludes that section 2527 does not violate the free speech rights of PBMs under either the federal or California Constitution.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **DENIES** Defendants' Motion for Judgment on the Pleadings.

Dated: May 4, 2007

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge

APPENDIX K

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., dba Beeman's Pharmacy; CHARLES MILLER, dba Medicine Shoppe; ANTHONY HUTCHINSON AND ROCIDA, INC., dba Finley's Rexall Drug; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY, INC., dba American Surgical Pharmacy; BILL PEARSON AND PEARSON AND HOUSE, on behalf of themselves and all others similarly situated and on behalf of the general public, dba Pearson's Medical Group Pharmacy,
Plaintiffs-Appellants,

v.

No. 04-56369
D.C. No.
CV-02-01327-VAP

TDI MANAGED CARE SERVICES, INC., dba Eckerd Health Services; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; ADVANCE PCS,
Defendants-Appellees.

ANTHONY HUTCHINSON, AND ROCIDA, INC., dba FINLEY'S REXALL DRUG; CHARLES MILLER, dba YUCAIPA VALLEY PHARMACY; JIM MORISOLI, AND AMERICAN SURGICAL PHARMACY, INC., dba AMERICAN SURGICAL PHARMACY; BILL PEARSON, AND PEARSON AND HOUSE, dba PEARSON'S MEDICAL GROUP PHARMACY, on behalf of themselves and all others similarly situated and on behalf of the general public; JERRY BEEMAN, AND PHARMACY SERVICES, INC., dba BEEMAN'S PHARMACY,
Plaintiffs-Appellants,

v.

ANTHEM PRESCRIPTION

No. 04-56384
D.C. No.
CV-04-00407-VAP
OPINION

MANAGEMENT, INC.; ARGUS HEALTH SYSTEMS, INC.; BENESCRIPT SERVICES, INC.; FFI RX MANAGED CARE; FIRST HEALTH SERVICES CORPORATION, dba VIRGINIA FIRST HEALTH SERVICES CORP.; MANAGED PHARMACY BENEFITS, INC.; MEDE AMERICA CORP.; NATIONAL MEDICAL HEALTH CARD SYSTEMS, INC.; PHARMACARE MANAGEMENT SERVICES, INC.; PRIME THERAPEUTICS; RESTAT CORPORATION; RX SOLUTIONS, INC.; TMESYS, INC.; WHP HEALTH INITIATIVES, INC., *Defendants-Appellees.*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
April 3, 2006—Pasadena, California

Filed June 2, 2006

Before: Mary M. Schroeder, Chief Judge, Myron H. Bright,* and Harry Pregerson, Circuit Judges.
Opinion by Judge Bright

COUNSEL

Michael A. Bowse and Allan Browne, Beverly Hills, California, Alan M. Mansfield, John W. Hanson, and Hallen D. Rosner, San Diego, California, for the appellants.

Thomas N. Makris and Andrea L. Courtney, Sacramento, California, Brian D. Martin, San Diego, California, for the appellees.

OPINION

BRIGHT, Circuit Judge:

Plaintiffs-Appellants Pharmacies brought suit against Defendants-Appellees Pharmacy Benefit Managers ("PBMs") based on violations of California Civil Code §§ 2527 and 2528. The district court dismissed the Pharmacies' claims due to lack of "injury in fact" sufficient to confer Article III standing. We reverse and remand.

I

This case involves the relationship between PBMs (referred to in California Civil Code §§ 2527 and 2528 as "Prescription Drug Claims Processors"),

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

pharmacies, and third-party payors (for example, health insurance companies, self-insured employer groups, and union health and welfare plans). A customer goes to a pharmacy with a prescription and presents both an insurance card and a co-pay to get the prescription. The pharmacy fills the prescription from inventory. The pharmacy then submits a claim to a PBM for reimbursement. The pharmacy usually has a contractual relationship with various PBMs to assist in performing claims processing services. A PBM coordinates certain aspects of the reimbursement relationship between pharmacies and third-party payors. The PBM processes the pharmacy's claim for reimbursement and pays the pharmacy reimbursements in the amount it unilaterally sets. The PBM, which handles claims for several third-party payors, then submits the claim to the payor and gets paid.

In 1981, the California Pharmacists Association introduced a bill which would require PBM reimbursements at customary charges made by pharmacies rather than the rates unilaterally set by PBMs. However, the bill that passed merely required PBMs to conduct or obtain the results of bi-annual studies of a statistically significant sample of California pharmacies' retail drug pricing for pharmaceutical dispensing services to private uninsured customers, and supply copies of those studies to "clients" on whose behalf the PBMs perform studies. *See* Cal. Civ.Code § 2527(c), (d). The Pharmacies sought to enforce California Civil Code sections 2527 and 2528 by bringing an action against the PBMs. The PBMs sought to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) by arguing the Pharmacies lack

Article III standing. The District Court granted the motion to dismiss. This appeal followed.

II

Standing issues are reviewed de novo. *Viceroy Gold Corp. v. Aubry,* 75 F.3d 482, 487–88 (9th Cir.1996). The district court's interpretation of a statute is a question of law also subject to de novo review. *Id.* at 488. This court may affirm the district court's judgment on any ground supported by the record. *Atel Fin. Corp. v. Quaker Coal Co.,* 321 F.3d 924, 926 (9th Cir.2003).

III

[1] The Pharmacies claim, among other things, they have suffered procedural injury sufficient to give them Article III standing. "To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Citizens for Better Forestry v. USDA,* 341 F.3d 961, 969 (9th Cir.2003) (citations omitted). "Furthermore, he or she 'needs [to] establish the reasonable probability of the challenged action's threat to [his or her] concrete interest.'" *Id.* (citation omitted) (alteration in original).

[2] California Civil Code section 2527(c) requires prescription drug claims processors to conduct or obtain the results of a study or studies identifying the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to

private consumers.[1] Section 2527(d) provides in part: "[t]he study report or reports obtained pursuant to subdivision (c) shall be transmitted by certified mail by each prescription drug claims processor to the chief executive officer or designee, of each client for whom it performs claims processing services .... no less often than every 24 months." Section 2528 reads in part:

> A violation of Section 2527 may result only in imposition of a civil remedy.... Any owner of a licensed California pharmacy shall have standing to bring an action seeking a civil remedy pursuant to this section so long as his or her pharmacy has a contractual relationship with, or renders pharmaceutical services to, a beneficiary of a client of the

---

[1] Section 2527(c) reads in full:

(c) On or before January 1, 1984, every prescription drug claims processor shall have conducted or obtained the results of a study or studies which identifies the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to private consumers. The study or studies shall meet reasonable professional standards of the statistical profession. The determination of the pharmacy's fee made for purposes of the study or studies shall be computed by reviewing a sample of the pharmacy's usual charges for a random or other representative sample of commonly prescribed drug products, subtracting the average wholesale price of drug ingredients, and averaging the resulting fees by dividing the aggregate of the fees by the number of prescriptions reviewed. A study report shall include a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th). This study or these studies shall be conducted or obtained no less often than every 24 months.

> prescription drug claims processor, against whom the action is brought ....

Thus, sections 2527 and 2528 are intended to give the Pharmacies the ability to enforce PBMs' obligations to provide certain studies to PBM third-party payor clients.

[3] Plaintiffs make out a procedural injury: the failure on the part of the PBMs to follow the statutory procedures requiring they conduct studies and provide them to third parties. *Cf. Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1514 (9th Cir.1992) ("[B]ecause 'NEPA is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decisionmaking process,' injury alleged to have occurred as a result of violating this procedural right confers standing." (citations omitted)).

[4] The Pharmacies must still, however, show the procedures are designed to protect some threatened concrete interest. *See Mumma,* 956 F.2d at 1514 ("The personal injury requirement will be met only if the alleged harm is 'distinct and palpable ... and not abstract or conjectural or hypothetical.' " (citation omitted)).

The Pharmacies argue California Civil Code sections 2527 and 2528 require the PBMs to make studies available to third-party payors. These studies would reflect the true market rate of return for pharmacy prescriptions. Thus, the Pharmacies claim the Legislature intended that by supplying those involved in the transactions with accurate information regarding free market pricing for the drugs, the market and third-party payors could make informed decisions about fair reimbursement rates to be paid or received for the provision of pharmaceuticals to

plan participants—as compared to the rates PBMs were currently imposing on pharmacies. The Pharmacies assert recipients of the studies could use this information to evaluate what should be actual market prices, negotiate fairer reimbursement rates, lobby for legislative intervention should that be necessary, and ascertain payments made to PBMs against those amounts the PBMs pass on to pharmacies.

The PBMs respond that the use of the information in this manner, to the benefit of the Pharmacies, is too remote to create standing: should the third-party payors actually receive the studies, there exists no requirement they use them in the event that they even read them.

[5] When the legislature "is the source of the purportedly violated legal obligation, we look to the statute to define the injury." *Mumma,* 956 F.2d at 1514 (citation omitted). The Legislature here intended that making these studies publicly available would presumably at least "require claims processors to present objective data on the range and percentiles of usual and customary charges of pharmacists in the hope that at a time in the future this information will become the basis for reimbursement." Staff Comment to the report of the Assembly Committee on Finance, Insurance, and Commerce (cited in *ARP Pharm. Serv., Inc. v. Gallagher Bassett Serv., Inc.,* 135 Cal.App.4th 841, 850, 38 Cal.Rptr.3d 67 (2006) (vacated and request for rehearing granted)). As the Department of Insurance noted in the Enrolled Bill Report, even if "the bill is fairly innocuous in its impact ... it may help identify areas for cost-containment in the future." The concrete injury, as the Pharmacies allege, is a lack of information, the

denial of which then adversely affects the possibility such information will improve reimbursement rates at some point in the future.

[6] Short of assuming the legislature passed a bill with useless procedural provisions, we must conclude such procedures play some, if not a critical, part in future third-party payor decisions. *See Mumma,* 956 F.2d at 1514. The procedural injury here threatens a concrete interest of the Pharmacies and is thus sufficient to create "injury in fact" for Article III standing purposes.

[7] Nonetheless, the PBMs continue, the Pharmacies must still show causation and redressability. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). They argue the Pharmacies cannot allege facts leading to a reasonable inference that "but for" the PBMs' alleged failure to provide adequate fee studies, the Pharmacies would have received increased payments. However, as the Pharmacies correctly note, the relevant question is not the ultimate outcome that would result from the properly followed procedures, but rather whether the failure to conduct and disseminate the studies is the "but for" cause of the procedural injury. *Cf. Mumma,* 956 F.2d at 1517–18 ("The asserted injury is that environmental consequences might be overlooked and reasonable alternatives ignored as a result of deficiencies in the final EIS and ROD. The ultimate outcome following proper procedures is not in question.").

[8] Regarding redressability, the PBMs argue the Pharmacies cannot allege facts creating a reasonable inference that the failure to provide surveys caused an identifiable injury to any pharmacy, and thus neither statutory damages nor any other remedy sought can be fairly seen as providing redress. This argu-

ment, however, merely restates the PBMs' claim that there exists no "injury in fact." The procedural injury would be redressed if the PBMs followed proper procedures.

Finally, the PBMs argue the district court should be affirmed on the alternative basis that California Civil Code sections 2527 and 2528 violate the First Amendment of the United States Constitution. While this court can affirm on any legal basis finding support in the record, *Atel Fin. Corp.,* 321 F.3d at 925, we decline to address this issue here when it was not argued in the district court below. We observe that the parties will have an opportunity to fully address such argument on remand.

REVERSED AND REMANDED.

APPENDIX L

Cal. Civ. Code § 2527

Prescription drug claims processors; requirements; fee studies

(a) On or after January 1, 1984, no prescription drug claims processor, as defined in subdivision (b), shall enter into or perform any provision of any new contract, or perform any provision of any existing contract, with a licensed California pharmacy, or process or assist in the processing of any prescription drug claim submitted by or otherwise involving a service of a licensed California pharmacy unless the processor is in compliance with subdivisions (c) and (d).

(b) A "prescription drug claims processor," as used in this part, means any nongovernmental entity which has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and which processes, consults, advises on, or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof. A "prescription drug claims processor" shall not include insurers (as defined in Section 23 of the Insurance Code), health care service plans (as defined in subdivision (f) of Section 1345 of the Health and Safety Code), nonprofit hospital service plans (pursuant to Chapter 11A, (commencing with Section 11491) of Part 2 of Division 2 of the Insurance Code), pharmacy per-

mitholders (pursuant to Section 4080 of the Business and Professions Code), employers, trusts, and other entities which assume the risks of pharmaceutical services for designated beneficiaries. Also, a "prescription drug claims processor" shall not include insurers, health care service plans, and nonprofit hospital service plans which process claims on a nonrisk basis for self-insured clients.

(c) On or before January 1, 1984, every prescription drug claims processor shall have conducted or obtained the results of a study or studies which identifies the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to private consumers. The study or studies shall meet reasonable professional standards of the statistical profession. The determination of the pharmacy's fee made for purposes of the study or studies shall be computed by reviewing a sample of the pharmacy's usual charges for a random or other representative sample of commonly prescribed drug products, subtracting the average wholesale price of drug ingredients, and averaging the resulting fees by dividing the aggregate of the fees by the number of prescriptions reviewed. A study report shall include a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th). This study or these studies shall be conducted or obtained no less often than every 24 months.

(d) The study report or reports obtained pursuant to subdivision (c) shall be transmitted by certified mail by each prescription drug claims processor to the chief executive officer or designee, of each client for whom it performs claims processing services. Consistent with subdivision (c), the processor shall transmit the study or studies to clients no less often than every 24 months.

Nothing in this section shall be construed to require a prescription drug claims processor to transmit to its clients more than two studies meeting the requirements of subdivision (c) during any such 24-month period.

Effective January 1, 1986, a claims processor may comply with subdivision (c) and this subdivision, in the event that no new study or studies meeting the criteria of subdivision (c) have been conducted or obtained subsequent to January 1, 1984, by transmitting the same study or studies previously transmitted, with notice of cost-of-living changes as measured by the Consumer Price Index (CPI) of the United States Department of Labor.

APPENDIX M

Cal. Civ. Code § 2528

Violations; civil remedy; damages; attorney's fees and costs; standing; notice

A violation of Section 2527 may result only in imposition of a civil remedy, which includes, but is not limited to, imposition of statutory damages of not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000) depending on the severity or gravity of the violation, plus reasonable attorney's fees and costs, declaratory and injunctive relief, and any other relief which the court deems proper. Any owner of a licensed California pharmacy shall have standing to bring an action seeking a civil remedy pursuant to this section so long as his or her pharmacy has a contractual relationship with, or renders pharmaceutical services to, a beneficiary of a client of the prescription drug claims processor, against whom the action is brought provided that no such action may be commenced by the owner unless he or she has notified the processor in writing as to the nature of the alleged violation and the processor fails to remedy the violation within 30 days from the receipt of the notice or fails to undertake steps to remedy the violation within that period and complete the steps promptly thereafter.

APPENDIX N

Case Nos. 07-56692 and 07-56693

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BEEMAN and PHARMACY SERVICES INC., d/b/a BEEMAN's PHARMACY, et al.,
Plaintiffs-Appellees,
v.
ANTHEM PRESCRIPTION MANAGEMENT, LLC, et al.,
Defendants-Appellants

JERRY BEEMAN and PHARMACY SERVICES INC., d/b/a BEEMAN's PHARMACY, et al.,
Plaintiffs-Appellees,
v.
TDI MANAGED CARE SERVICES, INC., et al.,
Defendants-Appellants.

On Appeal From the United States District Court
For the Central District of California
Case Nos. EDCV 02-1327-VAP, 04-0407-VAP

NOTICE OF DECISION BY SUPREME COURT OF CALIFORNIA AND REQUEST FOR RULING ON FIRST AMENDMENT CHALLENGE

THOMAS M. DEE
tom.dee@huschblackwell.com
CHRISTOPHER A. SMITH
chris.smith@huschblackwell.com
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105-3441
Telephone: 314.480.1500
Facsimile: 314.480.1530

THEODORE J. BOUTROUS, JR.
tboutrous@gibsondunn.com
Counsel of Record
GAIL E. LEES
glees@gibsondunn.com
CHRISTOPHER CHORBA
cchorba@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Defendant-Appellant Express Scripts, Inc.

Pursuant to this Court's order dated June 6, 2012 (Dkt. 105), Appellants provide notice that the Supreme Court of California has rendered its decision on the certified question. Attached as Exhibit A is a copy of the opinion.

This Court granted en banc review and vacated the panel decision, which had held that Section 2527 of the California Civil Code is "constitutional under *both* the United States and California Constitutions." (Panel Decision (Dkt. 69-1) (emphasis added); *see* Order Granting Rehearing En Banc (Dkt. 94).) The en banc Court then certified the following question to the California Supreme Court: "Does California Civil Code section 2527 compel speech in violation of article I, section 2 of the California Constitution?" (En Banc Order (Dkt. 105) at 4.) In response, the California Supreme Court held that Section 2527 *does* compel speech pursuant to the

California Constitution, but concluded that the statute was subject to, and satisfied, rational basis review. (Ex. A, majority op. at 2.) Two justices dissented on the basis that the statute was subject to and failed intermediate scrutiny. (*Id.*, concurring and dissenting op. at 18.)

Appellants respectfully disagree with the California Supreme Court's conclusion that rational basis review applied as a matter of state law. Moreover, where the California court relied on principles borrowed from federal law, it disregarded the United States Supreme Court's unambiguous guidance that under the First Amendment, expression of factual information is protected by heightened judicial scrutiny, and "[c]ommercial speech is no exception." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

The California Supreme Court did not decide, and this Court did not certify, the question whether Section 2527 violates the First Amendment to the United States Constitution. Because the panel majority concluded that Section 2527 does not violate the First Amendment, that federal question is now squarely before this Court. (*See* Appellants' Petition for Rehearing En Banc (Dkt. 79) at 13 (arguing that the panel majority's "analysis under the First Amendment . . . conflicts with established Supreme Court precedent [and] independently warrant[s] review").)

In its order certifying the California law question, this Court identified critical infirmities in the panel majority's constitutional analysis. (*See* En Banc Order (Dkt. 105).) The Court noted the disagreement between the panel and the dissent on whether *Rumsfeld v. Forum for Academic and Insti-*

tutional Rights, Inc., 547 U.S. 47 (2006), stood for the proposition that "compelled dissemination of factual speech is not subject to any *First Amendment* scrutiny" (En Banc Order (Dkt. 105) at 10, 12 (emphasis added)). The panel's reading of *FAIR* squarely conflicted with the Supreme Court's holding in *Sorrell* that "the creation and dissemination of information are speech within the meaning of the First Amendment" and are subject to heightened judicial scrutiny. 131 S. Ct. at 2667. Even the California Supreme Court did not endorse the panel majority's position, instead holding that Section 2527 *does* compel speech. (Ex. A, majority op. at 2.)

Appellants respectfully request that this Court order briefing and oral argument on the question of federal constitutional law decided by the panel majority and identified in the en banc petition—whether Section 2527 violates the First Amendment to the United States Constitution because it is "a stand-alone law that does nothing more than mandate the content and transmission of speech . . . in violation of . . . the First Amendment." (En Banc Order (Dkt. 105) at 11.)

Dated: December 23, 2013

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Counsel of Record
Gail E. Lees
Christopher Chorba
GIBSON, DUNN &
CRUTCHER LLP

Thomas M. Dee
Christopher A. Smith
HUSCH BLACKWELL LLP

Attorneys for Defendant-Appellant Express Scripts, Inc.

APPENDIX O

Office of the Clerk
UNITED STATES COURT of APPEALS for the NINTH CIRCUIT
95 Seventh Street, Post Office Box 193939
San Francisco, California 94119-3939

Molly Dwyer, Clerk of Court (415) 355-8000

Edmuns G. Brown, Jr., Attorney General
Office of the Attorney General, State of California
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550

Dear Mr. Brown:

In accordance with Federal Rule of Appellate Procedure 44 and 28 U.S.C. § 2403(b), we are certifying to the Attorney General of the State of California a constitutional challenge to a state statute raised in a pending appeal in which the State of California is not a party.

The case is *Beeman v. Anthem Prescription*, Ninth Circuit docket numbers 07-56692, 07-56693. The state statute at issue is California Civil Code § 2527.

The attorneys are:

Thomas M. Peterson, Esquire
Morgan, Lewis & Bockius LLP
One Market Street
Spear Street Tower
San Francisco, CA 94105

Alan M. Mansfield, Esquire
Rosner & Mansfield LLP
10084 Carroll Canyon Rd., Ste. 100
San Diego, CA 92131

FOR THE COURT:
Jeffrey Fisher
Staff Attorney/Deputy Clerk

APPENDIX P

JASON LEVIN (State Bar No. 161807)
STEPTOE & JOHNSON LLP
633 West Fifth Street, Ste. 700
Los Angeles, CA 90071-3132
Tel: 213.439.9400
Fax: 213.439.9599
jlevin@steptoe.com

MARTIN D. SCHNEIDERMAN (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: 202.429.3000
Facsimile: 202.429.3902
mschneid@steptoe.com

Attorneys for Defendant ADVANCE PCS

Additional Defendants Listed at Conclusion of Brief

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

JERRY BEEMAN AND PHARMACY SERVICS, INC., dba BEEMAN'S PHARMACY, *et al.*, Plaintiffs, vs. TDI MANAGED CARE SERVICES, INC. dba ECKERD HEALTH SERVICES, *et al.*., Defendants.	Case No. EDCV 04-407 VAP (SGLx) **DECLARATION OF MOLLY LANE IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** Date: April 23, 2007 Time: 10:00 a.m. Judge: Hon. Virginia A. Phillips

DECLARATION OF MOLLY MORIARTY LANE

I, Molly Moriarty Lane, declare as follows:

1. I am an active member of the California State Bar and an attorney at the law firm of Morgan, Lewis & Bockius LLP, attorneys of record for Anthem Prescription Management, Inc. in the related action *Jerry Beeman and Pharmacy Services, Inc. et al. v. Anthem Prescription Management, Inc., et al.*, case no. CV 04-01262 VMC (PLAx).

2. Except as otherwise noted, I have personal knowledge of the following facts, and if called as a witness, I could and would completely testify under oath to these facts.

3. Attached hereto as Exhibit A is a true and correct copy of excerpts from the legislative history of California Civil Code sections 2527 and 2528, which were introduced as Assembly Bill 2044 ("AB 2044").

The first page of Exhibit A is the declaration from Legislative Intent Services authenticating the materials provided in this Exhibit. Each Tab in the Exhibit then corresponds to a Tab identified in the declaration from Legislative Intent Services as follows:

Tab A-1: All versions of Assembly Bill 2044 (Lancaster-1982).

Tab A-3: Analysis of Assembly Bill 2044 prepared for the Assembly Committee on Finance, Insurance, & Commerce.

Tab A-4: Material from the legislative bill file of the Assembly Committee on Finance, Insurance & Commerce on Assembly Bill 2044, as follows:

(1) File from committee;

(2) File from archives.

Tab A-13: Post-enrollment documents regarding Assembly Bill 2044.

4. Attached hereto as Exhibit B is a true and correct copy of an additional excerpt from the legislative history of California Civil Code sections 2527 and 2528.

REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201, Defendants hereby request that the Court take judicial notice of the attached Exhibits. *See also*, *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (a court may take judicial notice of "records and reports of administrative bodies"); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995) (a court may properly consider legislative history including hearing transcripts and documents referenced within them); *Torrance Redevelopment Agency v. Solvent Coating Co.*, 763 F. Supp. 1060, 1063-64 (C.D. Cal. 1991) (considering legislative history including "Committee Reports" by the state legislature).

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 2nd day of March, 2007 in San Francisco, California.

s/ Molly Moriarty Lane
Molly Moriarty Lane
Attorneys for Defendants

APPENDIX Q

Supplement 1
Assembly Bill 2044 – Lancaster

PAYMENTS OF USUAL CHARGES FOR PHARMACEUTICAL SERVICES BY THIRD-PARTY PAYORS

The amendments to the Insurance Code proposed by Assembly Bill 2044 (Lancaster) are based on legislative findings that:

1. The practices of nongovernmental third-party payors of pharmaceutical services have interfered with patients' free choice of pharmacies, and caused some individual pharmacies to choose not to participate in third-party payor programs because of "below cost, arbitrary and inadequate compensation and the failure of programs to recognize the variation in patient services."
2. Consequently, the proposed legislation is necessary to assure the continued availability of pharmaceutical services by protecting community pharmacies from coercive third-party administrative and financial practices.

Assembly Bill 2044 would add new sections to the Insurance Code which require a third-party payor, including a:

nongovernmental healthcare service plan;

nonprofit hospital service plan;
commercial health and disability insurer, including a workers' compensation insurer;
self-insured health plan;
employee welfare benefit plan;
contractor or consultant who processes claims for pharmaceutical services

to compensate a pharmacy for pharmaceutical services to persons covered by a group plan according to usual charges of the pharmacy for the same or similar services to private customers not covered by a group plan. Payments to a pharmacy are due within 30 days after receipt by the third-party payor of a claim. In the event of a payment after 30 days, interest shall be paid to the pharmacy on the unpaid balance at the maximum monthly rate allowed by Section 1 of Article XV of the Constitution.

Under the bill, a third-party payor may:
make post-payment audit reviews;
establish co-payment, deductible or indemnification provisions;
include a reasonable upper limit on claim payments. This upper limit shall not be less than the 90th percentile of usual charges within the state calculated in accordance with procedures customarily employed by third-party payors with respect to the payment of medical claims.

The remedies for a violation of the above provisions include money damages to the extent to which a third-party has failed to comply with the section, plus:
reasonable attorney fees and costs;
declaratory and injunctive relief;
any other relief which the court deems proper.

In addition, the bill provides that third-party payors which establish or administer group plans for the purchase of pharmaceutical services from pharmacies shall not adopt any policy or practice which is unfair or unreasonable or which discriminates against or favors any particular pharmacy or group of pharmacies. Remedies for a violation of these provisions include:

statutory damages of not less than $1,000 nor more than $10,000, depending on the gravity of the violation;

reasonable attorney fees and costs;

declaratory and injunctive relief;

any other relief that the court deems proper.

The bill does not apply to a pharmacy owned or operated by a third-party payor or a pharmacy which renders services pursuant to a contract with a third-party payor by which the pharmacy assumes all or a significant part of the financial risk of rending the services.

Until January 1, 1983, the bill would not apply to parties to a contract executed prior to January 1, 1982.

Assembly Bill 2044 is sponsored by the California Pharmacists Association. The membership of the association consists of individual pharmacists. Fifty to 60% are owners of pharmacies; 40 to 50% are employees of individual pharmacies, chains, hospital, healthcare service plans, etc.

The association believes that the present system of reimbursement, which provides for a fixed fee plus actual cost of ingredients, rather than the usual and customary charge, is inequitable. A pharmacist is placed in the position of either signing up as a participant under the contract or facing a serious loss of

volume of prescription business. The association estimates that 10 to 15% of its business in the state is paid for by private third-party payors. According to the association, third-party payors tend to base their fixed fees on the Medi-Cal allowance, which is $3.60, rather than on independent statistical studies.

Pharmacists do not individually possess the strength to bargain with program administrators and, collectively, they are prohibited from doing so under federal antitrust laws. In addition, they have not been encouraged by results in the courts in pursuing antitrust allegations over insurers. Although in a 5-4 decision, the U.S. Supreme Court held that pharmaceutical reimbursement agreements are not automatically exempt from judicial scrutiny by falling within the "business of insurance" exception to the Sherman Antitrust Act[1], a federal district court granted a motion for summary judgment to an insurer against whom a pharmacist had alleged restraint of trade.[2]

The goal of the sponsor of the bill is to achieve by legislation a reimbursement policy which it believes is equitable, a goal members cannot achieve through collective bargaining and have not achieved through the courts. The goal of third-party administrators and payors, on the other hand, is to keep costs as low as possible, a goal in direct conflict with that of the pharmacists.

Opponents of the proposals in the bill include:

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1 Group Life & Health Insurance Co. v. Royal Drug Co., Inc., 440 US 205 (1979).

2 Blue Shield of California v. Sausalito Pharmacy, U.S. District Court, Northern District of California

Insurance companies, including workers' compensation carriers, and hospital service plans, such as Blue Cross, which object strongly to provisions which they say will be anti-competitive, negate longstanding business and contractual agreements, increase costs and ultimately raise premiums to employers and participants;

Unions, which in some instances may have self-insured employee welfare benefit plans which are included in the bill. It is thought that the federal Employees Retirement Income Security Act (ERISA) preempts state laws with respect to self-insured plans, but the issue has not been resolved at this time.

Contractors and consultants who process the claims, based on the belief that a manager or administrator should be able to contract on a reduced fee basis in return for the large volume of business;

Health care service plans, such as Kaiser, INA/Ross Loos, and Maxicare, who are opposed to any change in the law which would in any way inhibit or restrict their ability to contract with a pharmacy, either owned or operated by the health plan, or any other pharmacy in the service area of the health plan.

Employers, such as Ford Motor Company, who are concerned about premium costs.

Measures similar to AB 2044 have been enacted in Georgia, Tennessee, and Alabama.

APPENDIX R

Statement by Department of Insurance
Concerning Assembly Bill No. 2044 (Lancaster)

Assembly Bill No. 2044 would require that all payments by third-party payors to a pharmacy for pharmaceutical services rendered to persons covered by a group plan be not less than the usual charges of a pharmacy for the same or similar services to private customers not covered by a group plan. Plan limits for such payments would be imposed, with interest penalties levied for late payments.

The Department of Insurance feels that the bill would inhibit or prevent attempts by the insurance industry at health insurance and health care cost control. We also point out that under current law, no other provider of services is guaranteed full payment for his services by an insurer. This bill would do just that for pharmacies.

The bill would give to patients the freedom of choice as to pharmacy selection. Thus, if a patient liked his "corner drug store" better than a cheaper drug store, the bill would permit the pharmacy selected to charge whatever price it wanted, and collect from the patient the difference between its charge and the amount paid by the third-party payor (insurer). However, the insurer could not under the bill refuse to pay its normal benefit if the insured chooses the more expensive druggist. Indeed, the upper limit which could be imposed on a "normal charge" payable under a group plan would be one not less

than the 90th percentile of "usual pharmacy charges" within the state, calculated in accordance with "procedures customarily employed by third-party payors with respect to the payment of medical claims."

We think this provision would have the probable result of raising the reimbursement amounts through a large portion of the state. We note that a pharmacy can probably provide services pursuant to group insurance arrangements more cheaply than to off-the-street trade through monthly billings and other cost savings measures.

The end result of the bill, we think, be to increase premiums to all insureds, with pharmacies being the ultimate beneficiaries. We think it is not in the best interest of the insurance-buying public.

APPENDIX S

CA No. 04-56369
DC No. EDCV 02-1327 VAP (SGLx)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BEEMAN AND PHARMACY SERVICES, INC., dba BEEMAN'S PHARMACY; ANTHONY HUTCHINSON AND ROCIDA, INC., dba FINLEY'S REXALL DRUG; CHARLES MILLER dba YUCAIPA VALLEY PHARMACY; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY, INC., dba AMERICAN SURGICAL PHARMACY; BILL PEARSON AND PEARSON AND HOUSE, dba PEARSON'S MEDICAL GROUP PHARMACY, on behalf of themselves and all others similarly situated and on behalf of the general public,

Appellants,

v.

TDI MANAGED CARE SERVICES, INC. dba ECKERD HEALTH SERVICES; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; and ADVANCE PCS,

Appellees.

Appeal From Judgment Of The United States District Court For the Central District of California

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APPELLANT'S OPENING BRIEF

ROSNER, LAW & MANSFIELD
HALLEN D. ROSNER (SBN 109740)
ALAN M. MANSFIELD (SBN 125998)
JOHN W. HANSON (SBN 214771)
10084 Carroll Canyon Road, First Floor
San Diego, California 92131
Tel. (858) 348-1005/Fax: (858) 348-1150

BROWNE & WOODS LLP
Allan Browne (State Bar No. 34923)
Michael A. Bowse (SBN 189659)
450 North Roxbury Drive, Seventh Floor
Beverly Hills, California 90210-4231
Tel. (310) 274-7100 *I* Fax (310) 275-5697

JURISDICTION

Appellants, owners of licensed California pharmacies (hereinafter "Pharmacy Owners"), appeal on behalf of themselves and all others similarly situated and on behalf of the general public, plaintiffs herein, appeal from the final judgment of the District Court, dismissing their Complaint in its entirety for lack of Article III standing. This Court has jurisdiction on appeal pursuant to 28 U.S.C. § 1291 and original jurisdiction pursuant to 28 U.S.C. § 1332.

The district court entered its final judgment and order of dismissal on July 12, 2004. The order fully disposed of the Pharmacy Owner's Class Action Complaint. Appellants filed their notice of appeal on August 5, 2004.

STATEMENT OF THE CASE

Plaintiffs/Appellants are owners of California pharmacies seeking to enforce the requirements of certain California statutes, Cal.Civ.Code §§ 2527 and 2528, that require Pharmacy Benefit Managers (or "PBMs") to conduct bi-annual surveys of retail drug pricing and to publish these studies to their clients. These same Pharmacy Owners also request damages, equitable, and other relief as provided for under Cal.Civ.Code § 2528 and Cal. Bus. & Prof. Code § 17200, et seq.

In short, PBMs coordinate certain aspects of the reimbursement relationship between pharmacies and third-party payors (e.g., health insurance companies, self-insured employer groups, and union health and welfare plans) for the drugs pharmacies supply third-party payor member consumers. The

relationship between pharmacies and PBMs is as follows: consumers get their prescriptions filled at a pharmacy, the pharmacy submits claims to a PBM for reimbursement. By agreement, the PBM processes the pharmacy's claim for reimbursement and pays the pharmacy reimbursements. The PBM, which handles claims for several third-party payors, submits the claim to the payor and gets paid.

The Legislature enacted California Civil Code §§ 2527 and 2528 in response to concerns that California pharmacies were being caught between escalating wholesale drug prices and rapidly declining prescription reimbursement rates. Requiring the studies and information sharing were meant to address this problem.

Section 2528 provides an owner of a licensed California pharmacy (and noone else) standing to sue PBM's for failure to comply with these statutory requirements. Section 2528, furthermore, specifically provides for damages to, including statutory damages, and other relief on behalf of pharmacy owners for each and every violation by PBMs.

On December 5, 2002, after providing defendant PBMs the notice required under Cal.Civ.Code § 2528, plaintiff Pharmacy Owners filed their Class Action Complaint on behalf of themselves, the general public, and all similarly situated California pharmacy owners. The plaintiffs alleged that the studies were neither done nor distributed to the required entities. Alternatively, for those studies that may have been conducted, those studies were alleged to be fundamentally flawed.

On April 6, 2004, the above-entitled case was joined with another related case by an intra-district transfer from the Honorable Florence Marie-Cooper

to the docket of the Honorable Virginia A. Phillips. That case was titled Beeman, et al. v. Anthem Prescription Management, Inc. et al., EDCV 04-0407-VAP(SGLx) (hereinafter "Beeman II"), and involved the same allegations brought by the same plaintiffs against a new group of defendants. In that case, one of the twenty defendants had filed a motion to dismiss on. Article III standing grounds. At the time of the hearing on that motion originally filed in the other case, this case had been pending for approximately 18 months and had progressed through early motions for summary judgment brought by the defendants, as well as limited discovery related to plaintiffs' pending motion for class certification.

On June 14, 2004, defendants/appellees AdvancePCS, Inc., Express Scripts, Inc., and Medco Health Solutions, Inc. filed their own motion to dismiss regarding Article III standing issues, which was joined by TDI Managed Care Services, Inc. on June 29, 2004. The plaintiffs filed an Opposition on June 28, 2004, and defendants file a Reply.

On July 10, 2004, the District Court, the Honorable Virginia A. Phillips presiding, issued a written opinion and order granting defendants' Motion on the grounds that the Legislature's provision of "standing" to pharmacy owners to sue for enforcement of and damages related to the violations of Sections 2527 and 2528 did not constitute a sufficient basis for Article III standing. The Pharmacy Owners appeal ensued.

ISSUES PRESENTED FOR REVIEW

1. Whether the failure to disclose the required studies created an "informational injury" to appellant

pharmacies sufficient to satisfy the Article III "injury in fact" requirement?
2. Whether the appellees' failure to create the required studies and to publish them to all of their clients created a sufficient procedural injury to appellees to satisfy Article III standing?
3. Whether appellees' claims for restitution and disgorgement of profits qualify as injuries in fact sufficient to satisfy Article III standing?

STATEMENT OF THE FACTS

To fully understand the issues involved in this appeal, it is helpful to have a basic understanding of the relationship between the businesses relevant to this suit, Pharmacy Benefit Managers ("PBMs")(referred to in Cal.Civ.Code §§ 2527 and 2528 as "Prescription Drug Claims Processors"), pharmacies, and third-party payors (e.g., health insurance companies, self-insured employer groups, and union health and welfare plans). The relationship follows a typical path for the dispensing services a pharmacy provides to consumers. A customer goes to a pharmacy with a prescription she wishes to fill and presents an insurance card and whatever "co-pay"amount (the amount the customer must pay over the amount covered by insurance) is required to pay for the prescription. (ER 1 at pp. 14-15; ER 47 at p.3.) The pharmacy has usually purchased the prescribed drug from a wholesaler or manufacturer and fills the prescription from inventory. (Id.) The pharmacy has a contractual relationship with various Pharmacy Benefit Managers ("PBMs"), either directly or through a consortium of pharmacies, to assist in performing claims processing services. (Id.) The PBM

coordinates certain aspects of the reimbursement relationship between pharmacies and third-party payors. (Id.) After filling the prescription and receiving the "co-pay"and insurance information from the customer, the pharmacy submits a claim to the PBM for reimbursement. (Id.) By agreement, the PBM then processes the pharmacy's claim for reimbursement and pays the pharmacy reimbursements in the amounts it unilaterally sets. (Id.) The PBM, which handles claims for several third-party payors, submits the claim to the payor and gets paid. (Id.)

Typically, the PBM uses a formula for reimbursement such as the AWP (or MAC), plus a pharmacy filling fee (an allowance for the pharmacy's cost of doing business), minus the PBM's service charge (which is some percentage of each transaction).(Id.)The formula looks like this:

AWP - PBM Service Charge + Pharmacy Filling Fee = Reimbursement. (Id.)

The problem has been and continues to be that PBM's set the reimbursement formula at a level too low to cover both the actual cost of the drug to pharmacies and the overall cost to the pharmacies of processing the prescription, overhead, and providing related services to the consumer; while at the same time keeping the "spread" between the AWP/MAC and the amount actually reimbursed to pharmacists. (ER 1 at pp.14-15; ER 47 at 4; ER 150 at 9; ER A at 1.)

In 1981, the California Pharmacists Association (CPhA) introduced a bill to the California Legislature (AB 2044) that sought to require PBM reimbursements at pharmacies' customary charges, rather than the artificially low rates set unilaterally by PBMs. (ER 150 at pp. 8-10.) As described by its spon-

sor, Assemblyman Bill Lancaster, the bill "would require all payments to a pharmacy for pharmaceutical services by... persons processing claims... be not less than the usual charges of the pharmacy to private consumers." (ER 150 at p. 9.)

In response to opposition to AB 2044, a compromise was reached so that rather than having the Legislature create a detailed set of specific reimbursement rates, AB 2044 was altered to instead require information creation and sharing as a means to correct the market in which pharmacies, PBM's, and third-party payors operated. (ER 150 at pp. 12-13, 16; ER A at P- 1.)

The Legislature enacted this form of AB 2044 as California Civil Code §§ 2527 and 2528, effective January 1, 1984. These statutes required PBMs to conduct or obtain the results of bi-annual surveys of a statistically significant sample of California pharmacies' retail drug pricing for pharmaceutical dispensing services to private uninsured consumers. The purpose of §§ 2527 and 2528 was to "enhance [pharmacies'] opportunities for a fair reimbursement" by PBMs by disseminating such information yo the interested parties in the relevant market. (ER A at p. 1.)

Under § 2527, pharmacies' dispensing fees are to be calculated by performing the required statistically accurate survey of California pharmacies' average charges for dispensing medicine to private, uninsured consumers by subtracting the average wholesale price paid by pharmacies for a representative sample of commonly prescribed drugs from those pharmacies' usual charges for such drugs to private consumers of those drugs. (ER 150 at p. 16.) In other words, the studies were to look at the market operat-

ing outside of the 4-party relationship between the customer, pharmacy, PBM, and third-party payor. The studies were (and are) instead to *9 consider the two-party situation where private uninsured individuals go to a pharmacy and pay the market price for the drug, not just a co-pay. (Id. at 15.) This study would, therefore, reflect the true market rate of return for pharmacy prescriptions. (ER 1 at ¶¶ 27, 55.)

Under the statute, PBMs were also required to supply copies of those surveys to the "clients" on whose behalf the PBMs perform services. (ER 150 at p.24.) Cal.Civ.Code § 2527 (d) ("The study or reports obtained... shall be transmitted by certified mail by each prescription drug claims processor to... each client for whom it performs claims processing services....")

By requiring PBMs to supply the information to such persons, the Legislature hoped to supply those involved in the transactions with accurate information regarding free market pricing for those drugs. (ER 1 at ¶27.) With that information, the market could make informed decisions about fair reimbursement rates to be payed or received for the provision of pharmaceuticals to plan participants, as compared to the reduced rates PBMs were imposing on pharmacies. (ER 150 at p. 16; ER A at p. 1.)

Section 2528 provides that only owners of California pharmacies, after proper pre-suit notice to the PBM, have the right to sue a PBM for failure to comply with their statutory requirements. Cal.Civ.Code § 2528.

STANDARD OF REVIEW

Standing issues are reviewed de novo. *See Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004). The District Court addressed standing at the pleading stage pursuant to a motion to dismiss. At the pleading stage, general allegations of injuries resulting from the defendant's conduct may suffice, for on a motion to dismiss the Court 'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As long as plaintiffs allege facts that, if taken as true would create standing, a motion to dismiss must fail. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976) (discussing difference between motion to dismiss and summary judgment regarding standing allegations and stating that even an "attenuated" causal nexus to injury is sufficient so long as injury is in fact alleged). Furthermore, as long as there remains a possibility that plaintiffs may be able to plead additional facts that are necessary to avoid dismissal, leave must be granted for plaintiffs to so amend. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982).

ARGUMENT

I. Introduction and Summary of Argument

This case involves the simple proposition that where a statutory scheme explicitly creates "standing" in certain parties to enforce mandates meant for those same parties' benefit, those parties should have access to federal court to enforce those statutes.

California Civil Code Sections 2527 and 2528, which require defendants to conduct and distribute biannual surveys of certain pharmacy-related transaction costs, establish not only the existence of monetary damages to plaintiff pharmacies for the violation of its requirements, but perhaps even more fundamentally they create statutory rights to the disclosure of information to themselves and the other key players in the world of reimbursements to pharmacies for the medicine they provide consumers. Clear Supreme Court authority directs that the denial of a statutory right to the disclosure of information, and by this appellants mean either disclosure directly to the pharmacies themselves or to third-party payors only, constitute Article III injuries. The statutes themselves explicitly provide that California pharmacies, and only California pharmacies, have standing to sue to enforce the information requirements and disclosures they have mandated at the behest of and for the benefit of these same entities. Quite simply, if these plaintiffs cannot bring their suit in federal court to protect their rights, then no one can.

To satisfy Article III standing limitations, the pharmacy owners here must show the complained-of conduct has caused them to suffer an "injury in fact" that a favorable judgment will redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In other words, appellants must show that (1) they have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely rather than speculative that the injury will be redressed by a favorable decision. *Lujan*, 504

U.S. at 560-61. Numerous courts have stated that Article Ill's standing requirement is fundamentally a corollary of the separation of powers doctrine. *See, e.g.*, *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464, 471-75 (1982). Its purposes are (1) to ensure that cases are decided in a specific factual context, rather than the "rarified atmosphere of a debating society," (2) to prevent courts from issuing advisory opinions that would determine the rights of persons not before the court (whose facts may be materially different), and (3) to minimize encroachment by the judiciary on the functions of the other branches of government. *Id.*

On a misreading of the statutory scheme, the District Court below found that the rights asserted by these California pharmacies were not their rights at all, but those of others. Alternatively, and in disregard of the Legislature's own determination and clear Supreme Court precedent, the Court found no causal relation between the complained-of violations and any injury. The operation of these statutes themselves, by providing pharmacies with the right to information, the right to have that information shared with third-party payers, and the right to damages, including statutory damages, clearly proves that all Article III requirements are met.[1]

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[1] The parties did not raise and the Court did not address "prudential" standing requirements. Prudential concerns are waivable and have been waived here. *See Pershing Park Villas Homeowners Assoc. v. United Pac. Ins.*, 219 F.3d 895, 899 (9th Cir. 2000). Regardless, appellants' case satisfies all of the potential "prudential" limitations. These limitations are commonly stated in terms of limitations on third-party standing, prohibitions on generalized grievances, and requirements that plain-

The violation of the above rights, created and defined by the legislature creates injury in fact. These injuries are clearly and certainly caused by the PBMs, who have the sole duty to create the required studies and send them to all of their clients. In addition, the relief requested in this Complaint would clearly redress the injuries to pharmacies by requiring the PBMs conduct and distribute adequate studies and pay for the damages they have inflicted already. This case does not present the abstract concerns of a debating society, but rather the rights of the litigating parties arising out of a long-standing battle to save independent pharmacies from the ever-decreasing amounts they are paid for the products and services they provide. Finally, the Court failed to address standing under the other causes of action for viola-

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tiff be within "zone of interests" protected by statute. *See* E. Chemerinsky, *Federal Jurisdiction* §§ 2.3.4, 2.3.5, 2.3.6 (3d ed. 1999). They are flexible and indeed waivable requirements. *See* Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* ¶¶2:1210, 2:129a (Rutter 2001). First, the California pharmacies are not limited to asserting the rights of others as the cause of action for enforcement was established exclusively for them. *See* Cal.Civ.Code § 2527 (providing PBMs must provide information to clients and referring to contracts with California pharmacies). Second, sections 2527 and 2528 do not create "generalized grievances" shared by large class of persons in substantially equal measure, such as taxpayer standing, but are limited to California pharmacies. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (discussing "generalized grievances"). Finally, California pharmacies are certainly within the "zone of interests" sought to be protected by the legislation as they are the ones who sponsored the legislation and are specifically designated as its beneficiaries in these statutes. *See FEC v. Akins*, 524 U.S. 1, 19-20 (finding "zone of interest" test met where statute indicated persons seeking to enforce were those intended by statute).

tions of California Business and Professions Code § 17200 and for declaratory relief. The legal claims and pleaded facts are there sufficient to survive a motion to dismiss for lack of standing. This Court, therefore, must reverse the District Court's judgment and dismissal and remand for further proceedings.

II. Informational Injury: Appellant Pharmacies Have Article III Standing For The Violation of California Civil Code §§ 2527 and 2528 Based on U.S. Supreme Court Precedent Regarding the Deprivation of a Statutorily Created Right to Information.

The United States Supreme Court has repeatedly held that the deprivation of a statutorily created right to the disclosure of information is an "injury in fact" for purposes of Article III standing. *See F.E.C. v. Akins*, 524 U.S. 11 (1998) (and cases cited therein). It is hard to imagine a more descriptive statement of the injury plaintiffs have suffered and continue to suffer than the denial of the "statutory right to the disclosure of information." This is not the only injury sufficient for Article III purposes, but this injury alone is sufficient to support standing in federal court.

The most recent Supreme Court iteration of the rule that the deprivation of a statutorily created right to information qualifies as an Article III injury is found in *F.E.C. v. Akins*, 524 U.S. 11 (1998). In Akins, the Court held that Congress could by statute create a right to information and that the denial of such information was an injury sufficient to satisfy Article III. *Akins*, 524 U.S. at 21. A group of voters brought suit challenging a decision by the Federal

Election Commission that the American Israel Public Affairs Committee ("AIPAC") is not a "political committee" subject to regulation and reporting requirements under the Federal Election Campaign Act of 1971. *Id.* at 14-18. A federal statute authorizes suit by any person aggrieved by a Federal Election Commission decision. *Id.* at 19 (discussing 2 U.S.C. § 437g(a), of the Federal Election Campaign Act of 1971 ("FECA")). The Court granted standing and concluded that Congress had created a right to information about political committees and that the plaintiffs were denied the information by virtue of the Federal Election Commission's decision. Justice Breyer, writing for the Court, explained: "The 'injury in fact' that respondents have suffered consists of their inability to obtain information – list of AIPAC donors... and campaign-related contributions and expenditures – that on respondents' view of the law, the statute requires that AIPAC make public." *Id.* at 21. In other words, the statute created a right to information, albeit a right that would not exist without the statute, and the alleged infringement of that statutory right was deemed sufficient to meet Article III.

This was not an expansion of the law of standing, as Justice Breyer stated, "[i]ndeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21. The Court pointed to two particular cases as examples: *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

Public Citizen v. Department of Justice involved an action by two public interest groups against the

United States Department of Justice to have the Federal Advisory Committee Act ("FACA"), which requires open meetings and public disclosure of information, applied to the American Bar Association's Committee on Federal Judiciary. *Public Citizen*, 491 U.S. at 443, 447. In particular, the public interest groups wanted the names of potential judicial nominees the Committee was considering and the reports and minutes of its meetings that FACA would require be publicly disclosed if FACA was applied to the Committee. *Id.* at 447. The American Bar Association contested the public interest groups' standing. *Id.* at 448. The Court held, analogizing to the vast litigation conducted in federal court under the Freedom of Information Act ("FOIA"), that Article III standing was present where litigants "sought and were denied" information that a statute required to be disclosed. *Id.* at 449.

Havens Realty Corp. v. Coleman similarly involved a statute requiring the disclosure of information the denial of which was found to be an Article III injury. *Havens*, 455 U.S. at 372. The Havens case involved the claims of two "testers" sent to an apartment complex in order to "test" whether the owners were violating the Fair Housing Act by falsely and intentionally informing minorities (and only minorities) that housing was not available. *Id.* The Court specifically held that the tester who alleged that she was given the false information, even though she had no intention of actually renting an apartment, had alleged an "injury in fact" for Article III purposes.

> As we have previously recognized, "**[t]he actual or threatened injury required by Art III may exist solely by virtue of**

> **'statutes creating legal rights, the invasion of which creates standing**....' Section 804(d)[of the Fair Housing Act], which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).

Havens, 455 U.S. at 374-75 (emphasis added, citations omitted).

The Ninth Circuit Court of Appeals in *Demando v. Morris*, 206 F.3d 1300 (9th Cir. 2000), applied *FEC v. Akins* to the Truth in Lending Act ("TILA") provisions that provide a statutory obligation to disclose certain information and allows enforcement, even without any showing of "actual" damages.[2] *Demando*, 206 F.3d at 1303.

In *Demando*, the plaintiff had a dispute with her credit card company, alleging various statutory and common law claims against the company after it notified her it was increasing the Annual Percentage Rate of her card, which rate she alleged had been set

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[2] TILA authorizes statutory damages independent of actual damages in class actions. *See Demando,* 206 F.3d at 1303.

permanently at a lower rate. Regarding plaintiff's claims such as breach of contract, the Court of Appeals found that because the new rate never went into effect, the plaintiff "has ... not been injured by any violation of the credit agreement, nor is any future injury threatened." *Id.* The Court, however, held that the plaintiff was allowed to proceed on her TILA claim because TILA requires all notices reflect the correct terms of the underlying agreement. *Id.* The Court of Appeals specifically found that the "loss of a statutory right to disclosure" was an Article III "injury in fact," citing Akins. *Id.*

California Civil Code § 2527 requires a study to be conducted or obtained every two years and that that study be disclosed to PBM clients. Appellants qualify as "clients" under the commonly accepted definition of the term "client." For example, the American Heritage College Dictionary defines "client" as "1. The party for which professional services are rendered...." American Heritage College Dictionary 261 (3d ed. 2000). PBMs render professional services, i.e., claims processing, to both pharmacies and third-party payers. Pharmacies fill the claims and seek reimbursement through PBMs. Third-party payers pay the claims of pharmacists through PBMs. Both have contracts with PBMs. (ER 1 at ¶¶26-29.)

The statute provides for the right to receive the study, section 2527, references the contractual relationship between PBMs and pahrmacies as well as the processing of claims submitted by pharmacies. Cal.Civ.Code § 2527(a).

Importantly, the statutory history refers to pharmacies as "clients" of PBMs that are to receive the studies. In the Assembly Third Reading, the As-

sembly Office, of Research describes the bill in detail and states:

> This bill requires every prescription drug claims processor, as defined, to conduct, or obtain, a study which identifies prevailing dispensing service fees charged by pharmacies to private consumers and to transmit a copy of the results of the study to each of its client pharmacies. (Emphasis added.) (ER 48 at p. 24.)

Section 2527(d) compels PBMs to mail studies to their "clients", and defines clients as not just insurers but those "for whom it performs claims processing services." PBMs perform claims processing for both third-party payors and pharmacies, that is just the simple, real-world truth.

Appellees and the District Court disagree citing Section 2528, which creates enforcement standing only in certain pharmacies, as proof that the two true groups of "clients" of the PBMs are not both recognized as "clients" under the statute. Section 2528 states, in relevant part, that:

> Any owner of a licensed California pharmacy shall have standing to bring an action seeking a civil remedy pursuant to this section so long as his or her pharmacy has a contractual relationship with, or renders pharmaceutical services to, a beneficiary of a client of the prescription drug claims processor....

Cal.Civ.Code § 2528 (emphasis added).

Although it is true, as the District Court states, that if the above use of the term "client" were to include pharmacies themselves, the limitation this sentence seeks to impose on the pharmacies that could sue would be superfluous as the pharmacy

would only have to provide services to a "beneficiary" of itself. However, and fundamentally, some of the goals of the statute, as plaintiffs allege in ¶26, is to provide information for negotiations between third-party payors and pharmacies as well as to allow pharmacies to actively police the disclosure of adequate disclosures and studies between third-party payors and PBMs. It would make little sense in terms of these purposes to deny pharmacies simultaneous access to these very studies. But by imposing the artificial requirement on the term "client" that it be used in an exclusive sense in both statutes, the appellees argue for exactly that.

To read Section 2528's use of the term "client" to deny the very purposes of the statutory scheme, which is to ensure the disclosure of information for the benefit of pharmacies, would be contrary to the "primary rule" of statutory construction - the purpose of the statute is the ultimate guiding force, even where the strict letter of the statute may be construed as inconsistent with that purpose on occasion. As stated in *Kennard v. Rosenberg*, 127 Cal.App.2d 340 (1954):

> [T]he primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained if possible, and, when once ascertained will be given effect even though it may not be consistent with the strict letter of the statute and that a statute is to be construed in a way which will render it reasonable, fair and harmonious with its manifest purpose and which will avoid mischief or absurd consequences. *Kennard*, 127 Cal.App.2d at 345.

III. Procedural Injury: Appellant Pharmacies Have Article III Standing Even If Not Entitled to the Studies as the Cal.Civ.Code §§ 2527 and 2528 Expressly Grant them a Cause of Action for Enforcement of and Damages for Violations of the Duty to Disclose Information to Third-Party Payors.

Even if pharmacy owners are not entitled to the studies pursuant to the statute, pharmacy owners nevertheless have sustained and continue to sustain a procedural injury sufficient for Article III standing. Sections 2527 and 2528 were proposed by pharmacy owners and were designed expressly for their benefit. The statutes themselves specifically accord standing to pharmacy owners for all enforcement purposes and provide for monetary compensation, including statutory damages, and other relief for pharmacies. The California Legislature has clearly and repeatedly expressed its intention and belief that the creation and disclosure of the studies would benefit California pharmacies by increasing rates and otherwise creating a more fair system of cost reimbursement for pharmacies. When those studies have either been inadequately conducted, inadequately disclosed, or not conducted or disclosed at all by PBMs, California pharmacies sustain an injury through the denial of the Legislature's mandated procedures meant for their benefit.

Just as certainly entrenched in Supreme Court precedent as "informational injury" doctrine, is the "procedural injury" doctrine whereby a statutory right conferred on individuals to have a certain procedure followed gives rise to a cognizable Article III

injury when the procedure is not followed. The Supreme Court has long-recognized that when the legislature creates procedural rights, the denial of those rights alone creates an Article III injury, at least as long as those procedural rights are meant to protect against a concrete harm to the person to whom they are granted. Here, pharmacy owners are protected by several undeniably concrete harms, such as monetary losses due to inadequate and unfair reimbursement rates.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), several wildlife conservation groups and environmental groups challenged a rule promulgated by the Secretary of the Interior interpreting § 7 of Endangered Species Act of 1973, 16 U.S.C. § 1536 ("ESA"), in such a fashion as to render it applicable only to actions within the United States. *Lujan*, 504 U.S. at 557-58. The ESA seeks to protect species of animals against threats to their continuing existence. *Id.* at 558. Among the injuries asserted by the Lujan plaintiffs was a "procedural injury." *Id.* at 572. Section 7(a)(2) of the ESA requires interagency consultation between the Secretary of the Interior and certain federal agencies. *Id.* The ESA, furthermore, contains a broad "citizen suit" provision that provides "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States... who is alleged to be in violation of any provision of this chapter." *Id.* (quoting 16 U.S.C. § 1540(g).) The plaintiffs alleged that the challenged rule limiting the scope of the ESA led to violations of their procedural right to compel consultation between the Secretary and the agencies. *Id.* at 572-73. While the Court held that the plaintiff groups had not shown that the impact on certain wildlife popula-

tions or areas would have any affect on them as they made no showing that they or their members continued to use or have any direct involvement in the specific regions affected by the rule change and so were not asserting a concrete injury to themselves, *Id.* at 564-66, the Court discussed procedural injuries in general. *Id.* at 572-73 n.7-8.

The Court clearly stated that the loss of procedural protections created by statute alone serve as an Article III injury so long as the procedures are "designed to protect some threatened concrete interest" of the plaintiff. *Id.* at 573 n.8. The Court further stated that there was no requirement that the plaintiff show that the failure to follow required procedure caused or would cause injury to the underlying interest.

There is this much truth to the assertion that "procedural rights"

> are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, even if the other agencies were obliged to consult with the

> Secretary, they might not have followed his advice.)

Lujan, 504 U.S. at 573 n.7 (emphasis added).

In Justice Kennedy's and Souter's concurrence in the section of the Lujan opinion discussing procedural injury, which concurrence provided the essential fifth and sixth votes, they further elucidated the Court's conclusion that the legislature's creation of procedural rights alone creates sufficient ground for Article III injury where those rights are denied.

> As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before....

Lujan, 504 U.S. at 580. All that is required, according to Justice Kennedy, is that the legislature "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.* Justice Kennedy found that the ESA did not of its own force establish that there is an injury in "any person" by virtue of any "violation." *Id.* The *Lujan* opinion, therefore, clearly holds that the legislatively created procedural injuries are sufficient to establish

Article III injury and causation so long as the procedure is designed to protect a cognizable right of the plaintiff. There need not be any showing of other injury as the legislature has recognized the procedural injury already.

More recently than *Lujan*, the Court in *FEC v. Akins* took an arguably even more expansive view of standing where procedural injury was involved. It should be noted that in Akins the injury referred to and found sufficient regarding Article III requirements was not only an inability to obtain information; it referred to an inability to obtain information that must, under the relevant law, be made public. "The 'injury in fact' that respondents have suffered consists of their inability to obtain information... that on respondents' view of the law, the statute requires that AIPAC make public." *Akins*, 524 U.S. at 21. This is a procedural right to obtain information created by statute. In distinguishing Justice Scalia's dissent, the Akins Court made clear that whether there was an "injury in fact" was to be determined solely by reference to positive law, the statute. If the statute does seek to protect individuals from the procedural harm they have suffered, then that is all that is required. *Id.* at 22-23 (distinguishing *U.S. v. Richardson*, 418 U.S. 166 (1974) on the grounds that the relevant positive law there, the U.S. Constitution, did not explicitly grant standing to taxpayers or any group, while the relevant statute there did).

The reasoning in *Lujan* and *FEC v. Akins* makes perfect sense: when Congress creates a procedural right, it does so not because the right will necessarily lead to particular results, but instead because procedural rights create desirable structures, incentives,

and increased or decreased probabilities. In Congress' apparent view, those structures, incentives, and probabilities tend to produce outcomes that are better or more fair. This is the underlying logic of the relevant analysis in *Lujan* and *Akins*; the statute is designed not to require particular results, but to structure processes in a way that will increase the likelihood of good or fair decisions. The injury does not consist of an environmental or informational injury alone, or even at all; the injury consists of the failure to provide the beneficiaries of the statute with the procedural protections created by the statute.

A further case relevant to this discussion about injury and causation under Article III is *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1510-13, 1514 n.11 (9th Cir. 1992). There the injury to the plaintiff coalition of environmental groups was based upon the Forest Service's alleged failure to conduct and provide to the Secretary of Agriculture an adequate environmental impact statement (EIS). *Idaho Conservation League*, 956 F.2d at 1510-13, 1514 n.11. The Court held the plaintiffs had a right to the disclosure of certain information (an adequate EIS) between governmental offices and that that statutorily created safeguard to protect against the risk of uninformed choices by the required recipients of the information was sufficient to provide Article III standing if it was violated. *Id.* at 1514.

The Court held that the injury to was sufficient to confer Article III standing even though the plaintiffs were merely enforcing their right to have adequate information disclosed between government offices and not to themselves. *Id.* at 1514-15. The Court simply considered the right the plaintiffs were enforcing to be a "procedural" right to ensure statu-

torily mandated information is disclosed in the manner proscribed by the statutory scheme. *Id.*

It made no difference to the Court that such information, even if developed and disclosed, "might be overlooked" or "ignored." *Id.* at 1518. As the Ninth Circuit pointed out in Idaho Conservation, and again more recently in the similar case *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961 (9th Cir. 2003), to require "proof" that following the informational procedures set out by statute would have certain and definite effects, would be unfair as it would require plaintiffs to undertake the very actions (investigation, study, publication) the defendants were to have completed but did not. *Idaho Conservation*, 956 F.2d at 1516; *Citizens for Better Forestry*, 341 F.3d at 972. Again, the purpose of the statute is to minimize the risk of uninformed choices by those to be provided the information. *Citizens for Better Forestry*, 341 F.3d at 971. The increase in that risk is a concrete harm to those plaintiffs provided the right to ensure compliance with the information disclosure procedures. *Id.*

Even under the District Court's construction of the statute in this case, which would deny the plaintiff pharmacy owners the right to have the information disclosed to them personally, therefore, the statutory right to have information disclosed to others pursuant to a statute designed for their benefit is clearly a sufficient procedural injury.

The District Court denied that any such injury occurred or is occurring to California pharmacy owners as, in its estimation, the "chain of inferences is simply too speculative" between PBM failures to disclose the appropriate information and any actual harm to these pharmacy owners. (ER 178 at p. 18.)

The Court, however, was incorrect as a matter of law as the statutory scheme here and the procedural rights it creates in California pharmacy owners are explicit and clearly designed to protect them from further unfair reimbursements.

IV. Restitution and the Declaration of Rights and Duties: Plaintiffs Have Article HI Standing for Their UCL and Declaratory Judgment Causes of Action.

The District Court did not address standing under California Business & Professions Code § 17200, (often referred to as the "Unfair Competition Law" or "UCL") and plaintiffs' action for declaratory relief. To the degree appellees attack Article III standing under the latter two causes of action on separate grounds from that discussed regarding the Section 2527 claim, and even if the Court were to find Article III issues, the District Court could have and should have exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over these claims if the Section 2527 claim passed Article III muster. *See Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1402-03 (E.D. Cal. 1997); *Rosales v. Citibank*, 133 F. Supp. 2d 1177 (N.D. Cal. 2001). In fact, standing to assert the UCL claims alone would support the maintenance of the Section 2527 claims even if the Section 2527 claims did not meet Article III standing. *Id.*

Even a quick reading of the UCL cause of action (ER 1 at ¶¶ 43-54) reveals how appellants have been affected in addition to how they are affected from the deprivation of rights under Sections 2527 and 2528. Section 2527 makes illegal any PBM contract with or provision of services to California pharmacies.

Cal.Civ.Code § 2527(a). Illegal actions such as this are well-within the UCL's purview, which provides equitable relief for all unlawful, unfair, or fraudulent business practices, Cal.Bus.&Prof.Code § 17204. Each plaintiff pharmacy as a matter of equitable relief is, therefore, entitled to (1) the service fees defendants subtracted from pharmacy reimbursements, and (2) the excess profits or monies generated by the PBMs from those illegal contracts.

A short explanation of the appellants UCL claim is in order. The UCL provides courts with a broad "cleansing power" to fashion equitable relief to prevent and remedy "fraudulent, unfair, or unlawful" business practices. *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal.3d 442, 449 (Cal. 1979) ("The general equitable principles underlying [the UCL] as well as its express language arm the trial court with the cleansing power to order restitution to effect complete justice."); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 179 (Cal. 2000) (discussing court's broad powers to fashion relief); *Barquis v. Merchants Collection Ass'n.*, 1 Cal.3d 94, 111 (Cal. 1972) (discussing broad powers of injunction. Only one of the above three categories, "unlawful, unfair, or fraudulent," needs to be proven to qualify as a violation. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (Cal. 1999).

To determine whether an action is "unlawful," the UCL "borrows" the violation of other laws and treats them as unlawful practices independently actionable under § 17200. See *Farmers Ins. Exch. v. Superior Court*, 2 Cal.4th 377, 383 (Cal. 1992); *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th 553, 561-67 (Cal. 1998). Notably, remedies available un-

der the UCL are cumulative to remedies provided by the underlying statute. Ca1.Bus.& Prof. Code § 17205.

As detailed in plaintiffs' Complain, (ER 1 at ¶¶30-33, 49), appellants allege that defendants/appellees' contracts with them were not only unfair and fraudulent but, pursuant to Cal.Civ.Code § 2527(a), also unlawful. Section 2527(a), in defining the violation of the statute, states that none of the defendants:

> "shall enter into or perform any provision of any new contract, or perform any provision of any existing contract, with a licensed California pharmacy, or process or assist in the processing of any prescription drug claim submitted by or otherwise involving a service of a licensed California pharmacy unless the processor is in compliance [with the statutes requirements for conducting and publishing the required study]." Cal.Civ.Code § 2527(a) (emphasis added.).

Appellants further allege that as the PBM contracts and transactions are unlawful, they are void as made in violation of the public policy embodied in section 2527 or otherwise can be voided or rescinded as an equitable remedy. (ER 1 at ¶33.) *See Stevens v. Superior Court*, 75 Cal.App.4th 594 (1999) (holding statutory violations may form the predicate violations for claims of commissions paid to unlicensed insurance dealers); *In re Anderson*, 79 B.R. 482 (S.D. Cal. 1987) (illegal contracts are void and entitling rescission and restitution of amounts paid, citing California law); *People v. Barenfeld*, 203 Cal.App.2d 166, 181-82 (Cal.App. 1962) (unlawful contracts may be void or rescindable).

Money either not paid or retained attributable to unlawful, fraudulent or unfair conduct by the defendant PBMs is certainly an "injury in fact" sufficient to fulfill the requirements of Article III. *Vongrabe v. Spring PCS*, _ F.Supp.2d _, 2004 WL 722719 (S.D. Cal. March 29, 2004) (holding that claim for restitution under the California UCL sufficient for Article III standing purposes). Here, appellants allege they have conferred on defendant PBMs, as a result of illegal and void transactions, the benefit of the pharmacies' rights to reimbursement for pharmaceuticals and services provided. (ER 1 at ¶¶29, 33.) "Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1146-47 (Cal. 2003). As the Supreme Court held in *Cortez v. Purolator Air Filtration Prods., Inc.*, 23 Cal.4th 163, 169, 178 (Cal. 2000), a claim of restitution includes "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." Appellants have an ownership interest in their claim for reimbursement from third-party payors. The PBMs, by virtue of these illegal and void transactions, have taken or retained money or property otherwise earned by pharmacies by virtue of the pharmacies' provision of pharmacy products and services. As the Complaint alleges, this amount taken or retained can be measured by the difference between the "amounts paid by defendant on a per prescription basis and the amounts paid by uninsured customers for the same prescriptions...." (ER 1 at ¶54.) It can also be measured by the amount plaintiffs would be entitled to by

statute for these violations of the law that defendants have unlawfully retained. *Rosales v. Citibank*, 133 F.Supp.2d 1177, 1180-1183 (the amount of monies retained by defendants in refusing to pay plaintiff and the class as required by statute and law are an appropriate measure of restitution).

All of the monetary remedies requested are related to defendants' violation and infringement of rights particular to plaintiffs, as provided under Cal.Civ.Code § 2527(a) and enforced through the UCL, to be free of illegal contracts that PBMs have foisted on pharmacies for years. Plaintiffs therefore have Article III standing to assert these claims, independent of the First Cause of Action.

Finally, the right to seek a declaratory judgment is provided for by federal statute and may be obtained "whether or not further relief is or could be sought." 28 U.S.C. § 2201. It would be quite anomalous to hold that Congress has conferred a right based on an actual controversy (here, appellees' violation of section 2527) to obtain declaratory relief to "any interested party" under federal law, then find such relief can only be sought in state court. This provides further support for finding Article III standing.

CONCLUSION

Based on the foregoing discussion, appellants respectfully request the Court reverse the District Court's Judgment, and remand for further proceedings.

STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, appellants hereby identify the above-entitled case to be related to the currently pending case *Beeman et al. v. TDI Managed Care Services, Inc.*, CA No. 04-56369, DC No. EDCV 02-1327 VAP(SGLx). These cases were related and transferred, intra-district to the Honorable Virginia A. Phillips. The Complaint in both cases make similar allegations and involve similar facts. The primary difference is that each case involves different defendants. Judge Phillips entertained simultaneous briefing in each case regarding the issues presented on this appeal and with only minor differences entered the same order in each case.

DATED: Dec. 6, 2004.

ROSNER, LAW & MANSFIELD

By: s/ John W. Hanson
Alan M. Mansfield
John W. Hanson
Attorneys for Appellants

APPENDIX T

ROSNER, LAW & MANSFIELD
Hallen D. Rosner (SBN 1097 40)
Alan M. Mansfield (SBN 125998)
10085 Carroll Canyon Road, First Floor
San Diego, California 92131
Tel. (858) 348-1005/ Fax (858) 348·1150

BROWNE & WOODS LLP
Allan Browne (State Bar No. 34923)
Michael A. Bowse (SBN 189659)
450 North Roxbury Drive, Seventh Ftoor
Beverly Hills, California 9021()-4231
Tel. (310) 274-7100/ Fax (310) 275-5697

Attorneys for Plaintiffs JERRY BEEMAN and PHARMACY SERVICES, INC., dba BEEMAN'S PHARMACY; ANTHONY HUTCHINSON AND ROCIDA, INC., dba FINLEY'S REXALL DRUG; CHARLES MILLER dba YUCAIPA VALLEY PHARMACY; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY, INC., dba AMERICAN SURGICAL PHARMACY; BILL PEARSON and PEARSON AND HOUSE, dba PEARSON'S MEDICAL GROUP PHARMACY, on behalf of themselves and all others similarly situated and on behalf of the general public,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
RIVERSIDE DIVISION

JERRY BEEMAN AND PHARMACY SERVICES, INC., dba BEEMAN'S PHARMACY; ANTHONY HUTCHINSON AND ROCIDA, INC., dba FINLEY'S REXALL DRUG; CHARLES MILLER dba YUCAIPA VALLEY PHARMACY; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY, INC., dba AMERICAN SURGICAL PHARMACY; BILL PEARSON AND PEARSON AND HOUSE, dba PEARSON'S MEDICAL GROUP PHARMACY, on behalf of themselves and all other similarly situated and on behalf of the general public,	)	CASE NO. <u>CLASS ACTION</u> COMPLAINT FOR: (1) Violation of California Civil Code Section 2527 *et seq*. (2) Violation of Business and Professions Code Setion 172000, *et seq*. (3) Declaratory Relief and Unjust Enrichment
Plaintiffs,	)	
v.	)	Demand for Jury Trial

ANTHEM PRESCRIPTION MANAGEMENT, INC.; ARGUS HEALTH SYSTEMS, INC.; BENESCRIPT SERVICES, INC.; CIGNA HEALTH CORPORATION; FFI RX MANAGED HEALTH CARE; FIRST HEALTH SERVICES CORPORATION, dba VIRGINIA FIRST HEALTH SERVICES CORP.; GENERAL IPA PRESCRIPTION PROGRAMS, INC.; MANAGED PHARMACY BENEFITS, INC.; MEDE AMERICA CORP.; NATIONAL MEDICAL HEALTH CARD SYSTEMS, INC.; PHARMACARE MANAGEMENT SERVICES, INC.; PAL LABORATORIES, INC.; formerly known as PHARMACY BENEFIT ADMINISTRATORS, INC.; PRIME THERAPEUTICS; RESTAT CORPORATION; RX SOLUTIONS, INC.; TMESYS, INC.; WHP HEALTH INITIATIVES, INC.,	)
Defendants.	)

Plaintiffs, on behalf of themselves and all others similarly situated as to all Causes of Action, and also

on behalf of the general public as to the Second and Third Causes of Action, allege as follows against the above-listed defendants (hereinafter referred to collectively as "defendants"), all on Information and belief, formed after an inquiry reasonable under the circumstances, which allegations are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

JURISDICTION AND VENUE

1. This Court has jurisdiction over all causes of action asserted herein pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, per plaintiff and per defendant, exclusive of interest and costs.

2. This Court has exclusive jurisdiction over the claims asserted and the defendants because each are individuals, associations or corporations that are either authorized or registered to conduct, or in fact do conduct substantial business in the State of California. Each of the defendants has sufficient minimum contacts with California, or otherwise intentionally avail themselves of the markets within California, through the collection and distribution of monies and the sale and/or distribution of their services in California to render the exercise of jurisdiction by the California courts permissible under traditional notions of fair play and substantial justice.

3. Venue is proper in this District as a substantial part of the events or occurrences upon which this action is based and that give rise to the claims asserted herein occurred in part in this District. Plaintiffs and numerous Class members reside in this Dis-

trict, entered into transactions involving the services at issue, were injured and/or subjected to irreparable harm in this District. Defendants are subject to personal jurisdiction in this District, received substantial compensation and profits from the sale of their services in this District and/or entered into illegal agreements and transactions in this District. Thus, defendants' liability arose in part in this District.

INTRODUCTION AND SUMMARY OF ACTION

4. This is a class and private Attorney General action brought on behalf of independent pharmacies in the State of California who either had a contractual relationship with the defendants, and/or rendered pharmaceutical dispensing services to the defendants or a beneficiary of a client of the defendants listed herein during the past four years. During the period addressed in this action, defendants failed to comply with their obligations imposed by law and entered into a series of illegal transactions. Such conduct injured plaintiffs, other similarly situated California pharmacies, as well as the general public that continually are victimized by such illegal practices or are competitively or otherwise harmed as a result of such acts and practices. As detailed below, defendants have engaged in a pattern and practice of uniformly ignoring and repudiating their obligations under the law, as a result of which they are legally responsible for such conduct as set forth below.

5. Based upon the obligations imposed upon defendants and their experience in the industry, defendants either knew, recklessly disregarded, reasonably should have known or were obligated under the taw to understand that their continuous failure

to perform their obligations under the law, as well as their subsequent conduct of entering into and performing contracts and transactions in violation of state law, were unlawful and rendered their contracts and agreements with plaintiffs and the Class either void or voidable.

6. Defendants have uniformly entered into transactions with plaintiffs, the Class members and the general public in violation of their obligations under California law. These actions are material for the reasons set forth in detail below.

7. The amounts in dispute are significant, based upon the statutory violations stated herein. If thousands of Class members are entitled to similar amounts, the total amounts to be paid in restitution or damages could be in the hundreds of millions or billions of dollars. Defendants have failed or refused to pay such amounts, even though they are now currently due and demand has been made for their compliance with the law.

8. Both Class members and the general public also face irreparable harm in terms of, *inter alia*, being continually victimized as a result of defendants' failure to comply with their obligations under the law and being required to abide by transactions and contracts that are illegal and thus either void or voidable.

PARTIES

Plaintiffs

9. (a) Jerry Beeman and Pharmacy Services, Inc., dba Beeman's Pharmacy (collectively, "Beeman's Pharmacy") are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, Beeman's Pharma-

cy had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Beeman's Pharmacy also has made a demand to each of the defendants that they comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

(b) Anthony Hutchinson and Rocida Inc., dba Finley's Rexall Drug (collectively, "Finley's Rexan Drug") are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, Finley's Rexall Drug had a contractual relationship with or: rendered pharmaceutical services to a beneficiary of a client of .one or more of the defendants. Finley's Rexall Drug also has made a demand for defendants to comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

(c) Charles Miller, dba Yucaipa Valley Pharmacy(formerly the Medicine Shoppe and referred to herein as "Miller/Medicine Shoppe") is a resident of Riverside County, California and owns a licensed California pharmacy. During the relevant time· period, Miller/Medicine Shoppe had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Miller/Medicine Shoppe also has made a demand for defendants to comply with CMI Code Section 2527. Despite such demand, to date defendants have refused· to honor their obligations under the law and entered into a series of illegal transactions.

(d) Jim Morisoli and American Surgical Pharmacy, Inc., dba American Surgical Pharmacy (collectively, "American Surgical") are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time · period, American Surgical had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. American Surgical also has made a demand for defendants to comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

(e) Bill Pearson and Pearson and House Pharmacies, Inc., dba Pearson's Medical Group Pharmacy (collectively, "Pearson's Pharmacy') are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, Pearson's Pharmacy had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Pearson's Pharmacy also has made a demand for defendants to comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

Defendants

10. (a) Anthem Prescription Management ("Anthem") is an Ohio Corporation that does business in California, with its principal place of business at 8890 Duke Boulevard, Mason, Ohio. The division of Anthem that performs prescription drug claims processing services, and which is obligated by law to

perform the studies descrribed herein is not a California pharmacy permit holder. At all times relevant hereto, Anthem failed or refused to comply with the legal obligations detailed herein. On information and belief, Anthem has failed to conduct the studies required by California. Though plaintiffs demanded that Anthem comply with its legal obligations to perform the study described herein, Anthem failed to respond to plaintiffs' demand.

(b) Argus Health Systems, Inc. ("Argus") is a Delaware Corporation that does business in California, with its principal place of business at 1300 Washington Street, Kansas City, Missouri. At all times relevant hereto, Argus failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then on information and belief failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(c) Benescript Services, Inc. (“Benescript”) is a Georgia Corporation that does business in California, with its principal place of business at 3300 Holcomb Bridge Road, Norcross, Georgia. At all times relevant hereto, Benescript failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law, and then (by letter dated February 21, 2003) specifically refusing to comply with the statutory requirements for conducting such studies when plaintiff demanded they do so.

(d) Cigna Health Corporation ("Cigna") is a Delaware corporation doing business in California, with its principal place of business located at 900 Cottage Grove Road, Bloomfield, Connecticut. At all times

relevant hereto, Cigna failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law, and then (by letter dated February 10, 2003) refusing to conduct such studies when plaintiffs demanded they do so.

(e) FFI Ax Managed Care ("FFI") is a Florida corporation doing business in California with its principal place of business located at 8536 Crow Drive, Suite 105, Macedonia, Ohio. At all times relevant hereto, FFI failed or refused to comply with the legal obligations detailed herein. On information and belief, FFI has failed to conduct the studies required by California. Though plaintiffs demanded that FFI comply with its legal obligations to perform the study described herein, Anthem failed to respond to plaintiffs' demand.

(f) First Health Services Corporation {"First Health") is a Virginia corporation that does business in California under the name Virginia First Health Services Corporation, with its principal place of business located at 4300 Cox Road, Glen Allen, Virginia. At all times relevant hereto, First Health failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law, and then (by letter dated March 3, 2003) refusing to conduct such studies when plaintiffs demanded they do so.

(g) General IPA Prescription Programs, Inc. ("GPP") is a New York corporation that does business In California, with its principal place of business located at 305 Madison Avenue, New York, NY. At all times relevant hereto, GPP failed or refused to comply with the legal obligations detailed herein. On information and belief, GPP has failed to conduct the

studies required by California. Though plaintiffs demanded that GPP comply with its legal obligations to perform the study described herein, GPP failed to respond to plaintiffs' demand.

(h) Managed Pharmacy Benefits, Inc. ("MPB") is a Missouri corporation that does business in California, with its principal place of business located at 1100 North Lindbergh Rd., St. Louis, Missouri. At all times relevant hereto, MPB failed to comply with the legal obligations detailed herein, including -- on information and belief -- failing to comply with the statutory requirements for conducting the statutorily required studies after plaintiffs demanded it do so.

(i) Mede America Corp. ("Mede") is a Delaware corporation with its principal place of business located in East Meadow, New York. At all times relevant hereto, Mede failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(j) National Medical Health Card Systems, Inc. ("National Medical") is a New York corporation that does business in California, with its principal place of business located at 26 Harbor Park Dr., Port Washington, New York. At all times relevant hereto, National Medical failed or refused to comply with the legal obligations detailed herein. On information and belief, National Medical has failed to conduct the studies required by California. Though plaintiffs demanded that National Medical comply with its legal obligations to perform the study described herein, National Medical failed to respond to plaintiffs' demand.

(k) Pharmacare Management Services, Inc. ("Pharmacare") is a Delaware corporation that does business in California, with its principal place of business located at 695 George Washington Hwy., Lincoln, Rhode Island. At all times relevant hereto, Pharmacare failed or refused to comply with the legal obligations detailed herein. On information and belief, Pharmacare has failed to conduct the studies required by California. Though plaintiffs demanded that Pharmacare comply with its legal obligations to perform the study described herein, Pharmacare failed to respond to plaintiffs' demand.

(l) PAL Laboratories, Inc., fka Pharmacy Benefit Administrators, Inc. ("PAL") is a Florida corporation that does business in California, with its principal place of business located at 3075 NW Avenue, Miami, Florida. At all times relevant hereto, PAL failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law, and then (by letter dated March 3, 2003) refusing to conduct such studies when plaintiffs demanded they do so.

(m) Prime Therapeutics ("Prime") is a Delaware corporation that does business in California, with its principal place of business located at 1020 Discovery Road No. 100, Eagan, Michigan. At all times relevant hereto, Prime failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(n) Restat Corporation (“Restat'") is a Wisconsin corporation that does business in California, with its principal place of business located at 724 Elm Street,

West Bend, Wisconsin. At all times relevant hereto, Restat failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(o) AX Solutions, Inc. ("RX Solutions") is a Florida corporation that does business in California, with its principal place of business located at 13101 Telecom Dr., Tampa, Florida. AX Solutions began processing prescription drug claims in California in or about March 2001. At all times thereafter, AX Solutions failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(p) Tmesys, Inc. ("Tmesys") is a Florida corporation that does business in California, with its. principal place of business located at 1300 Morris Drive, Chesterbrook, Pennsylvania. At all times relevant hereto, Tmesys failed or refused to comply with the legal obligations detailed herein. On information and belief, Tmesys has failed to conduct the studies required by California. Though plaintiffs demanded that Tmesys comply with its legal obligations to perform the study described herein, Tmesys failed to respond to plaintiffs' demand.

(q) WHP Health Initiatives, Inc. (CWHP") is an Illinois corporation that does business in California, with its principal place of business located at 300 Wilmor Rd. MS 3301, Deerfield, Illinois. At all times relevant hereto, WHP failed and refused to comply

with the legal obligations detailed herein, on information and belief failing to comply with the statutory requirements for conducting the statutorily required studies for the reasons detailed below.

11. On information and belief, each of the defendants is a non-governmental entity that has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and which processes, consults, advises on or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof as defined by, and does not fall within any of the exceptions set forth in, California Civil Code Section 2527(a). In connection with such business operations, defendants have actively entered into transactions with pharmacies throughout California, including within this District Defendants were required to conduct, but did not conduct, the relevant studies here at issue in compliance with the requirements of California law and thus entered into a series of contracts and transactions in violation of California law.

12. During the relevant time period, defendants acted in concert and/or agreed either expressly or impliedly through, among other things, the various associations they acted through, not to conduct the studies in question and to continue to collect monies despite the nature of the illegal business practices detailed herein, thus engaging in a conspiracy that resulted in injury to members of the Class and the general public. As a result, the actions of each defendant, as alleged in the Causes of Action stated herein, were ratified and approved by the other defendants or their respective directors, officers and/or

managing agents, as appropriate for the particular time period alleged herein.

13. Whenever this Complaint refers to any act or acts of defendants, the reference shall also be deemed to mean that the directors, officers, employees, affiliates, or agents of the responsible defendant authorized such act while actively engaged in the management, direction or control of the affairs of defendants, and each of them, and/or by persons who are the parents or alter egos of defendants while acting within the scope of their agency, affiliation, or employment. Whenever this Complaint refers to any act of defendants, the reference shall be ·deemed to be the act of each defendant, jointly and severally.

CLASS ACTION ALLEGATIONS

14. This action is brought and may properly be maintained as a class action pursuant to the relevant provisions of Fed. A. Civ. P. 23(b) and (c). Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as representative members of the following proposed class (the "class"): All licensed independent pharmacies or their owners who are based in the State of California and who had any contractual relationship with or rendered pharmaceutical services to any beneficiary of a client of any of the defendants at any time during the past four years, or had a prescription drug claim processed either directly or with assistance by any of the defendants.

15. In this suit, plaintiffs seek for the ·members of the Class both equitable relief, including declaratory, injunctive, restitutionary and other equitable monetary relief and damages as set forth more fully

below, including but not limited to the statutory damages provided for in California Civil Code Section 2528 and/or payment for the full value of any services rendered or paid for in connection with the illegal transactions at issue herein.

16. Specifically excluded from the proposed Class are the Court and its staff, defendants, any entity in which any of the defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity.

NUMEROSITY OF THE CLASS

17. The proposed Class is so numerous that the individual joinder of all its members in one action is impracticable. While the exact number and the Identities of Class members are not completely known at this time but can be ascertained through appropriate investigation and discovery, as defendants conduct business throughout the State of California, plaintiffs estimate the Class includes approximately 2,200 individual independent pharmacies.

EXISTENCE AND PREDOMINANCE OFCOMMON QUESTIONS Of LAW AND FACT

18. Common questions of law and fact arising out of the claims here at issue exist as to all members of the Class and predominate over any individual issues. These common legal and factual questions include, but are not limited to, the following:

a. Whether defendants were required to comply with all relevant state statutes as set forth herein on behalf of all Class members;

b. Whether defendants failed to conduct studies required by or in compliance with the procedures set forth under California CMI Code Section 2527 and/or failed to fully comply with the demands made by plaintiffs;

c. Whether defendants entered into contracts or transactions prohibited under California law, and whether such contracts are either void or voidable as a result of defendants engaging in illegal conduct;

d. Whether defendants' conduct constitutes an unlawful, fraudulent or unfair business act or practice;

e. Whether defendants knew, recklessly disregarded, reasonably should have known about, or were obligated by law to be aware of their obligations to conduct the studies required by law;

f. When defendants learned of these obligations;

g. Whether defendants continued to collect the monies here at issue despite their knowledge of or reckless or negligent disregard for the true facts;

h. Whether the conduct at issue had a likelihood of deceiving Class members;

i. Whether the gravity of the harm attributable to such conduct was outweighed by any benefits attributable thereto;

j. Whether defendants acted in concert and/or agreed not to conduct the studies required by or in compliance with California laws;

k. Whether defendants fraudulently, recklessly, negligently or otherwise concealed the true facts at issue in this action;

l. When defendants initiated this scheme to systematically refuse to comply with the law;

m. The amount of revenues and profits defendants received or saved and/or the amount of monies

or other obligations imposed on or lost by Class members as a result of such wrongdoing;

n. Whether Class members are threatened with irreparable harm and/or are entitled to injunctive and other equitable relief and, if so, what is the nature of such relief; and

o. Whether Class members are entitled to payment of equitable monetary relief and/or damages plus interest thereon, and if so, what is the nature of such relief.

TYPICALITY OF CLAIMS

19. Plaintiffs' claims are typical of the claims of members of the Class. Plaintiffs and all members of the Class paid monies to defendants even though such transactions were illegal and thus either void or voidable and had their legal rights infringed upon, are entitled to payment for injuries, losses and damages as described herein and/or are facing irreparable harm arising out of defendants' common course of conduct. The rights of Plaintiffs and each member of the Class to payment of any damages or restitution resulting therefrom are proximately attributable *to* defendants' wrongful conduct, undertaken in violation of state law as alleged herein. Plaintiffs were not aware at the time they entered into transactions with defendants of the true facts as stated herein, and have complied with all legal requirements for bringing this action.

ADEQUATE REPRESENTATION

20. Plaintiffs will fairly and adequately protect the interests of the members of the Class in that they

have no irreconcilable conflicts with or interests materially antagonistic to those of the other Class members.

21. Plaintiffs have retained attorneys experienced in the prosecution of class actions, and who have been previously appointed by courts as adequate class counsel.

SUPERIORITY AND SUBSTANTIALBENEFITS OF CLASS LITIGATION

22. A class action is superior to other available methods for the fair and efficient group-wide adjudication of this controversy and possesses substantial benefits. Individual joinder of all members of the Class is impracticable, and no other group method of adjudication of all claims asserted herein is more efficient and manageable while at the same time providing all the remedies available to ensure the full purpose of this State's laws are effectuated. Furthermore, as the damages suffered by each individual member of the Class *may* be relatively small and the relief sought discrete, the expense and burden of individual litigation in order to obtain such relief would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, and the cost to the court system of adjudicating such litigation on an individual basis would be substantial. The Class members, because of the amounts at stake, would have little interest in individually controlling the prosecution of separate actions; to counsel's knowledge there is no substantial litigation concerning this controversy pending against the parties; and it is not anticipated that there will be any difficulties in the management of

this litigation due to the focus of the wrongdoing on defendants' conduct and the level of their knowledge of the true facts. Individualized litigation would also present the potential for varying, inconsistent, or .contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. The conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each Class member as compared to other methods for the group-wide adjudication of this controversy. Thus, both the Class and the court system achieve substantial benefits by the prosecution of this action on a class-wide basis by avoiding the burden of multiple litigation involving identical claims, as well as by aiding legitimate business enterprises in curtailing illegitimate competition and ensuring a therapeutic and deterrent effect on those companies such as defendants that indulge in fraudulent practices.

23. Notice of the pendency of and any resolution of this action can be provided to the Class members by individual mailed notice, or the best notice practicable under the circumstances.

24. This action is also properly certified to proceed on a class-wide basis because:

a. The prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual Class members, thus establishing incompatible standards of conduct for defendants;

b. Because of the nature of some of the relief sought, the prosecution of separate actions by individual Class members would create a risk of adjudi-

cation with respect to them that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such. adjudications or would substantially impair or impede the ability of such Class members to protect their interests; and

c. Defendants have acted or refused to act in respects generally applicable to the Class, thereby making appropriate final injunctive relief with regard to the members of the Class· as a whole in terms of the equitable relief sought.

FACTUAL ALLEGATIONS

25. Independent California pharmacies survive on the slimmest of profit margins, if they can profit or survive at all. With increasing regularity, California pharmacies are caught between escalating wholesale drug prices and rapidly declining prescription reimbursement rates. As the narrow gap between those prices and reimbursement rates tightens even further (or even inverses), pharmacies go out of business, consolidate or are forced to reduce the quality of service provided to their customers.

26. As early as 1980, the California Legislature recognized this trend. Ultimately, in response to this concern the Legislature enacted California Civil Code §§ 2527 and 2528, effective as of January 1, 1984. These statutes required pharmacy benefit managers ("PBMs", referred to in the statute as "prescription drug claims processors") such as defendants to conduct or obtain the results of bi-annual studies of California pharmacies' retail drug pricing, using methods that both meet reasonable professional standards of the statistical profession and, as set forth in the statute, which identify the fees, separate

from ingredient costs, for pharmaceutical dispensing services to private consumers. Under the statute, PBMs were also required to supply copies of those studies to the insurers and other third-party payors on whose behalf the PBMs interact with California pharmacies. By requiring PBMs to supply that information to third-party payors, the Legislature hoped to supply those who actually paid for pharmaceuticals purchased from California pharmacies with accurate information regarding free market pricing for those drugs, such that pharmacies would receive full reimbursement for such products. Armed with that information, third-party payors could make informed decisions about fair reimbursement rates they should pay to California pharmacies for dispensing pharmaceuticals to their plan participants, as compared to the charges PBM's were imposing.

27. There can be no legitimate dispute that this statutory scheme was intended to apply to entities such as defendants, as the Legislature gave examples of defendants or their competitors as the persons with the obligations to comply with the statute. Yet rather than comply with these statutory obligations, defendants have systemically ignored, failed or refused to act in· accordance with the law.

28. Defendants provide their products and services for use throughout California and generate millions of dollars each year by providing such products and services and thus presumably would be aware of such obligations.

29. Consistent with the experience of other Class members, during the relevant time period plaintiffs entered into contracts with one or more of the defendants, performed provisions of existing contracts, or had one or more of the defendants process or as-

sist in the processing of prescription drug claims submitted by or otherwise involving the services of plaintiffs in their capacities as licensed California pharmacies or owners thereof.

30. Defendants have systemically failed to conduct the studies required by and/or in compliance with the provisions of Civil Code Section 2527(c), and/or to provide such studies to the appropriate persons identified under Civil Code Section 2527(d), despite being obligated by law to do so. These violations are severe and grave, since for several defendants, no such studies have apparently been conducted during the last 18 years, or at least until plaintiffs demanded they do so.

31. In addition, even to the extent such studies have been conducted by any of the defendants, such studies must have been flawed and not conducted in accordance with the statute's requirements for statistical accuracy. Among other things, such studies on information and belief would have not taken into account the prescription drug purchases made by uninsured payors (also called "cash only" customers), which is a statistically significant part of the relevant sample size (and which pay significantly more per prescription than compensated by defendants), because such data would not be contained in any data bases available to defendants and/or such studies have not been conducted of all or a representative sample of independent California pharmacies. Nor would such studies have taken into account the average wholesale prices paid by California pharmacies for the medicines they dispense, because such data would not be in any databases available to defendants and/or defendants failed to conduct a study of

all or a representative sample of independent California pharmacies to obtain that information.

32. Moreover, even had the defendants performed studies consistent with the requirements of Civil Code Section 2527 within 30 days of plaintiffs' demand, that would not obviate defendants' statutory liability for the entirety of the relevant time period.

33. Thus, under the circumstances existing at the time any agreements were signed or transactions were entered into with the Class members by defendants during the relevant time period, such transactions were illegal Civil Code Section 2527(a) provides that if defendants have not conducted a study in accordance with the statutory requirements and submitted it to the appropriate persons, they cannot enter into, engage in or perform any such contracts or transactions in this State. As a result, all such transactions are void or voidable, having been performed illegally. Plaintiffs and Class members are instead entitled to the reasonable value for such services, which is most appropriately measured by the amount paid by uninsured cash-only payors for such services.

34. Defendants have failed to comply with their statutory obligations despite demand having been made therefor by plaintiffs for both themselves and the Class.

35. Defendants have held Class members accountable for continuing obligations that were not legally due and/or required the payment of monies that were not owed due to the void or voidable nature of such contracts, to the detriment and injury of plaintiffs and · members of the Class.

36. As a result of the foregoing, defendants have systemically engaged in a series of transactions in violation of California law.

37. Defendants may assert that they were permitted to collect such monies under their agreements despite their illegal conduct. If the agreements were construed In such a way, the agreements (or defendants' claimed interpretation) would be unconscionable, because there would have been unequal economic bargaining power, terms imposed on a take it or leave it basis, and a material and adverse change in an important term of the parties' understanding (i.e., that the transactions and contracts were legal and not void or voidable) with no notice thereof and to the surprise of members of the Class and no opportunity to change the terms, all to the detriment of and prejudice to the rights of the Class members but with significant benefit to defendants. Because the agreements *were* drafted by defendants, and since any construction resulting in an absurd result *or* an unconscionable and illegal term should be avoided, while plaintiffs believe no ambiguities about the illegality and voidability of such transactions exist, any ambiguities in the construction of the agreements in terms of permitting such conduct in contravention of these statutory requirements must be construed against defendants and in favor of members of the Class in light of the statutory prohibitions set forth above.

38. As a result of the above, defendants failed to abide by their legal obligations and collected monies even though such monies were illegally collected, because the transactions upon which such funds were due were illegal. Such conduct adversely impacted or

will impact thousands of members of the Class and the general public.

39. Class members and members of the general public are particularly vulnerable to such deceptive and fraudulent practices. Most persons possess limited knowledge of such a potential for such illegal conduct. Thus, Class members could not have reasonably been expected to determine in advance whether such limitations or illegal conduct truly existed or took place.

40. Class members were injured by defendants' failure to comply with their obligations imposed under California law. Class members should therefore be given the ability to void such transactions as illegal and unenforceable and/or receive all amounts improperly paid or the reasonable value for the services rendered versus the value of what they were required to take in payment for such services, and/or such monies should be paid to members of the general public.

41. Class members and the general public have not received a return of the · improperly paid or retained monies and are currently owed such amounts, plus any damages. restitution, interest or other legal or equitable monetary relief required to be paid to them by law.

42. Defendants' failure to abide by their legal obligations is ongoing and continues to this date.

FIRST CAUSE OF ACTION

Violation of Civil Code Section 2527 et seq. - Against All Defendants

43. Plaintiffs hereby incorporate, as if fully set forth herein, each and every allegation contained in ¶¶ 1-42 hereof and further allege as follows.

44. Defendants entered into a series of written contracts and engaged in transactions with plaintiffs, members of the Class and the general public throughout the relevant time period within this State. As detailed above, defendants have engaged in such transactions in violation of the law, and specifically in violation of California Civil Code Section 2527(a).

45. As alleged above, defendants have failed to comply with their obligations under Civil Code Section 2527(c) and/or 2527(d). Defendants have failed to completely resolve such wrongful conduct despite demand therefor on behalf of plaintiffs and the Class having been made in compliance with the statutory requirements.

46. Plaintiffs and members of the Class are therefore each entitled to between $1,000 and $10,000 in statutory damages for each violation of the statute engaged in by defendants, and there are multiple violations. They are also entitled to an order of the Court for declaratory and injunctive relief or any other relief the Court deems proper, including but not limited to an order prohibiting defendants from refusing to comply with their legal obligations and/or declaring as void or voidable any contracts or transactions that occurred when the statute was violated by defendants as a result of such illegality and

the return and/or payment for the reasonable value for such services or any monies illegally collected as set forth herein, plus reasonable attorneys' fees and costs.

SECOND CAUSE OF ACTION

Unlawful, Unfair and Fraudulent Business Acts and Practices Against All Defendants

47. Plaintiffs hereby incorporate each and every allegation contained in ¶¶ 1-46 as if fully alleged herein and further allege as follows.

48. Defendants' acts and practices as detailed above constitute acts of unfair competition. Defendants have engaged in an unlawful, unfair or fraudulent business act and/or practice within the meaning of California Business & Professions Code § 17200.

49. Defendants have engaged in an "unlawful" business act and/or practice by engaging in a series of transactions in violation of California law. As detailed above, these business acts and practices violated numerous provisions of law, including, *inter alia,* California Civil Code § 2527, and involved entering into a series of illegal contracts and transactions. Plaintiffs reserve the right to identify additional violations of law as further investigation warrants.

50. Through the above-described conduct, defendants have engaged in an “unfair" business act or practice in that the justification for engaging in such conduct based on the business acts and practices described above is outweighed by the gravity of the resulting harm, particularly considering the available alternatives, violates the spirit or intent of the law

and/or offends public policy, is immoral, unscrupulous, unethical and offensive, or causes substantial injury to consumers and competitors.

51. By engaging in the above-described conduct, defendants have engaged in a "fraudulent" business act or practice in that the business acts and practices described above had a tendency and likelihood to deceive both plaintiffs, the Class members and/or·the general public.

52. Defendants need only to have violated one of the three provisions set forth above to be strictly liable under this Cause of Action.

53. The above-described unlawful, unfair or fraudulent business acts and practices engaged in by defendants continue to this day and present a threat to the Class and the general public in that defendants have failed to publicly acknowledge the wrongfulness of their actions and provide the complete relief required by the statute.

54. Pursuant to California Business & Professions Code § 17203, plaintiffs, individually and on behalf of the Class and also on behalf of the general public, seek an order of this Court prohibiting defendants from refusing to continue to engage in the unlawful, unfair, or fraudulent business acts or practices set forth in this Complaint and/or ordering defendants perform their obligations under the law and the cancellation of any illegal obligations. Plaintiffs additionally request an order from the Court requiring that defendants provide complete equitable monetary relief, including that they disgorge and return or pay defendants' ill-gotten gains obtained from the series of illegal contracts or transactions they entered into and/or pay restitution, including the amount of any monies that should have been paid if

defendants had complied with their legal obligations or as equity requires, which can be determined by examining the difference between the amount paid by defendants on a per prescription basis and the amounts paid by uninsured consumers for the same prescriptions, any amounts Class members paid to defendants as a fee for processing such transactions or claims or a portion of the reimbursements paid by third-party payors that defendants improperly retained as a fee for such services, and pay such other monies as the trier of fact may deem necessary to deter such conduct or prevent the use or enjoyment of all monies wrongfully obtained Such an order is necessary so as to require defendants to surrender all money obtained either directly or indirectly as a result of such acts of unfair competition so that defendants are prevented from benefitting or profiting from the practices that constitute unfair competition or the use or employment by defendants of any monies resulting from such illegal transactions and/or to ensure the return of any monies as may be necessary to restore to any person in interest any money or property which may have been acquired by means of such acts of unfair competition. Plaintiffs" also request the Court order that an asset freeze or constructive trust be imposed over all monies that rightfully belong to members of the Class and the general public.

THIRD CAUSE OF ACTION

Declaratory Relief and Unjust Enrichment - Against All Defendants

55. Plaintiffs hereby incorporate as if fully set forth herein, each and every allegation contained in ¶¶ 1-54 hereof, and further allege as follows.

56. There currently exists between the parties an actual controversy regarding the respective rights and liabilities of the parties regarding, *inter alia,* the obligation of Class members and members of the general public to pay the charges and amounts in question and/or the need for defendants to comply with their obligations under the law, as alleged in detail above, in order to engage in such transactions and enter into such contracts.

57. Plaintiffs, members of the Class and the general public may be without adequate remedy at law, rendering declaratory relief appropriate in that:

a. Damages may not adequately compensate the Class members or the general public for the injuries suffered, nor may other claims permit such relief;

b. The relief sought herein in terms of ceasing such practices, implementing a protocol for conducting the required studies and/or declaring there is no obligation of Class members or members of the general public to pay certain monies due to the illegal conduct of defendants, may not be fully accomplished by awarding damages; and

c. If the conduct complained of is not enjoined, harm will result to Class members and the general public because defendants' wrongful conduct is continuing and on-going, and the obligation for many Class members or members of the general public to

continue to pay such sums is still allegedly outstanding.

58. Class members and the general public may suffer irreparable harm if a determination of the parties' rights and obligations is not ordered.

59. Accordingly, plaintiffs, on behalf of themselves, the Class and/or the general public, request the Court issue an order granting the following declaratory relief:

a. That a judicial determination and declaration be made of the rights of the Class members and the general public, and the corresponding responsibilities of defendants;

b. That defendants be ordered to cease and desist from failing to comply with their obligations under the law, engaging in transactions in violation of the law and/or finding such transactions and contracts are void or voidable, as well as from holding Class members responsible for any such obligations;

c. That defendants pay over all monies by which they have been unjustly enriched and establish a fund to reimburse the costs of any refund or payment due, and/or cancel or cause to be cancelled any further obligations to pay such sums that are not properly claimed as being due and owing; and/or

d. That defendants be restrained from refusing to institute, at their own cost and utilizing a Court-approved protocol, the studies required to be conducted under the law and inform the Court, the Class and all appropriate persons of the results thereof, as well as inform all appropriate persons of the right to damages, restitution or other equitable monetary relief as ordered by the Court.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs, on behalf of themselves and all others similarly situated, and as to the Second and Third Causes of Action also on behalf of the general public, pray for judgment against defendants, and each of them jointly and severally, as follows:

(1) An Order certifying the plaintiff Class and appointing plaintiffs and their counsel to represent the Class;

(2) For the declaratory, equitable, injunctive and/or monetary relief requested in the First, Second, and Third Causes of Action as appropriate for the particular causes of action;

(3) For all damages at levels found to be appropriate for the First Cause of Action;

(4) For pre- and post-judgment interest;

(5) For attorneys' fees and for costs of suit incurred herein pursuant to, *inter alia*, Civil Code Section 2528, the common fund and private Attorney General doctrines and/or C.C.P. §1021.5 as may be appropriate; and

(6) For such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims so triable and an advisory jury for a factual determination on all equitable claims.

Dated: February 23, 2004

BROWNE & WOODS LLP
Allan Browne
Michael A. Bowse

By s/ Michael A. Bowse
Michael A. Bowse

ROSNER LAW & MANSFIELD
Halan Rosner
Alan M. Mansfield

Attorneys for Plaintiffs
JERRY BEEMAN and PHARMACY SERVICES, INC., dba BEEMAN'S PHARMACY; ANTHONY HUTCHINSON AND ROCIDA, INC., dba FINLEY'S REXALL DRUG; CHARLES MILLER dba YUCAIPA VALLEY PHARMACY; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY, INC., dba AMERICAN SURGICAL PHARMACY; BILL PEARSON and PEARSON AND HOUSE, dba PEARSON'S MEDICAL GROUP PHARMACY, on behalf of themselves and all others similarly situated and on behalf of the general public

APPENDIX U

Hallen D. Rosner (SBN 1097 40)
Alan M. Mansfield (SBN 125998)
ROSNER, LAW & MANSFIELD
10085 Carroll Canyon Road, First Floor
San Diego, California 92131
(858) 348-1005
(858) 348·1150

Bonny Sweeney (SBN 176174)
Michael A. Bowse (SBN 189659)
MILBERG WEISS BERSHAD HYNES & LERACH LLP
355 So. Grand Avenue, Ste. 4170
Los Angeles, CA 90071
(213) 617-9007
(213) 617-9185

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, RIVERSIDE DIVISION

JERRY BEEMAN AND PHARMACY SERVICES, INC., dba BEEMAN'S PHARMACY; ANTHONY HUTCHINSON AND ROCIDA, INC., dba FINLEY'S REXALL DRUG; CHARLES MILLER dba MEDICINE SHOPPE; JIM MORISOLI AND AMERICAN SURGICAL PHARMACY, INC., dba AMERICAN SURGICAL PHARMACY; BILL PEARSON AND PEARSON AND HOUSE, dba PEARSON'S MEDICAL GROUP PHARMACY, on behalf of themselves and all other similarly situated and on behalf of the general public, Plaintiffs, v. CAREMARK INC.; TDI MANAGED CARE SERVICES, INC. dba ECKERD HEALTH SERVICES; MEDCO HEALTH SOLUTIONS, INC.; EXPRESS SCRIPTS, INC.; and ADVANCE PCS, Defendants.	CASE NO. CLASS ACTION COMPLAINT FOR: (1) Violation of California Civil Code Section 2527 *et seq*. (2) Violation of Business and Professions Code Setion 172000, *et seq*. (3) Declaratory Relief and Unjust Enrichment Demand for Jury Trial

Plaintiffs, on behalf of themselves and all others similarly situated as to all Causes of Action, and also on behalf of the general public as to the Second and Third Causes of Action, allege as follows against the above-listed defendants (hereinafter referred to collectively as "defendants"), all on Information and belief, formed after an inquiry reasonable under the circumstances, which allegations are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

JURISDICTION AND VENUE

1. This Court has jurisdiction over all causes of action asserted herein pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, per plaintiff and per defendant, exclusive of interest and costs.

2. This Court has exclusive jurisdiction over the claims asserted and the defendants because each are individuals, associations or corporations that are either authorized or registered to conduct, or in fact do conduct substantial business in the State of California. Each of the defendants has sufficient minimum contacts with California, or otherwise intentionally avail themselves of the markets within California, through the collection and distribution of monies and the sale and/or distribution of their services in California to render the exercise of jurisdiction by the California courts permissible under traditional notions of fair play and substantial justice.

3. Venue is proper in this District as a substantial part of the events or occurrences upon which this action is based and that give rise to the claims as-

serted herein occurred in part in this District. Plaintiffs and numerous Class members reside in this District, entered into transactions involving the services at issue, were injured and/or subjected to irreparable harm in this District. Defendants are subject to personal jurisdiction in this District, received substantial compensation and profits from the sale of their services in this District and/or entered into illegal agreements and transactions in this District. Thus, defendants' liability arose in part in this District.

INTRODUCTION AND SUMMARY OF ACTION

4. This is a class and private Attorney General action brought on behalf of independent pharmacies in the State of California who either had a contractual relationship with the defendants, and/or rendered pharmaceutical dispensing services to the defendants or a beneficiary of a client of the defendants listed herein during the past four years. During the period addressed in this action, defendants failed to comply with their obligations imposed by law and entered into a series of illegal transactions. Such conduct injured plaintiffs, other similarly situated California pharmacies, as well as the general public that continually are victimized by such illegal practices or are competitively or otherwise harmed as a result of such acts and practices. As detailed below, defendants have engaged in a pattern and practice of uniformly ignoring and repudiating their obligations under the law, as a result of which they are legally responsible for such conduct as set forth below.

5. Based upon the obligations imposed upon defendants and their experience in the industry, defendants either knew, recklessly disregarded, rea-

sonably should have known or were obligated under the taw to understand that their continuous failure to perform their obligations under the law, as well as their subsequent conduct of entering into and performing contracts and transactions in violation of state law, were unlawful and rendered their contracts and agreements with plaintiffs and the Class either void or voidable.

6. The amounts in dispute are significant, based upon the statutory violations stated herein. If thousands of Class members are entitled to similar amounts, the total amounts to be paid in restitution or damages could be in the millions of dollars. Defendants have failed or refused to pay such amounts, even though they are now currently due and demand has been made for their compliance with the law.

7. Defendants have uniformly entered into transactions with plaintiffs, the Class members and the general public in violation of their obligations under California law. These actions are material for the reasons set forth in detail below.

8. This class and private Attorney General action is brought by the named plaintiffs, listed herein, to remedy violations of California law, arising out of defendants' breaches of their obligations under the law.

9. Both class members and the general public also face irreparable harm in terms of, *inter alia*, being continually victimized as a result of defendants' failure to comply with their obligations under the law and being required to abide by transactions and contracts that are illegal and thus either void or voidable.

PARTIES

Plaintiffs

10. (a) Jerry Beeman and Pharmacy Services, Inc., dba Beeman's Pharmacy (collectively, "Beeman's Pharmacy") are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, plaintiffs had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Plaintiffs also have made a demand to each of the defendants that they comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

(b) Anthony Hutchinson and Rocida Inc., dba Finley's Rexall Drug (collectively, "Finley's Rexan Drug") are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, Finley's Rexall Drug had a contractual relationship with or: rendered pharmaceutical services to a beneficiary of a client of .one or more of the defendants. Plaintiffs also have made a demand for defendants to comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

(c) Charles Miller, dba Medicine Shoppe, is a resident of Riverside County, California and owns a licensed California pharmacy. During the relevant time· period, plaintiff had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Plaintiff also has made a demand for defendants to

comply with CMI Code Section 2527. Despite such demand, to date defendants have refused· to honor their obligations under the law and entered into a series of illegal transactions.

(d) Jim Morisoli and American Surgical Pharmacy, Inc., dba American Surgical Pharmacy are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, plaintiffs had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Plaintiffs also have made a demand for defendants to comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

(e) Bill Pearson and Pearson and House Pharmacies, Inc., dba Pearson's Medical Group Pharmacy are residents of San Bernardino County, California and own a licensed California pharmacy. During the relevant time period, plaintiffs had a contractual relationship with or rendered pharmaceutical services to a beneficiary of a client of one or more of the defendants. Plaintiffs also have made a demand for defendants to comply with Civil Code Section 2527. Despite such demand, to date defendants have refused to honor their obligations under the law and entered into a series of illegal transactions.

Defendants

11. (a) Caremark Inc. ("Caremark") is a foreign corporation that does business in California, with its principal place of business located at 2211 Sanders Road, Northbrook, IL 60062. At all times relevant

hereto, Caremark failed or refused to comply with the legal obligations detailed herein.

(b) TDI Managed Care Services Inc, dba Eckered Health Services ("Eckerd") is a foreign corporation that does business in California, with its principal place of business located at 620 Epsilon Drive, Pittsburgh, PA 15238. At all times relevant hereto, Eckerd failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then on information and belief failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(c) Medco Health Solutions, Inc. ("Medco") is a foreign corporation that does business in California, with its principal place of business located at 100 Parsons Pond Road, Franklin Lakes, NJ 07417. At all times relevant hereto, Medco failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then on information and belief failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(d) Express Scripts, Inc. ("Express") is a foreign corporation that does business in California, with its principal place of business located at 13900 Riverport Drive, Maryland Heights, MO 63043. At all times relevant hereto, Express failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then on information and belief failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

(e) Advance PCS ("Advance") is a foreign corporation that does business in California, with its principal place of business located at 5215 N. O'Connor Blvd., No. 1600, Irving, TX 75039. At all times relevant hereto, Advance failed or refused to comply with the legal obligations detailed herein, failing to conduct the studies required by California law until plaintiffs demanded they do so, and then on information and belief failing to comply with the statutory requirements for conducting such studies for the reasons detailed below.

12. Each of the defendants is a non-governmental entity that has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and which processes, consults, advises on or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof as defined by, and does not fall within any of the exceptions set forth in, California Civil Code Section 2527(a). In connection with such business operations, defendants have actively entered into transactions with pharmacies throughout California, including within this District Defendants were required to conduct, but did not conduct, the relevant studies here at issue in compliance with the requirements of California law and thus entered into a series of contracts and transactions in violation of California law.

13. During the relevant time period, defendants acted in concert and/or agreed either expressly or impliedly through, among other things, the various associations they acted through, not to conduct the studies in question and to continue to collect monies despite the nature of the illegal business practices detailed herein, thus engaging in a conspiracy that

resulted in injury to members of the Class and the general public. As a result, the actions of each defendant, as alleged in the Causes of Action stated herein, were ratified and approved by the other defendants or their respective directors, officers and/or managing agents, as appropriate for the particular time period alleged herein.

14. Whenever this Complaint refers to any act or acts of defendants, the reference shall also be deemed to mean that the directors, officers, employees, affiliates, or agents of the responsible defendant authorized such act while actively engaged in the management, direction or control of the affairs of defendants, and each of them, and/or by persons who are the parents or alter egos of defendants while acting within the scope of their agency, affiliation, or employment. Whenever this Complaint refers to any act of defendants, the reference shall be ·deemed to be the act of each defendant, jointly and severally.

CLASS ACTION ALLEGATIONS

15. This action is brought and may properly be maintained as a class action pursuant to the relevant provisions of Fed. A. Civ. P. 23(b) and (c). Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as representative members of the following proposed class (the "class"): All licensed independent pharmacies or their owners who are based in the State of California and who had any contractual relationship with or rendered pharmaceutical services to any beneficiary of a client of any of the defendants at any time during the past four years, or had a prescription drug claim pro-

cessed either directly or with assistance by any of the defendants.

16. In this suit, plaintiffs seek for the ·members of the Class both equitable relief, including declaratory, injunctive, restitutionary and other equitable monetary relief and damages as set forth more fully below, including but not limited to the statutory damages provided for in California Civil Code Section 2528 and/or payment for the full value of any services rendered or paid for in connection with the illegal transactions at issue herein.

17. Specifically excluded from the proposed Class are the Court and its staff, defendants, any entity in which any of the defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity.

NUMEROSITY OF THE CLASS

18. The proposed Class is so numerous that the individual joinder of all its members in one action is impracticable. While the exact number and the Identities of Class members are not completely known at this time but can be ascertained through appropriate investigation and discovery, as defendants conduct business throughout the State of California, plaintiffs estimate the Class includes approximately 2,200 individual independent pharmacies.

EXISTENCE AND PREDOMINANCE OF COMMON QUESTIONS Of LAW AND FACT

19. Common questions of law and fact arising out of the claims here at issue exist as to all members of

the Class and predominate over any individual issues. These common legal and factual questions include, but are not limited to, the following:

a. Whether defendants were required to comply with all relevant state statutes as set forth herein on behalf of all Class members;

b. Whether defendants failed to conduct studies required by or in compliance with the procedures set forth under California CMI Code Section 2527 and/or failed to fully comply with the demands made by plaintiffs;

c. Whether defendants entered into contracts or transactions prohibited under California law, and whether such contracts are either void or voidable as a result of defendants engaging in illegal conduct;

d. Whether defendants' conduct constitutes an unlawful, fraudulent or unfair business act or practice;

e. Whether defendants knew, recklessly disregarded, reasonably should have known about, or were obligated by law to be aware of their obligations to conduct the studies required by law;

f. When defendants learned of these obligations;

g. Whether defendants continued to collect the monies here at issue despite their knowledge of or reckless or negligent disregard for the true facts;

h. Whether the conduct at issue had a likelihood of deceiving Class members;

i. Whether the gravity of the harm attributable to such conduct was outweighed by any benefits attributable thereto;

j. Whether defendants acted in concert and/or agreed not to conduct the studies required by or in compliance with California laws;

k. Whether defendants fraudulently, recklessly, negligently or otherwise concealed the true facts at issue in this action;

l. When defendants initiated this scheme to systematically refuse to comply with the law;

m. The amount of revenues and profits defendants received or saved and/or the amount of monies or other obligations imposed on or lost by Class members as a result of such wrongdoing;

n. Whether Class members are threatened with irreparable harm and/or are entitled to injunctive and other equitable relief and, if so, what is the nature of such relief; and

o. Whether Class members are entitled to payment of equitable monetary relief and/or damages plus interest thereon, and if so, what is the nature of such relief.

TYPICALITY OF CLAIMS

20. Plaintiffs' claims are typical of the claims of members of the Class. Plaintiffs and all members of the Class paid monies to defendants even though such transactions were illegal and thus either void or voidable and had their legal rights infringed upon, are entitled to payment for injuries, losses and damages as described herein and/or are facing irreparable harm arising out of defendants' common course of conduct. The rights of Plaintiffs and each member of the Class to payment of any damages or restitution resulting therefrom are proximately attributable *to* defendants' wrongful conduct, undertaken in violation of state law as alleged herein. Plaintiffs were not aware at the time they entered into transactions with defendants of the true facts as stated herein,

and have complied with all legal requirements for bringing this action.

ADEQUATE REPRESENTATION

21. Plaintiffs will fairly and adequately protect the interests of the members of the Class in that they have no irreconcilable conflicts with or interests materially antagonistic to those of the other Class members.

22. Plaintiffs have retained attorneys experienced in the prosecution of class actions, and who have been previously appointed by courts as adequate class counsel.

SUPERIORITY AND SUBSTANTIAL BENEFITS OF CLASS LITIGATION

23. A class action is superior to other available methods for the fair and efficient group-wide adjudication of this controversy and possesses substantial benefits. Individual joinder of all members of the Class is impracticable, and no other group method of adjudication of all claims asserted herein is more efficient and manageable while at the same time providing all the remedies available to ensure the full purpose of this State's laws are effectuated. Furthermore, as the damages suffered by each individual member of the Class *may* be relatively small and the relief sought discrete, the expense and burden of individual litigation in order to obtain such relief would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, and the cost to the court system of adjudicating such litigation on an individual basis would be

substantial. The Class members, because of the amounts at stake, would have little interest in individually controlling the prosecution of separate actions; to counsel's knowledge there is no substantial litigation concerning this controversy pending against the parties; and it is not anticipated that there will be any difficulties in the management of this litigation due to the focus of the wrongdoing on defendants' conduct and the level of their knowledge of the true facts. Individualized litigation would also present the potential for varying, inconsistent, or .contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. The conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each Class member as compared to other methods for the group-wide adjudication of this controversy. Thus, both the Class and the court system achieve substantial benefits by the prosecution of this action on a class-wide basis by avoiding the burden of multiple litigation involving identical claims, as well as by aiding legitimate business enterprises in curtailing illegitimate competition and ensuring a therapeutic and deterrent effect on those companies such as defendants that indulge in fraudulent practices.

24. Notice of the pendency of and any resolution of this action can be provided to the Class members by individual mailed notice, or the best notice practicable under the circumstances.

25. This action is also properly certified to proceed on a class-wide basis because:

a. The prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual Class members, thus establishing incompatible standards of conduct for defendants;

b. Because of the nature of some of the relief sought, the prosecution of separate actions by individual Class members would create a risk of adjudication with respect to them that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such. adjudications or would substantially impair or impede the ability of such Class members to protect their interests; and

c. Defendants have acted or refused to act in respects generally applicable to the Class, thereby making appropriate final injunctive relief with regard to the members of the Class· as a whole in terms of the equitable relief sought.

FACTUAL ALLEGATIONS

26. Independent California pharmacies survive on the slimmest of profit margins, if they can profit or survive at all. With increasing regularity, California pharmacies are caught between escalating wholesale drug prices and rapidly declining prescription reimbursement rates. As the narrow gap between those prices and reimbursement rates tightens even further (or even inverses), pharmacies go out of business, consolidate or are forced to reduce the quality of service provided to their customers.

27. As early as 1980, the California Legislature recognized this trend. Ultimately, in response to this concern the Legislature enacted California Civil Code §§ 2527 and 2528, effective as of January 1,

1984. These statutes required pharmacy benefit managers ("PBMs", referred to in the statute as "prescription drug claims processors") such as defendants to conduct or obtain the results of bi-annual studies of California pharmacies' retail drug pricing, using methods that both meet reasonable professional standards of the statistical profession and, as set forth in the statute, which identify the fees, separate from ingredient costs, for pharmaceutical dispensing services to private consumers. Under the statute, PBMs were also required to supply copies of those studies to the insurers and other third-party payors on whose behalf the PBMs interact with California pharmacies. By requiring PBMs to supply that information to third-party payors, the Legislature hoped to supply those who actually paid for pharmaceuticals purchased from California pharmacies with accurate information regarding free market pricing for those drugs, such that pharmacies would receive full reimbursement for such products. Armed with that information, third-party payors could make informed decisions about fair reimbursement rates they should pay to California pharmacies for dispensing pharmaceuticals to their plan participants, as compared to the charges PBM's were imposing.

28. There can be no legitimate dispute that this statutory scheme was intended to apply to entities such as defendants, as the Legislature gave examples of defendants or their competitors as the persons with the obligations to comply with the statute. Yet rather than comply with these statutory obligations, defendants have systemically ignored, failed or refused to act in· accordance with the law.

29. Defendants provide their products and services for use throughout California and generate mil-

lions of dollars each year by providing such products and services and thus presumably would be aware of such obligations.

30. Consistent with the experience of other Class members, during the relevant time period plaintiffs entered into contracts with one or more of the defendants, performed provisions of existing contracts, or had one or more of the defendants process or assist in the processing of prescription drug claims submitted by or otherwise involving the services of plaintiffs in their capacities as licensed California pharmacies or owners thereof.

31. Defendants have systemically failed to conduct the studies required by and/or in compliance with the provisions of Civil Code Section 2527(c), and/or to provide such studies to the appropriate persons identified under Civil Code Section 2527(d), despite being obligated by law to do so. These violations are severe and grave, since for several defendants, no such studies have apparently been conducted during the last 18 years, or at least until plaintiffs demanded they do so.

32. In addition, even to the extent such studies have been conducted by any of the defendants, such studies must have been flawed and not conducted in accordance with the statute's requirements for statistical accuracy. Among other things, such studies on information and belief would have not taken into account the prescription drug purchases made by uninsured payors (also called "cash only" customers), which is a statistically significant part of the relevant sample size (and which pay significantly more per prescription than compensated by defendants), because such data would not be contained in any data bases available to defendants and/or such studies

have not been conducted of all or a representative sample of independent California pharmacies. Nor would such studies have taken into account the average wholesale prices paid by California pharmacies for the medicines they dispense, because such data would not be in any databases available to defendants and/or defendants failed to conduct a study of all or a representative sample of independent California pharmacies to obtain that information.

33. Moreover, even had the defendants performed studies consistent with the requirements of Civil Code Section 2527 within 30 days of plaintiffs' demand, that would not obviate defendants' statutory liability for the entirety of the relevant time period.

34. Thus, under the circumstances existing at the time any agreements were signed or transactions were entered into with the Class members by defendants during the relevant time period, such transactions were illegal Civil Code Section 2527(a) provides that if defendants have not conducted a study in accordance with the statutory requirements and submitted it to the appropriate persons, they cannot enter into, engage in or perform any such contracts or transactions in this State. As a result, all such transactions are void or voidable, having been performed illegally. Plaintiffs and Class members are instead entitled to the reasonable value for such services, which is most appropriately measured by the amount paid by uninsured cash-only payors for such services.

35. Defendants have failed to comply with their statutory obligations despite demand having been made therefor by plaintiffs for both themselves and the Class.

36. Defendants have held Class members accountable for continuing obligations that were not legally due and/or required the payment of monies that were not owed due to the void or voidable nature of such contracts, to the detriment and injury of plaintiffs and · members of the Class.

37. As a result of the foregoing, defendants have systemically engaged in a series of transactions in violation of California law.

38. Defendants may assert that they were permitted to collect such monies under their agreements despite their illegal conduct. If the agreements were construed In such a way, the agreements (or defendants' claimed interpretation) would be unconscionable, because there would have been unequal economic bargaining power, terms imposed on a take it or leave it basis, and a material and adverse change in an important term of the parties' understanding (i.e., that the transactions and contracts were legal and not void or voidable) with no notice thereof and to the surprise of members of the Class and no opportunity to change the terms, all to the detriment of and prejudice to the rights of the Class members but with significant benefit to defendants. Because the agreements *were* drafted by defendants, and since any construction resulting in an absurd result *or* an unconscionable and illegal term should be avoided, while plaintiffs believe no ambiguities about the illegality and voidability of such transactions exist, any ambiguities in the construction of the agreements in terms of permitting such conduct in contravention of these statutory requirements must be construed against defendants and in favor of members of the Class in light of the statutory prohibitions set forth above.

39. As a result of the above, defendants failed to abide by their legal obligations and collected monies even though such monies were illegally collected, because the transactions upon which such funds were due were illegal. Such conduct adversely impacted or will impact thousands of members of the Class and the general public.

40. Class members and members of the general public are particularly vulnerable to such deceptive and fraudulent practices. Most persons possess limited knowledge of such a potential for such illegal conduct. Thus, Class members could not have reasonably been expected to determine in advance whether such limitations or illegal conduct truly existed or took place.

41. Class members were injured by defendants' failure to comply with their obligations imposed under California law. Class members should therefore be given the ability to void such transactions as illegal and unenforceable and/or receive all amounts improperly paid or the reasonable value for the services rendered versus the value of what they were required to take in payment for such services, and/or such monies should be paid to members of the general public.

42. Class members and the general public have not received a return of the · improperly paid or retained monies and are currently owed such amounts, plus any damages. restitution, interest or other legal or equitable monetary relief required to be paid to them by law.

43. Defendants' failure to abide by their legal obligations is ongoing and continues to this date.

FIRST CAUSE OF ACTION

Violation of Civil Code Section 2527 et seq. - Against All Defendants

44. Plaintiffs hereby incorporate, as if fully set forth herein, each and every allegation contained in ¶¶ 1-43 hereof and further allege as follows.

45. Defendants entered into a series of written contracts and engaged in transactions with plaintiffs, members of the Class and the general public throughout the relevant time period within this State. As detailed above, defendants have engaged in such transactions in violation of the law, and specifically in violation of California Civil Code Section 2527(a).

46. As alleged above, defendants have failed to comply with their obligations under Civil Code Section 2527(c) and/or 2527(d). Defendants have failed to completely resolve such wrongful conduct despite demand therefor on behalf of plaintiffs and the Class having been made in compliance with the statutory requirements.

47. Plaintiffs and members of the Class are therefore each entitled to between $1,000 and $10,000 in statutory damages for each violation of the statute engaged in by defendants, and there are multiple violations. They are also entitled to an order of the Court for declaratory and injunctive relief or any other relief the Court deems proper, including but not limited to an order prohibiting defendants from refusing to comply with their legal obligations and/or declaring as void or voidable any contracts or transactions that occurred when the statute was violated by defendants as a result of such illegality and

the return and/or payment for the reasonable value for such services or any monies illegally collected as set forth herein, plus reasonable attorneys' fees and costs.

SECOND CAUSE OF ACTION

Unlawful, Unfair and Fraudulent Business Acts and Practices Against All Defendants

48. Plaintiffs hereby incorporate each and every allegation contained in ¶¶ 1-47 as if fully alleged herein and further allege as follows.

49. Defendants' acts and practices as detailed above constitute acts of unfair competition. Defendants have engaged in an unlawful, unfair or fraudulent business act and/or practice within the meaning of California Business & Professions Code § 17200.

50. Defendants have engaged in an "unlawful" business act and/or practice by engaging in a series of transactions in violation of California law. As detailed above, these business acts and practices violated numerous provisions of law, including, *inter alia,* California Civil Code § 2527, and involved entering into a series of illegal contracts and transactions. Plaintiffs reserve the right to identify additional violations of law as further investigation warrants.

51. Through the above-described conduct, defendants have engaged in an “unfair" business act or practice in that the justification for engaging in such conduct based on the business acts and practices described above is outweighed by the gravity of the resulting harm, particularly considering the available alternatives, violates the spirit or intent of the law

and/or offends public policy, is immoral, unscrupulous, unethical and offensive, or causes substantial injury to consumers and competitors.

52. By engaging in the above-described conduct, defendants have engaged in a "fraudulent" business act or practice in that the business acts and practices described above had a tendency and likelihood to deceive both plaintiffs, the Class members and/or·the general public.

53. Defendants need only to have violated one of the three provisions set forth above to be strictly liable under this Cause of Action.

54. The above-described unlawful, unfair or fraudulent business acts and practices engaged in by defendants continue to this day and present a threat to the Class and the general public in that defendants have failed to publicly acknowledge the wrongfulness of their actions and provide the complete relief required by the statute.

55. Pursuant to California Business & Professions Code § 17203, plaintiffs, individually and on behalf of the Class and also on behalf of the general public, seek an order of this Court prohibiting defendants from refusing to continue to engage in the unlawful, unfair, or fraudulent business acts or practices set forth in this Complaint and/or ordering defendants perform their obligations under the law and the cancellation of any illegal obligations. Plaintiffs additionally request an order from the Court requiring that defendants provide complete equitable monetary relief, including that they disgorge and return or pay defendants' ill-gotten gains obtained from the series of illegal contracts or transactions they entered into and/or pay restitution, including the amount of any monies that should have been paid if

defendants had complied with their legal obligations or as equity requires, which can be determined by examining the difference between the amount paid by defendants on a per prescription basis and the amounts paid by uninsured consumers for the same prescriptions, any amounts Class members paid to defendants as a fee for processing such transactions or claims or a portion of the reimbursements paid by third-party payors that defendants improperly retained as a fee for such services, and pay such other monies as the trier of fact may deem necessary to deter such conduct or prevent the use or enjoyment of all monies wrongfully obtained Such an order is necessary so as to require defendants to surrender all money obtained either directly or indirectly as a result of such acts of unfair competition so that defendants are prevented from benefitting or profiting from the practices that constitute unfair competition or the use or employment by defendants of any monies resulting from such illegal transactions and/or to ensure the return of any monies as may be necessary to restore to any person in interest any money or property which may have been acquired by means of such acts of unfair competition. Plaintiffs" also request the Court order that an asset freeze or constructive trust be imposed over all monies that rightfully belong to members of the Class and the general public.

THIRD CAUSE OF ACTION
Declaratory Relief and Unjust Enrichment - Against All Defendants

56. Plaintiffs hereby incorporate as if fully set forth herein, each and every allegation contained in ¶¶ 1-55 hereof, and further allege as follows.

57. There currently exists between the parties an actual controversy regarding the respective rights and liabilities of the parties regarding, *inter alia,* the obligation of Class members and members of the general public to pay the charges and amounts in question and/or the need for defendants to comply with their obligations under the law, as alleged in detail above, in order to engage in such transactions and enter into such contracts.

58. Plaintiffs, members of the Class and the general public may be without adequate remedy at law, rendering declaratory relief appropriate in that:

a. Damages may not adequately compensate the Class members or the general public for the injuries suffered, nor may other claims permit such relief;

b. The relief sought herein in terms of ceasing such practices, implementing a protocol for conducting the required studies and/or declaring there is no obligation of Class members or members of the general public to pay certain monies due to the illegal conduct of defendants, may not be fully accomplished by awarding damages; and

c. If the conduct complained of is not enjoined, harm will result to Class members and the general public because defendants' wrongful conduct is continuing and on-going, and the obligation for many Class members or members of the general public to

continue to pay such sums is still allegedly outstanding.

59. Class members and the general public may suffer irreparable harm if a determination of the parties' rights and obligations is not ordered.

60. Accordingly, plaintiffs, on behalf of themselves, the Class and/or the general public, request the Court issue an order granting the following declaratory relief:

a. That a judicial determination and declaration be made of the rights of the Class members and the general public, and the corresponding responsibilities of defendants;

b. That defendants be ordered to cease and desist from failing to comply with their obligations under the law, engaging in transactions in violation of the law and/or finding such transactions and contracts are void or voidable, as well as from holding Class members responsible for any such obligations;

c. That defendants pay over all monies by which they have been unjustly enriched and establish a fund to reimburse the costs of any refund or payment due, and/or cancel or cause to be cancelled any further obligations to pay such sums that are not properly claimed as being due and owing; and/or

d. That defendants be restrained from refusing to institute, at their own cost and utilizing a Court-approved protocol, the studies required to be conducted under the law and inform the Court, the Class and all appropriate persons of the results thereof, as well as inform all appropriate persons of the right to damages, restitution or other equitable monetary relief as ordered by the Court.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs, on behalf of themselves and all others similarly situated, and as to the Second and Third Causes of Action also on behalf of the general public, pray for judgment against defendants, and each of them jointly and severally, as follows:

(1) An Order certifying the plaintiff Class and appointing plaintiffs and their counsel to represent the Class;

(2) For the declaratory, equitable, injunctive and/or monetary relief requested in the First, Second, and Third Causes of Action as appropriate for the particular causes of action;

(3) For all damages at levels found to be appropriate for the First Cause of Action;

(4) For pre- and post-judgment interest;

(5) For attorneys' fees and for costs of suit incurred herein pursuant to, *inter alia*, Civil Code Section 2528, the common fund and private Attorney General doctrines and/or C.C.P. §1021.5 as may be appropriate; and

(6) For such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims so triable and an advisory jury for a factual determination on all equitable claims.

Dated: December 4, 2002

ROSNER, LAW & MANSFIELD

By s/ Alan M. Mansfield
ALAN M. MANSFIELD

BONNY SWEENEY
MICHAEL A. BOWSE
MILBERG WEISS BERSHAD HYNES & LERACH LLP

Attorneys for Plaintiff