No. S203124

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JERRY BEEMAN AND PHARMACY SERVICES, *et al.*,

Plaintiffs-Respondents,

v.

ANTHEM PRESCRIPTION MANAGEMENT, *et al.*,

Defendants-Appellants.

QUESTION CERTIFIED FROM THE EN BANC U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NOS. 07-56692, 07-56693

RESPONDENTS' CONSOLIDATED ANSWERING BRIEF

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I.

SUMMARY OF ARGUMENT

Respondents, plaintiffs in the actions identified below, submit this Joint Brief in Opposition to the Consolidated Opening Brief ("AOB") filed by defendants-appellants addressing the following question certified by this Court:

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

For the reasons stated below, Respondents propose the question be re-stated as follows:

> Does Civil Code section 2527's requirement that pharmacy benefit managers collect and report the charges imposed by California pharmacies to fill prescriptions for uninsured consumers constitute compelled speech subject to scrutiny under article I, section 2(a) of the California Constitution?

The Court is empowered to re-state the question certified by the Ninth Circuit. Cal.R.Ct. 8.548(f)(5).

The Ninth Circuit has asked this Court to decide whether the Legislature can require companies such as Appellants to collect and provide statistical data regarding pharmacies' fill-fees to their insurer and third party payer clients without running afoul of Article I, §2(a) of the California Constitution. If that reporting requirement raises any free speech issue at all, the issue it raises is substantially less significant than, for example, requiring super PACs to identify their donors --which this Court approved

just a few weeks ago in *Fair Political Practices Commission v. Americans For Responsible Leadership*, S206407, Order dated November 4, 2012 (ordering compliance with injunction requiring disclosure of political campaign contributors pursuant to Political Reform Act of 1974 (Gov. Code, §81000 et seq.)).

Both the federal district court presiding over this action and a majority panel of the Ninth Circuit Court of Appeals have determined that Civil Code §2527's requirement that Appellants distribute objective, statistical data regarding the fees pharmacies charge to uninsured consumers raises no constitutional question at all. They reached that conclusion after examining several U.S. Supreme Court decisions that made clear that laws compelling someone to say something raise constitutional questions "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." *Jerry Beeman & Pharmacy Services, Inc. v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1100 reh'g en banc granted, 661 F.3d 1199 (9th Cir. 2011) ("*Beeman*"). As the U.S. Supreme Court explained in *Rumsfeld v. FAIR,* 547 U.S. 47 (2006) ("*FAIR*"), requiring disclosure or display of objectively factual information (in that case, information regarding the presence of military recruiters on college campuses) "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 [prior cases] to suggest that it is." *Id.* at 62.

With the exception of the Second Appellate District's decision in *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*, 138 Cal. App. 4th 1307 (2006) ("*ARP*"), which also addressed Civil Code §2527 and was criticized by the Ninth Circuit in *Beeman*, Appellants have not cited a single published California decision striking down a law that simply requires a company to disclose data to a third party. The Second Appellate District's decision in *ARP* was misguided. Under the analysis employed in *ARP* and parroted in the two unpublished opinions issued by the same Appellate District, nearly every law or regulation that requires a person or business to disclose any form of statistical, financial or other objectively truthful information would be subject to strict scrutiny review and unconstitutional, simply because the person required to make the disclosure says they would prefer not to make it, no matter the reason.

It is critical that this Court clarify that California law does not render disclosure statutes unconstitutional merely because persons governed by the statute claim they would rather not provide that information or because the statute requires disclosures that are to be made separately from, rather than together with, other statements, advertising or promotional material. The Court's decision in this case will directly affect the scope of the California Legislature's power to enact laws that require businesses to make factual

disclosures in a variety of circumstances, including to protect the public health and advance other important public policies. Courts are not supposed to second guess those policies, or arrogate for themselves a decision whether the policies underlying legislatively required disclosures are important or not. Yet that is precisely what Appellants suggest -- that this Court substantially restrict the California Legislature's power to enact such laws by imposing the highest level of constitutional scrutiny to nearly all disclosure statutes or laws that require businesses to disclose data and find them presumptively invalid, leaving it for the courts to decide if a disclosure law advances a significant or important public policy or not.

These serious flaws in the legal analysis proposed by Appellants are compounded in this case by the fact that the question here is presented to this Court at the pleading stage, without a developed factual record. Nor can one be developed in this proceeding. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1208 (2011) ("Given the limitations of the certified question procedure, ... our answer must be confined to the circumstances of this case as established by the stipulated facts.")

For example, Appellants cannot demonstrate that the data disclosure requirement in §2527 "chills" protected speech without a factual record reflecting (a) what the protected speech is and what message is actually conveyed, and (b) how the Act's disclosure requirement would affect that protected speech. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 74 (1976)

(evidence must show compelled disclosure "will subject them to threats, harassment, or reprisals" such as "specific evidence of past or present harassment"). The mere fact that Appellants claim now, over 30 years after the statute went into effect and only after they have been sued to enforce the statute, they would rather not disclose statistical data regarding California pharmacies' charges to fill prescriptions to uninsured consumers is not enough to require constitutional scrutiny of Civil Code §2527. They must show that the law's disclosure requirement compels them to express a particular viewpoint or opinion, chills their protected speech, or that it actually burdens other, protected speech in some constitutionally prohibited way. Appellants cannot make that showing on the sparse record presented to this Court to consider this certified question. The fact that Appellants did not present any of the evidence found necessary under *Buckley* – despite the fact that they would control all of that evidence if it existed and despite having had over 25 years to gather such evidence – is compelling proof that evidence simply does not exist.

Appellants' contention that a law requiring businesses to report objectively factual data to their customers should be treated in the same manner as rules "forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die'" "trivializes the freedom protected" in the cases that addressed those rules. *FAIR,* 547 U.S. at 62. Based on the record presented, the Court must affirm the District

Court's finding that, as a matter of law, Section 2527 is not facially unconstitutional.

This Court should restate the certified question and find that Section 2527 does *not* constitute compelled speech subject to scrutiny under article I, section 2(a) of the California Constitution, and is constitutional. Alternatively, based on the record presented, this Court must affirm the District Court's finding that, as a matter of law, Section 2527 is not facially unconstitutional under every conceivable application.

II.

STATEMENT OF THE CASE AND ADDITIONAL FACTS

At issue here are California Civil Code §§2527 and 2528, which the California Legislature adopted 30 years ago in an effort to combat further declines in the payments made to independent pharmacies for prescription medications dispensed to insured California consumers. It was proposed as compromise legislation, supported by both pharmacies and the Pharmacy Benefit Manager ("PBM") industry (including several of the Appellants, referred to in the statute as "prescription drug claims processors").

The Legislature was concerned about those declining reimbursement rates because many pharmacies (particularly community pharmacies that serve rural California) would be forced out of business as reimbursement rates fell below the cost of the medicines they dispensed, ultimately decreasing consumer choice. The Legislature determined that the continued

existence of those community pharmacies was important to insure that Californians in all areas of the state had access to medication. Rather than directly regulating reimbursement rates, the Legislature concluded that if the insurers and other third party payers who ultimately bear the financial responsibility for those reimbursements had more complete and accurate statistical data regarding pharmacies' usual and customary charges for filling prescriptions, they would learn that the fees they paid to pharmacies were already well below "retail" fees to fill prescriptions and thereby realize that cost savings would more likely be found in other areas of their business, which would ultimately lead to more affordable health care for consumers. *See* EOR 148 (Excerpts of Legislative History of Civil Code §§2527, stating that the law "may help identify areas of cost containment in the future").

Notwithstanding this and similar clear legislative history, Appellants suggest -- based on a similarly unsupported statement to that effect in *ARP and with no citation to any record evidence* -- that the law would result in higher healthcare costs. AOB at 11. In fact, the *ARP* court based that assertion on a single sentence in a legislative staff report, taken entirely out of context from a paragraph that merely said that pharmacists hoped to receive higher reimbursement rates, but said nothing to contradict the notion that those higher reimbursement rates could only be achieved if the survey data helped third party payors paying the reimbursements to find areas of

cost savings elsewhere. *See* EOR 146. This is not proper, let alone conclusive, evidence of legislative intent. *See* n.3, *infra.*

To accomplish the Legislature's purposes, Civil Code §2527 requires PBMs (which, contrary to their assertion in their Opening Brief, includes all the defendants in the present actions) to survey California pharmacies in order to learn the average charges imposed by those pharmacies to fill prescriptions for commonly prescribed drugs filled for private clients. Appellants do not challenge the law's requirement that they perform those surveys. The statute then simply requires defendants to provide the statistical data obtained through those surveys to their "clients" and provide updated information regarding pharmacies' fees every two years thereafter, which can be done simply by providing updated information using the Consumer Price Index rather than additional surveys. See Cal. Civ. Code Section 2527(d). The statute requires no specific statement, nor an endorsement of any particular message -- merely the dissemination of data and an explanation how the data are broken down. *Id.* at (c).[1]

Section 2527 became law in 1981. For the next 20 years (the first lawsuit was filed in 2001), Appellants thumbed their noses at the law. Some ignored their obligations under the statute entirely, while others performed

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[1] "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)."

their obligations so poorly as to render the information provided meaningless. For over 20 years it was never the subject of a constitutional challenge, and presumably many Appellants disseminated the required (albeit flawed) surveys without objection or any complaint and without generating any actual evidence that Appellants' free speech rights were somehow "chilled" or adversely impacted by doing so. EOR at 163-165; 185-187.

Plaintiffs filed *Beeman v. Anthem Prescription Management, Inc.* ("*Beeman II*") and *Beeman v. TDI, etc., et al.* [U.S.D.C. Case No. EDCV 02-1327-VAP (SGLx) ("*Beeman I*") (collectively, "*Beeman*"), simply to require defendants to comply with their obligations under the law, which they had ignored for so long.

Appellants' failure to comply with the statute clearly was not based on any concern that the law infringed their free speech rights. It was not until years after *Beeman* was filed that Appellants first asserted that the statute implicated free speech issues. In fact, this was such an inconsequential issue that two of the four Appellants in *Beeman I* (Express Scripts, Inc. and Medco Health Solutions, Inc.) did not even raise the First Amendment free speech issue as an Affirmative Defense in their Answers, let alone assert this is a basis for dismissal for several years. Plaintiffs-Respondents Supplemental Excerpts of Record ("SEOR") at 00096-97 and

00110-111.[2] During 2003, Appellants in *Beeman I* brought a series of summary adjudication motions allegedly designed to "streamline" that case (which were denied); they also did not raise the free speech issue in these motions. EOR at 0281-287.

The California Attorney General rejected the notion that this statute implicates any free speech issues. In an *Amicus* Brief dated May 24, 2006, the Attorney General expressed the State of California's position that Section 2527 *is* constitutional and raises no free speech issues. (SEOR at 0004-23).

III.

THIS COURT SHOULD ANSWER "NO" TO THE CERTIFIED OR RESTATED QUESTION

The Ninth Circuit Court of Appeals and the District Court were right to reject Appellants' free speech challenge to Civil Code §2527's requirement that PBMs collect and then report statistical data regarding pharmacies' charges to third party payors. Disclosure and reporting requirements imposed on businesses are commonplace and not seriously subject to question on free speech grounds. Indeed, the reporting

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[2] In the federal court, where these actions are pending, challenges to the constitutionality of a statute relied upon by a plaintiff for his claims is an affirmative defense that must be asserted in the defendant's responsive pleading. *Kewanee Oil & Gas Co. v. Mosshamer*, 58 F.2d 711, 712 (10th Cir. 1932) ("the contention that the state statute is unconstitutional is an affirmative defense, and must be so pleaded in the answer").

requirement contained in Civil Code §2527 should be particularly safe from free speech challenges because it only requires disclosure of statistical data with an explanation of what the data are, rather than a grammatical statement on some topic.

The Second Appellate District's contrary holding in *ARP* is inconsistent with the law and wrong. To reach its conclusion that Civil Code §2527 impermissibly infringes upon free speech rights, the *ARP* Court took several steps. First, it determined that laws that require businesses to transmit information that they "do not wish to send" are content based regulation of speech that implicate free speech rights. *See ARP,* 138 Cal. App. 4th at 1315. Next, the court held that legally mandated disclosures that do not themselves either (a) propose a commercial transaction or (b) promote the regulated entity's business affect non-commercial speech, and therefore must be evaluated under strict scrutiny review. *See id.* at 1317 ("Nothing about the content of this report proposes a commercial transaction.... Nor does it promote the processors' business"). Finally, the court decided, based on no factual record at all, that Civil Code §2527 does not pass strict scrutiny review. *Id.* At each of those steps, the court misapplied the law.

The first conclusion reached by *ARP* (that §2527 is a content-based regulation of speech because it requires PBMs to transmit information that they "do not wish to send") is not the correct standard, and conflicts with

recent U.S. Supreme Court authority as well as several prior decisions of this Court. Indeed, in *Kasky v. Nike, Inc.*, 27 Cal.4th 939 (2002), this *Court* distinguished the case upon which the *ARP* court principally relied for its first conclusion -- *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) – on the very ground that makes *Riley* inapplicable here. The *ARP* Court relied on *Riley* for the proposition that laws requiring the reporting of statistical or financial data compel speech and must be subjected to constitutional analysis. Yet, in *Kasky*, this Court noted that the *Riley* decision was predicated on the fact that the reporting of statistical data required by the statute at issue in *Riley* "was 'inextricably intertwined' [with protected, "core" speech] because the state law required it to be included" in statements initiated by the speaker soliciting charitable solicitations. *Kasky, supra*, 27 Cal. 4th at 967.

That limitation of *Riley* is important here. As the Ninth Circuit panel who considered the present case and rejected *ARP* explained, the "forced speech" or "compelled speech" doctrine addresses two circumstances: (1) compelled speech that alters the content of speech *that the speaker is otherwise making* (*e.g.*, soliciting charitable contributions), and (2) compelled speech that itself indicates the speaker endorses a particular viewpoint. *Jerry Beeman and Pharmacy Services, Inc. v. Anthem Prescription Management, LLC,* 652 F.3d 1085, 1098 (9th Cir. 2011). *Riley* involved the first of those circumstances. This case involves neither and,

therefore, does not warrant constitutional scrutiny. *Id.* at 1099-1100 ("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.").

The *ARP* Court's second finding – that §2527 implicates "core speech" that must be subjected to strict scrutiny analysis – is at least as flawed as its first finding. In the judgment of the *ARP* Court, all that is required to trigger strict scrutiny is that "the regulation requires transmission of specific content." *ARP, supra,* 138 Cal.App.4th at 1315. As the California Attorney General explained in its *amicus* brief (see SEOR at 00009-22), if that actually was the standard, numerous statutes regarding food labeling, SEC disclosures, taxes, and other issues would all be subject to strict scrutiny review, which they are not.[3]

The *ARP* Court's third conclusion – that it could conduct an analysis of §2527's constitutionality without any factual record is inconsistent with *Gerawan Farming, Inc. v. Kawamura*, 33 Cal.4th 1 (2004), in which this Court held that resolution of a free speech constitutional issue at a

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[3] The Attorney General also properly noted that Appellants' claim about the legislative purpose of Section 2527 as based on a statement of one legislator in a report is irrelevant in determining true legislative intent. SEOR at 00017 (citing *inter alia*, *People v. Cruz*, 13 Cal.4th 764, 780, n. 9 (1996).)

minimum should be based on a complete factual record and not decided as a matter of law, if at all possible, unless it is absolutely clear that the law or rule could not possibly be constitutional. No such record exists here and there certainly is no basis to claim that Section 2527 could not possibly be constitutional.

Indeed, the *ARP* Court responded to the Attorney General's observation that the standard applied in that case would likely invalidate numerous disclosure statutes by stating, without discussion or authority or any reference to any record, that all of the other disclosure statutes were "necessary for the protection of the general public" and that "Section 2527 is not in that category." *ARP,* 138 Cal. App. 4th at 1318. In *Gerawan Farming*, this Court made clear that such conclusions regarding legislative purpose or a statute's effectiveness at serving that purpose cannot be made without a developed factual record. 33 Cal.4th at 23. Moreover, the *ARP* Court's response is inconsistent with that court's *own* analysis of the legislative history, which states the purpose was ultimately to "benefit insured consumers." *ARP,* 138 Cal. App. 4th at 1320.

A. Appellants Must Show That There Are No Circumstances Under Which The Law Would Be Valid

Appellants attempt to mount a facial challenge to §2527. As a result, their contention must be analyzed using the standard applicable to facial challenges.

This is so because their arguments are based on the text of the statute itself, not its application to the particular circumstances of an individual. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995). Appellants do not assert the statute's application should be limited to certain circumstances. Nor do they challenge the manner by which the statute has been actually applied to them. Indeed, there is no record upon which to base such specific challenges to the statute, as this statute has been in place for 30 years now without objection or any evidence of suppressed or chilled speech, and the *Beeman* actions have not advanced far beyond the pleadings stage

This Court has made clear that statutes should be declared facially invalid only in very rare circumstances, and that this is a "heavy burden" to satisfy. *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168, 180 (1981); *see also U.S. v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully."). As the United States Supreme Court has explained facial challenges should be disfavored "for several reasons," including that they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange, supra,* 552 U.S. 442, 449; *see also Reagan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("In exercising its power to review the constitutionality of a legislative Act, a

federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.")

Depending upon which of the two competing tests for facial challenges is applied, Appellants must show either (1) that the statute "inevitably poses a present total and fatal conflict with applicable constitutional prohibitions" (*Pacific Legal Foundation v. Brown,* 29 Cal.3d 168, 181 (1981)) or (2) that the statute conflicts "in the generality or great majority of cases." (*San Remo Hotel v. City and County of San Francisco,* 27 Cal.4th 643, 673(2002).

Under either test, because there is no factual record before this Court, Appellants' challenge to Civil Code section 2527 can be based on nothing more than the words of the statute. Speculation and hypotheses cannot be substituted for a factual record. *In re Johnson*, 62 Cal. 2d 325, 332 (1965) (courts may not rely on "speculation or hypotheses not shown to affect the parties before the court.").

Despite these rules, Appellants base their arguments *entirely* on speculation and hypothesis that are inconsistent with the record that does exist. They make numerous assumptions and engage in rampant speculation that find no support in the scant record before this Court, which as noted above, limits the Court's inquiry in answering a certified question. For example, Appellants argue in their Opening Brief that Section 2527 "does not regulate speech that is inherently or even potentially decieptive."

(AOB at 3.) Yet, they point to nothing in the record that would negate the potential that the statistical information required by the statute is necessary to correct third party payors' misimpressions, created by PBMs' own statements, that pharmacies charge inflated reimbursement rates and that those inflated reimbursement rates are a primary reason for high drug costs paid by third party payers on behalf of their clients. EOR at 0163, 0185. Not only is correcting or preventing such misstatements a constitutionally permissible reason for compelled disclosure statutes, the mere *possibility* of misstatements is a permissible basis to require counteracting disclosures. *Spirit Airlines, Inc. v. U.S. Dept. of Transp.*, 687 F.3d 403, 413 (D.C. Cir. 2012).

Appellants argue that §2527 forces them to transmit information that is "against their interests and could be used to harm them in the public debate over reimbursement rate regulation." AOB at 3. Appellants are "intermediaries" between their third party payor clients and pharmacies. AOB at 6. What interests do Appellants have that are *inconsistent* with providing full information to their clients? What public debate over reimbursement rate regulation? How could the data required to be collected under §2527 harm Appellants in that debate, assuming it exists? The record contains no evidence of any of this.

Appellants claim that §2527 forces PBMs to act as advocates for the pharmacies in the hope that the insurance companies will provide greater

remuneration to the pharmacies. AOB at 3, 39. There is no basis in the statute or the record for that statement. Section 2527 does not require PBMs to advocate any position.

Similarly, Appellants contend that their goal and that of their insurer clients is to "keep costs down for health plan sponsors" (AOB at 6) and that the statistical information required by Section 2527 would conflict with that goal by increasing healthcare costs. AOB at 41. But, where is the support for that claim in this record? In fact, the legislative history reflects that Section 2527 could ultimately lower health care costs. *See* EOR 146. And how would Appellants' supposed message relating to that supposed goal be contradicted by the statistical information at issue in section 2527? Why would it not support that goal? There is no record from which those questions can be answered, let alone answered in Appellant's favor.

As Appellants explain in their Opening Brief, when Section 2527 was enacted in the early 1980's as a piece of compromise legislation between all participants (including several of the Appellants), the proponent of the legislation stated that requiring PBMs to provide insurers with statistical information regarding pharmacies' charges to uninsured patients for filling prescriptions might cause insurers to re-evaluate the ever-decreasing reimbursements they paid to pharmacies for filling prescriptions of their insureds. AOB at 9-11. However, there was no requirement that they do so, nor was there any required accompanying message conveying

that intent. On the other hand, there is an obvious connection between the statistical information required by Section 2527 and the possibility that PBMs are providing misleading information to their clients that Section 2527 was meant to correct. After all, third party payors are only likely to re-evaluate their reimbursement rates to pharmacies based on the statistical information required by Section 2527 if that statistical information helps to correct a misimpression from which they suffer -- such as that pharmacies, rather than the PBMs themselves, are the high-cost participant in the chain of distribution.

Indeed, it is only logical that discovery will produce evidence that PBMs make statements to their clients that Section 2527 may be necessary to correct. For example, PBMs promote their services to third party payors by claiming that they provide cost-effective prescription benefit programs. Section 2527 is intended to help third party payors to find areas of cost containment. *See* EOR 148. There is no record here from which to determine: (1) whether or not Appellants and other PBMs have misled their clients regarding the nature and sources of costs incurred in providing prescription drug benefits, or (2) whether or not the statistical information required by Section 2527 would help to correct such misleading statements if they were made. This is precisely why this Court has made clear in decisions such as *Gerawan Farming* that the constitutionality of statutes should generally not be determined before a factual record can be

developed.

Appellants have not and cannot demonstrate in the absence of any factual record that Section 2527 cannot be constitutionally applied under any circumstances, requiring this Court to answer the certified question in the negative based upon the record before it. *Meese v. Keene*, 481 U.S. 465, 484 (1987).

B. Section 2527 is Constitutional Because It Does Not Regulate Protected Speech

Appellants' effort to characterize the statistical information required to be mailed by §2527 as "compelled speech" is contrary to the law. While Appellants claim the law forces them to express a political or social message or to convey opinions they do not share, they cite nothing to support that claim. In fact, they do not even articulate precisely what the supposed message or opinion is.

Indeed, Appellants do not believe it would implicate free speech concerns to require *pharmacists* to provide the statistical data at issue in the statute -- only the PBMs -- even though it would be the same data provided to the same clients. AOB at 3, 43, 48-49. Why would this distinction be of any meaning? This concession is significant, since it implicitly acknowledges that the statute does not require anyone to express a viewpoint or opinion, but merely requires delivery of factual data.

A "true 'compelled-speech'" case is one "in which an individual is

obliged to personally express a message he disagrees with, imposed by the government". *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005); *Meese, supra*, 481 U.S. at 465. That does not leave room for Appellants' challenge to Section 2527, as the statute does not require Appellants or other PBMs to express any specific message, let alone one with which they could disagree, to any third party.

On its face, a statute merely requiring disclosure of objective, statistical data, not some political, religious or other statement about which there can be differing viewpoints, does not implicate any free speech rights.

The Ninth Circuit found in *Environmental Defense Center, Inc. v. United States EPA,* 344 F.3d 832 (9th Cir. 2003), that Environmental Protection Agency regulations that required municipalities to "distribute educational materials to the community ... about the impacts of stormwater discharges..." did not restrict those municipalities' free speech rights, even though those statements were to be expressed in words, not data. *Id.* at 848-851. That court reasoned: "The State may not constitutionally require an individual to disseminate an ideological message, 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. These broad requirements do not dictate a specific message." *Id.* at 849, 851 ("The

public information requirement does not impermissibly compel speech.... The Rule does not compel a recitation of a specific message, let alone an affirmation of belief").

In *Rumsfeld v. FAIR*, *supra*, the U.S. Supreme Court placed a finer point on this general rule by enunciating two concepts that are critical to evaluating whether a statute that compels speech warrants constitutional scrutiny.[4] First, the Court indicated that the nature of the speech at issue is important to determine the constitutionality of the statute that compels it. Contrasting the requirement at issue there that schools post notices and send emails notifying students of military recruiters' presence on campus against West Virginia's law compelling students to recite the Pledge of

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[4] Appellants attempt to distinguish *FAIR* by asserting that it examined compelled conduct, not compelled speech. AOB at 29, n.9. However, the one decision of this Court that Appellants cite to support this assertion actually undermines it. In *Porter v. Bowen*, 496 F.3d 1009, 1021 (9th Cir. 2007) the Ninth Circuit expressly recognized that the Supreme Court in *FAIR* analyzed the constitutionality of the Solomon Amendment ***both*** as a regulation of speech and conduct. (Parenthetical description of *Rumsfeld v. FAIR* as "considering law schools' policies toward military recruiters *first as speech* and then *in the alternative* as expressive conduct"). Moreover, the decision in *FAIR* makes clear that the Solomon Amendment at issue did compel speech and that the Court was examining the constitutionality of the law within that context. *See FAIR,* 547 U.S. at 61-62 ("recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. 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. As FAIR points out, 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." (Citations omitted)).

Allegiance and New Hampshire's requirement that state license plates include the state motto "Live Free or Die", the Court reasoned that the "speech" compelled in the case before it was "a far cry from the compelled speech in *Barnette* [addressing compelled recitation of Pledge of Allegiance] and *Wooley* [addressing compelled display of "Live Free or Die" motto]." *FAIR,* 547 U.S. at 62. "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.*

Similarly here, the objective, statistical information that Section 2527 requires Appellants disclose to their clients every two years (or a follow-up statement providing an update of that information) bears no resemblance to compelled recitation of the Pledge of Allegiance or compelled display of the motto "Live Free or Die" by individuals who have political, moral or religious objections to the Pledge of Allegiance or that motto. There is no expression of ideology, opinion or religion in the statistical information required by Section 2527, or any other opinion or statement for that matter. As the Supreme Court made clear in *FAIR*, compelled expression of factual information in a registered mailing that is not required to be made in conjunction with any other communications simply does not warrant the level of constitutional scrutiny that has been

applied to laws compelling speech with explicit (or even implicit) expressions of ideology, opinion or religion.

Second, the *Fair* Court made clear that the effect of the compelled speech on the speaker's own message must be evaluated to determine whether the statute compelling the speech warrants constitutional scrutiny. The Court noted that its prior decisions that declared laws compelling speech unconstitutional "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR, supra,* 547 U.S. at 63.

Appellants cite nothing in the record to show that any non-misleading message of Appellants is affected in any way by compliance with Section 2527, or that during the past 30 years their communications with clients or their own messages that Appellants were not the cause of spiraling drug costs and they were interested in cost control were affected in any way.[5] Their inability to do so is fatal to their arguments. *Meese, supra,* 481 U.S. at 484.

Third, the Supreme Court in *FAIR referenced Pacific Gas & Elec. Co. v. Public Utilities Comm'n,* 475 U.S. 1 (1986) (relied upon by Appellants here), which had found that compelling a utility to include a

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[5] If a particular Appellant had not distributed a Section 2527 survey as Respondents have alleged, it would be hard-pressed to explain how some message it had conveyed to its clients had been affected by distribution of such information -- yet another reason why such a facial challenge is improper.

third party's newsletter in its billing envelopes violated the utility's rights under the First Amendment. According to the Supreme Court, the state directive in that situation was unconstitutional because "it interfered with the utility's ability to communicate its own message in its [own] newsletter", which it *also* distributed with its billing envelopes. *FAIR, supra*, 547 U.S. at 64. Section 2527 does not require PBMs to convey the statistical data collected pursuant to the statute at any particular time, other than bi-annually, let alone together with another communication. Nor does it require Appellants to convey any particular political or ideological message or reflect one way or the other on the views of any Appellant.

Similarly, the Supreme Court explained that in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), it declared a state law compelling newspapers to print political candidates' replies to editorials attacking them unconstitutional because the compelled reply "alter[ed] the message the paper wished to express." *FAIR, supra*, 547 U.S. at 64.

Courts around the United States have similarly concluded that free speech rights are not implicated by a statute or rule that merely requires the disclosure of viewpoint neutral information, but, rather, are only implicated when a law either requires dissemination of a particular ideological or political message or requires that statements be made in a context that impacts an entity's or person's own, voluntary speech. *See U.S. v. Sundel,* 53 F.3d 874, 878 (8th Cir. 1995) ("A First Amendment protection against

compelled speech, however, has been found only in the context of governmental compulsion to disseminate a particular political or ideological message."); *Scope Pictures,* 140 F.3d at 1205 (ordinance that required posting of signs containing factual information regarding risks and methods of transmitting venereal diseases and distribution of pamphlets with similar information at adult video arcades implicated "no political or ideological message" and, accordingly, did not infringe free speech rights); *Lake Butler Apparel Co. v. Secretary of Labor,* 519 F.2d 84, 89 (5th Cir. 1975) (requirement that employers post OSHA notices in workplace raises no free speech concerns because "The posting of the notice does not by any stretch of the imagination reflect one way or the other on the views of the employer").

Thus, whether a viewpoint neutral disclosure affects or even implicates free speech rights turns on whether the disclosure limits other, protected speech. Here, Appellants fail to identify any specific political or ideological message or viewpoint they are required to convey. Indeed, they can only come up with an implied suggestion of what a client might think, with absolutely no support in the record to make such a claim. Contrary to their suggestion, Appellants are noy limited in what they can say in disseminating this report, other than not being permitted to make misleading claims.

It is difficult to imagine how statistical information collected through

a survey that meets "reasonable professional standards of the statistical profession" (Civ. Code §2527(c)) could contradict any accurate, non-misleading message Appellants or other PBMs might want to convey to their clients. Indeed, objective, factual data is likely to contradict a message the PBMs otherwise deliver only if that message is false or misleading without disclosure of the data. Thus, even if Section 2527 did somehow compel Appellants to engage in speech that contradicted their own message, that would be an additional basis to reject their arguments rather than uphold them.

Attempting to escape this precedent, Appellants assert that California's free speech clause is broader in some respects than the First Amendment. AOB at 24-25. But the broader scope of California's free speech clause does nothing to distinguish these decisions. Indeed, the "distinction" Appellants attempt to invoke does not actually exist. According to Appellants, whereas the First Amendment "simply places a restriction on the legislature," the California constitution grants an affirmative right of free speech. AOB at 24. In fact, as this Court's precedent reflects, the entire California constitution is structured as limits on the power of the Legislature: "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. (citations) Two important consequences flow from this fact. First, the entire law-making authority of

the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution. (Citations.) ... Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations (imposed by the Constitution) are to be construed strictly, and are not to be extended to include matters not covered by the language used.' (Citations.)" *Methodist Hosp. of Sacramento v. Saylor*, 5 Cal.3d 685, 691 (1971).

Sorrell v. IMS Health, Inc., 131 S.Ct 2653 (2011) does not compel a contrary result, and was not the sea change in the law suggested by Appellants. That decision does nothing more than hold that state statutes that restrict protected speech based on its content or viewpoint is subject to constitutional scrutiny. *Id.* At 2663-664 ("§4631(d) imposes burdens that are based on the content of speech *and that are aimed at a particular viewpoint*." (emphasis added)); *id.* at 2666 ("respondents claim—with good reason—that § 4631(d) burdens their own speech.") Indeed, the Vermont law at issue in that case prevented speech based on its viewpoint and who the speaker would be. *Sorrell*, 131 S. Ct. at 2663 ("the statute disfavors specific speakers"). That has no relationship at all to Civil Code §2527.

Also contrary to Appellants' claim in their Opening Brief, the

requirements of Section 2527 are not at all like those declared unconstitutional in *Riley, supra*, which was the primary decision relied upon in *ARP*. Wholly apart from the fact that *Riley* involved non-commercial "core" speech involving solicitation of contributions, the state statute at issue in *Riley* required organizations soliciting charitable donations to make state-mandated disclosures *in the same communication* as the charitable solicitation – in other words, during the course of a voluntary communication initiated by the speaker. *Id.* at 786 n. 3 (quoting statute as requiring disclosure to be made "[d]uring any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution"). According to the Supreme Court, requiring that the legally mandated disclosures be made *at the same time* as the charitable solicitation is what burdened the constitutionally protected solicitation. *Id.* at 798.

Indeed, this Court has previously noted that the decision in *Riley* was predicated on the fact that the statistical data required to be reported by the statute at issue in *Riley* "was 'inextricably intertwined' [with protected, "core" speech] because the state law required it to be included" in charitable solicitations. *Kasky, supra*, 27 Cal. 4th at 967.

Section 2527 in contrast, contains no similar requirement that the statistical survey be transmitted together with any other message Appellants or other PBMs might wish to convey. On the contrary, the requirement that

the survey be distributed by certified mail makes it highly likely it would be transmitted alone. Accordingly, distribution of the statistical information should neither burden nor interfere with any truthful, not misleading message Appellants or other PBMs might convey to their clients.

The District Court correctly applied the analysis described by the U.S. Supreme Court in *FAIR* when it rejected Appellants' contention that Section 2527 interferes with free speech rights. As the District Court properly reasoned, there is nothing in Section 2527 that would compel Appellants "to endorse a pledge or motto contrary to their deeply-held beliefs". EOR at 0071. On the contrary, this statute requires nothing more than the distribution of objective, statistical information. The District Court also correctly determined there is no basis to conclude that the disclosure of objective, statistical data as required by Section 2527 would have an impermissible effect on Appellants' speech. EOR at 0077 ("Here . . . no similarly-protected speech is adversely affected, and the law will bestow more, not less information.") Indeed, compelled disclosure of objective, statistical data could only affect Appellants' speech if that speech is somehow false or misleading, in which case, as discussed below, the statute would have an entirely *permissible* effect on commercial speech.

C. Even if Section 2527 Were to Be Evaluated Under Case Law Governing "True Compelled Speech", It Could Not be Declared Unconstitutional

1. No California or Federal Court has Previously

Applied Strict Scrutiny Standard of Review to a General Business Information Disclosure Law Like Section 2527

Appellants' Opening Brief suffers from a key omission -- citation to a single case in which a strict scrutiny standard of review has been applied by this Court to determine the constitutionality of a general business information disclosure statute like Section 2527, which merely requires the disclosure of statistical information separate and apart from any other communication. That omission is not Appellants' fault. – Respondents are not aware of any such case aside from *ARP*.

Apart from the flawed decision by the California intermediate courts addressing Section 2527, which misapply the tests for determining whether speech is compelled, content neutral, commercial or core speech, no court has applied strict scrutiny to a general business information disclosure law like Section 2527. On the contrary, courts that have evaluated statutes like Section 2527 have applied a "rational basis" standard of review. As described below, the reason for this is clear -- a statute that requires a party to a commercial relationship to make factual disclosures to other parties in that relationship at most compels "commercial", not "core", speech. *See, e.g., Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (certiorari denied by Pharm. Care Mgmt. Ass'n v. Rowe, 126 S. Ct. 2360, 165 L. Ed. 2d 280) ("*PCMA*") (rejecting PBM trade groups' contention that statute compelling disclosure to their clients of payments PBMs received

from drug manufacturers should be evaluated under the strict scrutiny review).

There are substantial reasons why business disclosure statutes must be evaluated under a rational basis, rather than strict scrutiny, standard of review. As the First Circuit recognized in *PCMA*, *supra*, "[t]here 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." *Id.* at 316. Subjecting all of those laws, statutes and regulations to heightened scrutiny reserved for political, ideological, religious and other "core" speech would invite chaos. *See also* SEOR, at 00008 (*Amicus* Brief of California Attorney General). As the Second Circuit similarly explained in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001):

> "Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. See, e.g., 2 U.S.C. §434 (reporting of federal election campaign contributions); 15 U.S.C. §78-l (securities disclosures); 15 U.S.C. §1333 (tobacco labeling); 21 U.S.C. §343(q)(1) (nutritional labeling); 33 U.S.C. §1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C. §11023 (reporting of releases of toxic substances); 21 C.F.R. §202.1 (disclosures in prescription drug advertisements); 29 C.F.R. §1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code §25249.6 ('Proposition 65'; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law §33-0707 (disclosure

> of pesticide formulas). To hold that the Vermont statute [requiring certain public disclosures about mercury] is insufficiently related to the state's interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required."

2. At Most, Section 2527 Compels "Commercial Speech" Was Necessary, The Applicable Standard Would Be Rational Basis Review

Even if §2527's requirement that PBMs disclose objectively factual data in a report that is not required to accompany any other statements by the PBMs did burden other, voluntary speech such that it should be subjected to constitutional scrutiny, the nature of the statute and the context in which it requires disclosures to be made necessitates the conclusion that it compels only commercial speech. Indeed, Appellants admit in their Opening Brief that they have an economic interest in keeping under wraps the information §2527 would disclose. AOB at39. Indeed, that appears to be the only interest they are concerned about.

The *ARP* Court's holding that §2527 implicates free speech rights applicable to non-commercial speech was based upon an analysis totally at odds with the analysis this Court has determined is the correct one. Thus, while *ARP* looked at whether the information required to be disclosed itself either (1) proposes a commercial transaction or (2) promotes the regulated entity's business (*ARP*, 138 Cal.App.4th at 1317), this Court held just ten years ago that commercial speech is not limited to speech that proposes a

commercial transaction or follows any particular format. *Kasky*, *supra,* 27 Cal.4th at 956.

Rather, distinguishing between commercial and non-commercial speech requires consideration of (1) the speaker, (2) the intended audience, and (3) the content of the message. *Id.* at 960.

ARP considered none of these three factors to determine whether any speech implicated by §2527 was commercial or non-commercial speech and, as a result, reached the wrong conclusion when it held that §2527 should be subjected to strict scrutiny review and, on that basis, invalidated the statute.

Had the *ARP* court applied the test identified in *Kasky* v. *Nike,* it would have found that the statistical study that §2527 requires PBMs to send to their customers constitutes commercial speech. Indeed, in *PCMA, supra,* , the First Circuit held that a Maine statute that required PBMs to disclose to their customers (1) conflicts of interest and (2) financial arrangements with third parties such as their contracts with drug manufacturers, compelled commercial speech and, thus, was not subject to the strict scrutiny standard of review employed in *ARP because it touched upon the economic interests of the customers to whom disclosures were to be made.* 429 F.3d at 308-310.

3. If Strict Scrutiny Review Actually Applied to Section 2527, It Would Also Apply To and Invalidate Numerous Other Laws As Well.

If the construction of Article I, §2 adopted by *ARP* and urged here by Appellants were correct, disclosure laws that are commonplace at the state, federal and local levels throughout the country could not be adopted by the Legislature here because they would unconstitutionally infringe upon business' free speech rights, or could be struck down at the whim of a court that decided the disclosure was not "necessary for the protection of the public."

For example, as of January 1, 2011, restaurants are required to post the calories of food items they offer for sale. 21 U.S.C. §343(q)(5)(H); Cal. Health & Safety Code 114094 . If a restaurant claims it does not want to provide that data because it fears it would reduce dessert consumption, could it challenge the law as "compelled speech"? Of course that is not the law. Such disclosure laws have been found constitutional. *See, e.g., New York State Restaurant Association v. New York City Board Of Health,* 556 F.3d 114, 131-134 (2nd Cir. 2009) (applying rational basis review to New York City law requiring restaurants to display nutrition information alongside menu items and finding law presented no free speech problems, which was the basis for the California law).

The reasoning of *ARP* would almost certainly be used to invalidate Public Resources Code § 15013, which requires that products with removable or rechargeable batteries be conspicuously labeled with the following statements: "NICKEL-CADMIUM BATTERY. MUST BE RECYCLED OR DISPOSED OF PROPERLY." or "SEALED LEAD BATTERY. MUST BE RECYCLED OR DISPOSED OF PROPERLY." Cal. Pub. Res. Code § 15013(b). Indeed, in their Opening Brief Respondents assert such laws are unconstitutional.

Similarly, Proposition 65's compelled warning requirements regarding carcinogens or reproductive toxins could also be in jeopardy. It could also invalidate California's requirement that "[e]ach container of bottled water sold in this state, each water-vending machine, and each container provided by retail water facilities located in this state shall be clearly labeled" to include the source of the bottled water, a description of the treatment process or, if none, a statement to that effect, and the name and contact information for the bottler, brand owner, or facility operator. Cal. Health & Safety Code § 111170.The same is true for Civil Code § 1916.5, which requires lenders who give variable interest loans to provide consumers with a statement "consisting of the following language: NOTICE TO BORROWER: THIS DOCUMENT CONTAINS PROVISIONS FOR A VARIABLE INTEREST RATE." Cal. Civ. Code § 1916.5(a)(6).

It may also invalidate Corporations Code §12310, which requires that cooperative corporations include the following statement in their articles of incorporation: "This corporation is a cooperative corporation organized under the Consumer Cooperative Corporation Law. The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under such law." Cal. Corp. Code § 12310(b).

Business & Professions Code section 17500, *et seq.* contains a host of similar requirements, from "Made in the U.S.A." labels to disclosure requirements for pre-paid calling cards. Cal. Bus. & Prof. Code §17500, *et seq.*

In each of these circumstances, a company is required to provide data or a statement directed at a particular audience. If that company disagrees with that statement, or simply asserts it affects their decision whether to provide such information, it Appellants are correct such laws implicate "compelled speech" and must be justified on strict scrutiny grounds.

When the California Attorney General identified the likely invalidation of many disclosure statutes other than Section 2527 as a consequence of the *ARP* court's analysis, the court rebuffed the argument by asserting - without citation to any authority - that those other disclosure

statutes were "necessary for the protection of the general public" while Section 2527 was not. *ARP* , 138 Cal. App. 4th at 1318. That assertion is significant because (1) it concedes that the analysis announced in *ARP* would require that those disclosure statutes be subjected to strict scrutiny review, and (2) demonstrates that the constitutional analysis adopted by that court would uphold or invalidate such statutes based solely upon judges' beliefs regarding what is and what is not necessary for the public good or the "protection of the general public". Whether disclosure laws survive or fail in the face of constitutional challenge should not be subject to such fickle review.

That flippant statement certainly does not indicate that the *ARP* Court considered the rule that "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 253 (2011). Indeed, it appears to reflect almost no consideration for the Legislature's power to enact legislation it believes will advance the public interest.

Moreover, if that bald statement reflects the manner in which the constitutionality of statutes should be determined, courts can simply declare the policies that the Legislature sought to advance when it adopted a law unimportant and on that basis invalidate similar statutes, arrogating to themselves what is constitutional and what is not. As detailed below, such

a standard is without precedent in constitutional jurisprudence and is simply wrong. *Meese*, 481 U.S. at 484-85 (rejecting argument that term "political propaganda" conveyed a viewpoint or message since statute contained its own definition of the term which was content neutral).

4. If Constitutional Scrutiny Is Required, Rational Basis Review Is The Proper Standard

Although they recognize compelled commercial speech receives less constitutional protection than "core" speech, Appellants ask this Court to apply a heightened standard of scrutiny to Section 2527 and declare it facially unconstitutional as "non-commercial" speech based on *ARP*. According to Appellants, the relaxed standard of review applied to "compelled speech" in a commercial context does not apply to their challenge against Section 2527 because the statistical information that statute requires them to disclose to their clients every two years does not itself solicit a commercial transaction – undermining their argument this "compelled speech" interferes with their commercial interests. AOB at 38. Although the *ARP* court adopted that argument, it has no basis in California law based on the above authorities. *See Kasky, supra,* 27 Cal.4th at 959 (boundaries between commercial and non-commercial speech are the same under federal and California law).

For purposes of determining whether Section 2527 affects "commercial" or "core" speech, the relevant question is not whether the

statistical information the law requires PBMs to distribute "propose a commercial transaction", as Appellants urge. Instead, the relevant question is whether the speech that the disclosure is relevant to meets the general test for identifying commercial speech. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 and n.14 (1985) (holding that state statute compelling disclosure of information in attorney advertising must be evaluated under tests applicable to commercial speech, since disclosures provide information to customers relevant to proposed transaction); *Environmental Defense Center, Inc., supra*, 344 F.3d at 851 n. 27 (holding disclosure itself need not be "commercial" to apply rational basis scrutiny even if it does not itself propose a commercial transaction).[6] Here, Appellants' "compelled speech" argument is premised upon the assertion that by providing this data, third party payors might somehow reduce the payments retained by PBMs by encouraging third party payors "to pay pharmacists a fair rate for drug dispensing services" and affect their message they are also interested in cost containment. If that is the case,

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[6] Indeed, the fact the law requires the character of speech be evaluated according to the entire transaction affected by the compelled disclosures, rather than solely by the compelled disclosures themselves, is demonstrated by *Riley, supra,* 487 U.S. at 796. In that case, the Supreme Court determined that the state statute there at issue regulated "core" speech, rather than commercial speech, by evaluating the nature of the speech effected by the compelled disclosures B in that case, charitable solicitations. ("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.")

such speech would be related to on-going and proposed transactions between third party payors and Appellants and its professed concern would be relevant to those transactions. Thus, at most the statute implicates "commercial speech" as defined by this Court in *Kasky*.

There are substantial reasons why objective, factual disclosures like those required by Section 2527 are subjected to a relaxed standard of review. If a business disclosure statute like Section 2527 affects speech at all, it is only because it ensures the speaker's other, voluntary communications with its business partners are complete and accurate. Those voluntary communications that the disclosures are relevant to do propose or advance a commercial transaction or relationship and are clearly "commercial" communications for purposes of First Amendment analysis. As such, laws relating to those communications cannot properly be subjected to heightened review reserved for political, religious or similar highly protected speech.

Indeed, because disclosure statutes like Section 2527 do not compel expressions of any particular viewpoint or message, they are subject to an even more relaxed standard of review than that applied to restrictions of commercial communications. For example, in *PCMA, supra*, 429 F.3d at 316, in rejecting a facial constitutional challenge to that statute, the First Circuit noted that PBMs' disclosures of pricing and other information to their clients were far removed from the traditional concerns of "compelled

speech" and First Amendment protections:

> "So-called 'compelled speech' may under modern Supreme Court jurisprudence raise serious First Amendment concern where it effects a forced association between the speaker and a particular viewpoint. . . . What is at stake here, by contrast, is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes. . . ."

The Court flatly rejected as clearly mistaken the notion that such instances of "compelled speech" require anything like the extensive First Amendment scrutiny Appellants argue for here. All that was required according to the Court in *PCMA* was the lowest level of rational basis scrutiny. The Court held that such scrutiny "is so obviously met in this case as to make elaboration pointless." *Id.*[7]

In *Environmental Defense Center, supra*, 344 F.3d at 848-52, the Ninth Circuit held that the "compelled speech" doctrine only applies where the speech required by law purports to express some belief on the part of the speaker:

> ". . . the public information requirement does not impermissibly compel speech, and nothing in [it] offends the First Amendment. The Rule does not compel a recitation of a specific message, let alone an affirmation of belief."

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[7] Appellants' effort to limit the applicability of the *PCMA*'s decision to cases involving "comprehensive regulatory schemes" is baseless. The First Circuit engaged in no such discussion and based its decision on the fact that the statute only required the dissemination of objective, factual information in the context of a commercial relationship.

Id. at 852.[8] That is precisely the situation under Section 2527. Appellants have failed to identify any direct specific message, let alone an affirmation of that message, required by statute.

In so holding, the *Environmental Defense Center* Court invoked *Zauderer, supra,* as authority for applying such a relaxed standard of review. *Zauderer* examined the constitutionality of a state statute that required attorney advertisements include certain objective disclosures concerning the terms of representation. The U.S. Supreme Court held that purely factual information disclosures do not trigger heightened scrutiny and instead require only a rational connection between the means and ends.

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[8] Appellants have previously attempted to discredit the *Environmental Defense Center* decision by asserting the outcome there rested upon the Court's conclusion that the mandated disclosures were part of a comprehensive regulatory program. Nothing could be further from the truth. First, the Court relied upon *Zauderer*, which has nothing to do with any "comprehensive regulatory scheme," as the primary basis for its decision. That should be sufficient to dispel Appellants' attempt to rewrite *Environmental Defense Center*. Second, the *Environmental Defense Center* Court offered the existence of a comprehensive regulatory scheme as an *alternative* basis for its holding in a footnote and in a discussion completely separate from its conclusion that compelling the dissemination of factual information regarding stormwater runoff does not constitute compelled speech under the First Amendment. *See Environmental Defense Center, supra*, 344 F.3d at 850 (AEven if such a loosely defined public information requirement could be read as compelling speech . . ."); *see also id.* at 851 n.26 (relegating its discussion of the "comprehensive regulatory scheme to a footnote). Appellants' related effort to assert that, when the Court stated that the law did not compel a particular message, it meant that operators were permitted to opt out of the relevant rule, is totally baseless. The possibility that operators could opt-out was not even discussed in the section of the Court's opinion addressing the constitutionality of the rule under the First Amendment.

Zauderer, 471 U.S. at 650-51.[9]

That has also been the holding of numerous other courts that have rejected challenges to laws that require the disclosure of objective, viewpoint neutral, factual data that neither modifies nor burdens any protected speech. *E.g., United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) ("The IRS summons requires Sindel only to provide the government with information which his clients have given him voluntarily, not to disseminate publicly a message with which he disagrees. Therefore, the First Amendment protection against compelled speech does not prevent enforcement of the summons."); *Scope Pictures, of Missouri, Inc. v. City of Kansas City*, 140 F.3d 1201, 1205 (8th Cir. 1998) ("no political or ideological message is implicated in providing information about sexually transmitted diseases and unsafe sexual activities"); *Morales v. Daley*, 116 F. Supp. 2d 801, 816 (S.D. Tex. 2000) ("Since it is only information being sought, and plaintiffs are not being asked to disseminate publicly a message with which they disagree, the First Amendment protection against compelled speech does not prevent the government from requiring the plaintiffs to answer these questions." (quotations omitted)); *Mauldin v. Texas State Bd. of Plumbing Examiners*, 94 S.W.3d 867, 873 (Tex. App.

[9] Appellants' attempt to distinguish *Zauderer* from this case is also flawed. According to Appellants, *Zauderer* applies only to laws requiring disclosures whose effect is to correct false or misleading advertising. Even if that were true, as is discussed *infra*, Section 2527 may have precisely that effect.

2002) (rejecting free speech challenge to law requiring disclosure of social security number to retain professional license: "like every other license applicant in Texas, [plaintiff] is required for a limited purpose to divulge to a state agency a number that was assigned to him by the federal government.")

Significantly, all these courts either expressly or impliedly agree that a rational basis test like that used in *Zauderer* is appropriate whether or not misleading speech is being corrected by the disclosure. The laws whose constitutionality was questioned in those cases simply compelled the disclosure of factual information as part of an information campaign. The *PCMA* decision expressly stated that *Zauderer* was not so limited. 429 F.3d at 310, n. 8.

In this case, there is no question that the disclosures required by Section 2527 may be needed to correct Appellants' voluntary communications with their clients. *Supra* at 19; *Spirit Airlines, Inc. supra,* 687 F.3d at 413.

The information Section 2527 requires to be disclosed to those same customers bears directly on Appellants' claim that they are cost-effective participants in the market for prescription drug benefits. By adopting Section 2527, the California Legislature sought to provide customers with information that might cause them to re-evaluate the ever-decreasing reimbursements they paid to pharmacies for filling prescriptions for their

insureds. AOB at 10-11. It did not require such an evaluation, however. Assuming the California Legislature was correct in its belief that providing the statistical information required by Section 2527 might ease the downward pressure on reimbursement rates to pharmacies (there is certainly no record from which to determine that the Legislature was not correct), there is a clear connection between the statistical disclosures required by the statute and the commercial message that Appellants claim they convey to their clients.

In light of the corrective effect that the disclosures required by Section 2527 would have on the potentially false and misleading representations Appellants concede they make to their customers, Section 2527 easily satisfies the rational basis standard of review applied to similar business disclosure laws, particularly on a facial constitutional challenge.

5. Even if the Court Were to Apply Some Form of Heightened Scrutiny to Section 2527, the Statute Would Still Pass Constitutional Muster as a Matter of Law

Although the intermediate and strict scrutiny standards of review that are reserved for "core" political, religious and similar speech do not apply here. While the Decisions did not need to reach that issue, Section 2527 would pass muster under those tests even if they did.

Intermediate scrutiny, as defined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980), is a multi-part inquiry,

although the first part of the test applies only to a speech restriction case. As there is no restriction of speech alleged in this case, only the remaining parts are of relevance.

The first relevant part of the analysis looks to the governmental interest and whether it is substantial. *Id.* at 566. The basic governmental interest at issue here is to create a rational marketplace for pharmacy reimbursement rates, which, in turn, should lead to optimal pharmacy reimbursements, as well as optimal consumer choice of and access to pharmacy health care. The legislative history of Section 2527 referenced in Appellants' Opening Brief, and even cited in *ARP*, reflects these basic governmental interests. Under the *Central Hudson* analysis, these asserted governmental interests are clearly substantial. *Id.* at 569 (holding in case regarding utility rates that efficiency and fairness of rates is a substantial interest).

In *Gerawan Farming, Inc. supra,* 33 Cal.4th at 22-24, the Court found beyond doubt that the objective of ensuring the viability of California agriculture is a substantial objective. There is no substantive difference between maintaining the viability of California's agriculture industry and maintaining the viability of California's independent pharmacies. In fact, an interest that is substantial "beyond doubt" clearly reaches the compelling state interest requirement of even the strict scrutiny standard of review. *See Kasky, supra*, 27 Cal.4th at 952 (requiring under strict scrutiny that the

challenged regulation promote a compelling government interest); *Glendale Associates Ltd. v. NLRB*, 347 F.3d 1145, 1156 (9th Cir. 2003) (same).

The next part of the *Central Hudson* analysis asks "whether the regulation directly advances the governmental interest asserted." *Central Hudson,* 447 U.S. at 566. Here, the distribution of relevant information has a connection to determining and establishing fair rates and preserving consumer choice. Appellants admit the legislative goal is itself largely informational in nature. Section 2527 directly advances this informational goal. *Beeman v. TDI Managed Care Serv.*, 449 F.3d 1035 (9th Cir. 2006).

The final part of the intermediate scrutiny analysis asks "whether [the regulation] is not more extensive than necessary to serve that interest." *Central Hudson,* 447 U.S. at 566. This portion of the intermediate scrutiny test does not require that "the least restrictive alternative" has been employed, as that requirement is reserved for strict scrutiny. Rather, it only requires a "fit between the Legislature's ends and means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interests served. . . . Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Board of Trustees, State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

Although Appellants assert there is "an inadequate 'fit' between the

legislative goal and the speech ' 2527 compels," that assertion cannot be supported on the basis of the present record and cannot form a basis for answering the certified question.. Bald, hearsay assertions by legislative analysts and bare assertions by Appellants that Section 2527 would not affect pharmacy reimbursement rates are not admissible evidence of the statute=s effectiveness in achieving its purposes. They certainly do not provide a basis upon which this statute may be declared facially unconstitutional. *Gerawan Farming, supra,* 33 Cal.4th at 23 (remanding First Amendment challenge to statute on ground that discovery was required to establish "fit" between statute and legislative goals). This is particularly so in light of the existence of substantial reasons to conclude that, of all possible alternatives, requiring PBMs to mail the results to their clients is the least restrictive alternative and would meet even strict scrutiny. *See Kasky, supra,* 27 Cal.4th at 952 (requiring under strict scrutiny that the challenged regulation be narrowly tailored).

First, contrary to Appellants' alternative suggestion that they could do so, there is a significant question whether pharmacists themselves could not disseminate these studies due to antitrust laws. *See Northern Cal. Pharmaceutical Ass'n v. U. S.*, 306 F.2d 379, 389-90 (9th Cir. 1962) (affirming antitrust verdict against pharmacies who, among other things, conducted pricing study and distributed results to members). Second, only Appellants know who their clients are (indeed, they claim that information

is proprietary) and, therefore, only they can convey the required information to those clients. Thus, not only does Section 2527 provide a reasonable connection between means and ends B it also provides the only reasonable alternative.

If the statistical information required by Section 2527 conflicts with Appellants' own vague messages to their customers, it is at least possible (and will not be known without a full record developed through discovery) that such information is reasonable and appropriate to correct misleading statements made by the Appellants to their customers. Under *Environmental Defense Center, supra,* how can objective, statistical information "conflict" with Appellants' messages to their clients if those messages are accurate and not misleading? Thus, in order to escape the U.S. Supreme Court's holding in *FAIR*, Appellants must concede that Section 2527 compels commercial speech. This is so because compelled speech is commercial speech if it is meant to correct speech that is itself commercial.

Key questions such as whether Section 2527 advances a proper regulatory objective, directly or otherwise, and whether and to what extent the regulatory means are tailored to the ends, are intensely factual and have been found by the Court to be inappropriate for resolution at the pleading stage. *See Gerawan Farming, Inc., supra*, 33 Cal.4th at 23. While Section 2527 can meet both of those more exacting constitutional tests, at least as a

matter of law under any possible application of the statute, since Appellants' voluntary communications to their clients must be commercial communications, there are numerous factual issues in this case that await discovery and upon which there is simply no record before this Court. In light of the U.S. Supreme Court's recent decision in *Washington State Grange, supra,* 128 S.Ct. at 1190-91, that facial constitutional challenges to statutes on free speech grounds bear a particularly heavy burden, it is simply impossible to Section 2527 facially unconstitutional based on "the message" of the study without knowing any of the studies' results, if the studies were actually conveyed, what other information had been conveyed by Appellants to their clients, what the implicit "message" is in the studies, or if Appellants' rights of free expression were in any way impacted by this statute -- after all, this statute was in effect for over 20 years without challenge.

Thus, the certified question must be answered in the negative, as the Court has an insufficient record to find Section 2527 is unconstitutional in all its applications.

6. The *United Foods* Line of Authority Does Not Change the Outcome

United States v. United Foods, 533 U.S. 405 (2001), cited by Appellants at the end of their brief and the Court in *ARP* as separate authority to establish that Section 2527 is an unconstitutional intrusion on free speech rights,

actually demonstrates the different constitutional treatment received by statutes that merely require the disclosure of factual information by parties to commercial relationships on the one hand and statutes that compel the expression or funding of particular opinions or viewpoints on the other. The analysis employed by the U.S. Supreme Court in *United Foods* is different from the analysis employed by it in *FAIR* and *Zauderer* because the statutes at issue in those cases compelled entirely different kinds of statements and involved compelled subsidies for a particular viewpoint. At issue in *United Foods* was a statute that compelled participation in and funding of statements advocating the sale of mushrooms through advertisements (which necessarily express a particular viewpoint). In contrast, the statutes at issue in *FAIR* and *Zauderer* merely required the disclosure of objective, factual information. On the basis of that distinction, the U.S. Supreme Court employed entirely different analyses.

V.

CONCLUSION

As Appellants fail to meet their virtually insurmountable burden to establish California Civil Code section 2527 is facially unconstitutional under every conceivable application, and considering the paucity of the record before this Court, this Court should affirm the constitutionality of section 2527 by answering "no" to the certified question.

DATED: December 5, 2012 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204, subdivision (c)(1), I hereby certify that this brief contains 12,370 words, including footnotes, excluding those portions as permitted under Rule 8.204, subdivision (c)(3). I have relied on the word count of the computer program used to prepare the brief

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PROOF OF SERVICE

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