# APPENDIX

## TABLE OF CONTENTS

**APPENDIX A**

[FILED: AUGUST 26, 2025]

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,<br>*Plaintiff-Appellee*,<br>v.<br>ANDREW R. STOLFI, in his official capacity as Director of the Oregon Department of Consumer and Business Services,<br>*Defendant-Appellant*. | No. 24-1570<br>D.C. No.<br>6:19-cv-01996-MO<br>OPINION |

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted February 5, 2025
Portland, Oregon

Filed August 26, 2025

Before: Carlos T. Bea, Lucy H. Koh, and Jennifer Sung,
Circuit Judges.

Opinion by Judge Koh;
Partial Concurrence and Partial Dissent by Judge Bea

## SUMMARY*

### First Amendment/Takings

The panel reversed the district court's summary judgment in favor of Plaintiff Pharmaceutical Researchers and Manufacturers of America ("PhRMA"), in PhRMA's action challenging Oregon House Bill No. 4005 ("HB 4005").

HB 4005 requires prescription drug manufacturers to report information related to certain prescription drugs to the Oregon Department of Consumer and Business Services ("DCBS"). In most circumstances, HB 4005 requires DCBS to post disclosed information on its website. However, HB 4005 expressly provides that DCBS may not publicly post any information designated as a "trade secret" unless disclosure is in the public interest. PhRMA brought facial claims against HB 4005, alleging in relevant part, that: (1) the reporting requirement violates the First Amendment and (2) any invocation of the public-interest exception constitutes an unconstitutional taking under the Fifth Amendment.

The panel reversed the district court's grant of summary judgment in favor of PhRMA on its First Amendment claim. The disclosures required by HB 4005, which involve product-specific economic information about prescription drugs that are available for purchase on the market, are properly categorized as commercial speech. The panel declined to reach the issue of whether the statute is subject to intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), or a lower level of scrutiny under *Zauderer v. Office of Disciplinary*

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

*Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), concluding that the statute survives the more stringent standard of intermediate scrutiny.

The panel reversed the district court's grant of summary judgment in favor of PhRMA on its Fifth Amendment takings claim. Although DCBS has never invoked the public-interest exception, PhRMA has standing and the takings claim is ripe for review. The panel then determined that it is appropriate to treat the claim as an alleged regulatory taking, rather than as a categorical, per se taking. Even assuming *arguendo* that a facial challenge can be made under the test for regulatory takings set forth in *Penn Central Transportation Co. v. New York City*, 438 12 U.S. 104 (1978), none of the *Penn Central* factors support PhRMA's facial takings claim.

Concurring in part and dissenting in part, Judge Bea concurred that PhRMA's facial takings challenge on the Fifth Amendment ground failed because Oregon's long-standing public interest exception in its state trade secret laws undermined the reasonableness of any expectation of absolute protection of trade secrets in Oregon. Judge Bea dissented because in his view, HB 4005's Pricing Strategy Disclosure Requirement compels non-commercial speech and cannot survive strict scrutiny under the First Amendment.

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## OPINION

KOH, Circuit Judge:

In 2018, the Oregon Legislative Assembly passed the Prescription Drug Price Transparency Act, 2018 Or. Laws Ch. 7, also referred to as House Bill No. 4005 ("HB 4005"), codified at Or. Rev. Stat. §§ 646A.680-692. The law requires prescription drug manufacturers to, *inter alia*, report to the Oregon Department of Consumer and Business Services ("DCBS") information related to certain prescription drugs including, for example, current and past list prices, generic alternatives, and the length of time the drugs have been on the market. Or. Rev. Stat. § 646A.689(3). In most circumstances, HB 4005 requires DCBS to post disclosed information on its website. *Id.* § 646A.689(9). However, HB 4005 expressly provides that DCBS may not publicly post any information designated as a "trade secret" unless disclosure is in the public interest. *Id.* § 646A.689(10)(a).

This appeal concerns two facial challenges against HB 4005 brought by Plaintiff-Appellee Pharmaceutical Research and Manufacturers of America ("PhRMA"). First, PhRMA alleges that HB 4005's reporting requirement, Or. Rev. Stat. § 646A.689(3), compels speech in violation of the First Amendment. Second, PhRMA alleges that HB 4005's "public-interest exception," Or. Rev. Stat. § 646A.689(10)(a), constitutes an uncompensated taking in violation of the Fifth Amendment. The district court entered summary judgment in favor of PhRMA on both claims and entered final declaratory judgment. For the reasons below, we reverse and remand to the district court for further proceedings consistent with this opinion.

# I. BACKGROUND AND PROCEDURAL HISTORY

## A. Statutory Background

In February 2018, the Oregon Legislative Assembly enacted HB 4005, commonly known as the Prescription Drug Price Transparency Act. In a preface to the bill, the legislature explained that "the state has a substantial public interest in the price and cost of prescription drugs," especially because the state acts as a "major purchaser of prescription drugs" and "provides major tax expenditures for health care through the tax exclusion of employer-sponsored health insurance coverage and the deductibility of the excess medical costs of individuals and families." HB 4005, ch. 7. In a statement of purpose, the legislature explained that HB 4005 is intended to "provide notice and disclosure of information relating to the cost and pricing of prescription drugs in order to provide accountability for prescription drug pricing" and "permit purchasers, both public and private, as well as pharmacy benefit managers, to negotiate discounts and rebates for prescription drugs consistent with existing state and federal law." HB 4005, ch. 7.

### i. The Reporting Requirement

The first provision at issue in this appeal, which the parties refer to as the "reporting requirement," requires pharmaceutical manufacturers to disclose to DCBS information related to the costs, revenues, and prices of certain prescription drugs.[1] The challenged reporting

[1] For the purposes of HB 4005, a "manufacturer" is defined as "a person that manufactures a prescription drug that is sold in [Oregon]." Or. Rev. Stat. § 646A.689(1)(e). "Price" is defined as the drug's wholesale acquisition cost, *i.e.*, the drug's federally defined, national list price. *Id.* § 646A.689(1)(i); 42 U.S.C. § 1395w-3a(c)(6)(B).

requirement applies only to drugs for which: (a) "[t]he price was $100 or more for a one-month supply or for a course of treatment lasting less than one month," and (b) "[t]here was a net increase of 10 percent or more in the price of the prescription drug . . . over the course of the previous calendar year." Or. Rev. Stat. § 646A.689(2). For these drugs, HB 4005 requires manufacturers to "report to [DCBS], in the form and manner prescribed by [DCBS]" the following information:

> (a) The name and price of the prescription drug and the net increase, expressed as a percentage, in the price of the drug over the course of the previous calendar year;
>
> (b) The length of time the prescription drug has been on the market;
>
> (c) The factors that contributed to the price increase;
>
> (d) The name of any generic version of the prescription drug available on the market;
>
> (e) The research and development costs associated with the prescription drug that were paid using public funds;
>
> (f) The direct costs incurred by the manufacturer:
>
> > (A) To manufacture the prescription drug;
> >
> > (B) To market the prescription drug;
> >
> > (C) To distribute the prescription drug; and
> >
> > (D) For ongoing safety and effectiveness research associated with the prescription drug;
>
> (g) The total sales revenue for the prescription drug during the previous calendar year;

> (h) The manufacturer's profit attributable to the prescription drug during the previous calendar year;
>
> (i) The introductory price of the prescription drug when it was approved for marketing by the United States Food and Drug Administration and the net yearly increase, by calendar year, in the price of the prescription drug during the previous five years;
>
> (j) The 10 highest prices paid for the prescription drug during the previous calendar year in any country other than the United States;
>
> (k) Any other information that the manufacturer deems relevant to the price increase . . . ; and
>
> (l) The documentation necessary to support the information reported under this subsection.

*Id.* § 646A.689(3) (hereinafter, "HB 4005's reporting requirement").[2]

Following HB 4005's enactment, DCBS promulgated implementing regulations requiring manufacturers to include, among other disclosures, "[t]he factors that contributed to the price increase, including a narrative description and explanation of all major financial and nonfinancial factors that influenced the decision to increase the wholesale acquisition cost of the drug

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[2] Similar reporting requirements also apply to certain new prescription drugs introduced above a certain price threshold. Or. Rev. Stat. § 646A.689(6). However, PhRMA's motion for summary judgment discussed only the reporting requirement for existing drugs, and the district court's declaratory judgment was limited to the reporting requirement for existing drugs, Or. Rev. Stat. § 646A.689(3).

product and to decide on the amount of the increase." Or. Admin. R. 836-200-0530(2)(h).[3]

### ii. The Public-Interest Exception

The second provision at issue in this appeal, which the parties refer to as the "public-interest exception," relates to the public disclosure of certain information reported to DCBS by manufacturers. As a default, HB 4005 requires DCBS to post information disclosed by manufacturers publicly on the DCBS website. Or. Rev. Stat. § 646A.689(9). However, HB 4005 provides that DCBS may not post to its website information disclosed by manufacturers if: (1) "[t]he information is conditionally exempt from disclosure under [Or. Rev. Stat. § 192.345] as a trade secret; and (2) "[t]he public interest does not require disclosure of the information." *Id.* § 646A.689(10)(a). For purposes of HB 4005, a trade secret is defined to include "any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it." *Id.* § 192.345; *see id.* § 646A.689(10)(a).

As of May 2020, manufacturers had asserted 4,865 trade secret claims in the 1,112 reports submitted to DCBS. PhRMA represents that, according to an annual report published by DCBS, the number of trade secrets

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[3] Although the partial dissent would find several subsections of HB 4005's reporting requirement unconstitutional, the partial dissent agrees that multiple other subsections, specifically § 646A.689(3)(a), (b), (g), (i), and (j), do not violate the First Amendment. Partial Dissent at 80-81.

claimed by manufacturers had risen to more than 10,500 as of December 2023. Since HB 4005 was enacted in 2018, DCBS has not disclosed any information claimed as a trade secret.

### B. Procedural History

Plaintiff PhRMA is a trade association whose members include pharmaceutical and biotechnology manufacturers. On December 9, 2019, PhRMA sued in federal court under 42 U.S.C. § 1983, naming as defendant the director of DCBS, acting in his official capacity (hereinafter, the "State"). PhRMA brought four facial claims against HB 4005, alleging that: (1) HB 4005 violates the dormant Commerce Clause, (2) HB 4005 is preempted by the federal Defend Trade Secrets Act, 18 U.S.C. §§ 1832-1839, (3) HB 4005's reporting requirement violates the First Amendment, and (4) any invocation of HB 4005's public-interest exception constitutes an unconstitutional taking under the Fifth Amendment.[4] PhRMA initially sought both injunctive relief and declaratory relief, but later abandoned any claim for injunctive relief.

PhRMA and the State filed cross-motions for partial summary judgment. In PhRMA's summary judgment motion, PhRMA's First Amendment arguments addressed only Or. Rev. Stat. § 646A.689(3)(c), which requires manufacturers to provide the "factors that

[4] In its complaint, PhRMA also challenged Oregon's Advance Notification Law, House Bill No. 2658, 2019 Or. Laws Ch. 436, which requires manufacturers to provide 60 days' notice before increasing the price of certain medications. PhRMA voluntarily dismissed its challenges to the Advance Notification Law, following the resolution of a challenge to a similar California law. *See generally Pharm. Rsch. & Manufacturers of Am. v. David*, No. 2:17-cv-02573 (E.D. Cal.).

contributed to the price increase," and its implementing regulation, Or. Admin. R. 836-200-0530(2)(h).

At a hearing in January 2024, the district court made an oral preliminary ruling on the parties' cross-motions. The court granted summary judgment to PhRMA on its First Amendment and Fifth Amendment takings claims, granted summary judgment to the State on PhRMA's preemption claim, and denied summary judgment to both sides on the dormant Commerce Clause claim. In its preliminary oral ruling on the First Amendment claim, the district court concluded that HB 4005's reporting requirement was unconstitutional without referencing any specific subsection of HB 4005. However, the court had before it only the parties' argument as to one subsection: Or. Rev. Stat. § 646A.689(3)(c).

Following the district court's oral preliminary ruling, the parties submitted briefing on the proper scope of the judgment. Although PhRMA had only made summary judgment arguments as to Or. Rev. Stat. § 646A.689(3)(c), PhRMA requested a judgment declaring the entirety of HB 4005's reporting requirement facially unconstitutional. In response, the State argued in its declaratory judgment briefing that subsection 646A.689(3)(c) should be severed from the remainder of the statute.

In February 2024, the district court entered a declaratory judgment. *Pharm. Rsch. & Manufacturers of Am. v. Stolfi*, No. 6:19-CV-01996, 2024 WL 1144401 (D. Or. Feb. 16, 2024) ("*Declaratory Judgment*"). In relevant part, the court declared that HB 4005's reporting requirement violates the First Amendment and is therefore unenforceable. *Id.* Although the district court had previously provided no analysis of any subsection of HB 4005's reporting requirement other than §

646A.689(3)(c) and provided no analysis of any subsection of HB 4005 in the declaratory judgment, it declared the entirety of § 646A.689(3) unconstitutional. As the district court later explained in its written opinion, although the district court acknowledged the State's argument that PhRMA's First Amendment summary judgment briefing addressed only § 646A.689(3)(c), the court declined to sever this subsection from the statute because it concluded that the State had waived any severability argument by failing to address severability in its opposition to PhRMA's summary judgment motion, which only challenged § 646A.689(3)(c). The court further declared that the publication of trade secrets under the public-interest exception, § 646A.689(10)(a), constitutes a taking under the Fifth Amendment, and that any invocation of the exception without simultaneously providing just compensation for that taking would accordingly violate the Fifth Amendment. *Id.*

In March 2024, the district court issued a written opinion supporting its declaratory judgment. *Pharm. Rsch. & Manufacturers of Am. v. Stolfi*, 724 F. Supp. 3d 1174 (D. Or. 2024) ("*Summary Judgment Opinion*"). As to PhRMA's First Amendment claim, the court first concluded that, "[v]iewing the context of the disclosures as a whole, the speech at issue here is best categorized as commercial speech." *Id.* at 1197-99. The district court next considered which of the two levels of scrutiny governing commercial speech—intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), or the more permissive standard set forth in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)—should be applied to PhRMA's claim. *Id.* at 1199-200. The court explained that, for *Zauderer* to apply, the speech at issue "must disclose 'purely factual

and uncontroversial information.'" *Id.* at 1199 (quoting *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1275 (9th Cir. 2023)). The court determined that "the only non-factual information HB 4005 asks for is the pharmaceutical companies' narrative explanations justifying certain increases in price," but explained that "this is not the kind of non-factual information courts consider problematic under *Zauderer*." *Id.* Nonetheless, the court determined that because HB 4005 required manufacturers to "speak on a controversial topic and, in particular, justify why they fall on one side . . . of that controversy," *Zauderer* review was inappropriate. *Id.* at 1200. Applying *Central Hudson*, the district court held that HB 4005's reporting requirement failed intermediate scrutiny, concluding both that the State had failed to show how HB 4005 would directly advance its legislative goals, and that the State had failed to establish that HB 4005 was narrowly tailored to advance these goals. *Id.* at 1200-02. Again, the district court's analysis did not address any subsections of HB 4005's reporting requirement except § 646A.689(3)(c).

As to PhRMA's Fifth Amendment takings claim, the district court first concluded that PhRMA has standing to bring the claim, *id.* at 1186, and that the claim was ripe for review, *id.* at 1187-88. Turning to the merits, the court then determined that it was appropriate to treat PhRMA's claim as a regulatory taking, rather than a per se physical taking, and apply the regulatory takings test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Id.* at 1188-89. Applying the three factors articulated in *Penn Central*, the court determined that "all the factors support finding a regulatory taking" and thus concluded that any invocation of the public-interest exception constitutes an unconstitutional taking. *Id.* at 1189-90. Finally, the court

held that declaratory relief was an appropriate remedy, explaining that "[u]nless just compensation is provided, a taking of private property for public use occurs with each mandated public disclosure." *Id.* at 1190-91.

In its declaratory judgment, the district court declared the entirety of HB 4005's reporting requirement unconstitutional under the First Amendment and declared any invocation of the public-interest exception unconstitutional under the Fifth Amendment. Finding "no just reason for delay," the court entered partial final judgment on these claims under Federal Rule of Civil Procedure 54(b). *Declaratory Judgment*, 2024 WL 1144401 at *1. The State timely appealed.

## II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the district court's partial final judgment under 28 U.S.C. § 1291. We review the district court's summary judgment rulings de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). Under Federal Rule of Civil Procedure 56, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

## III. DISCUSSION

### A. First Amendment Claim

We first address PhRMA's facial First Amendment challenge. For the reasons below, we hold that HB 4005's reporting requirement is best categorized as commercial speech and survives applicable First Amendment scrutiny.

### i. Determining the Applicable Level of Scrutiny

#### a. Government Reporting Requirements

The State argues that HB 4005 merely requires manufacturers to report specific information to a government agency, which then makes that information available to the public unless it is a confidential trade secret. *See* Or. Rev. Stat. § 646A.689(3). And, as the State points out, statutes and regulations that require regulated entities and individuals to report information to a government agency are a common feature of modern government. *See, e.g.*, 26 U.S.C. § 6033 (requiring tax-exempt organizations to report internal financial information to the Internal Revenue Service ("IRS")); 17 C.F.R. § 229.402(b) (requiring corporations to submit information regarding executive compensation to the Securities and Exchange Commission ("SEC")); 40 C.F.R. §§ 705.10, 705.15 (requiring manufacturers of certain chemical substances to report information regarding chemical use and processing to the Environmental Protection Agency ("EPA")); 21 C.F.R. §§ 803.1, 803.20 (requiring medical device manufacturers to report adverse medical events related to their products to the Food and Drug Administration ("FDA")); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (controlling concurrence) (referring to the "thousands" of commonplace reporting requirements "on the books"). For ease, we refer to such laws as "government reporting requirements." Notably, it is also commonplace for statutes and regulations to authorize or require agencies to make the information that must be disclosed under such reporting requirements available to the public. *See, e.g.*, 26 U.S.C. § 6104(a) (requiring the IRS to make certain information in reports from tax-exempt organizations available to the public); 40 C.F.R. §

705.30(h) (authorizing the EPA to publicize chemical processing information); 21 C.F.R. § 803.9 (authorizing the FDA to publicly disclose information in medical device reports).

Government reporting requirements are distinguishable from laws that require a private individual or entity to communicate information directly to another private individual or entity or the general public. *See, e.g.*, *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 753-54 (9th Cir. 2019) (en banc) (ordinance requiring health warning on advertisements for sugar-sweetened beverages); *Nat'l Ass'n of Wheat Growers*, 85 F.4th 1263, 1266 (9th Cir. 2023) (law requiring businesses to provide carcinogen warnings if products expose consumers to glyphosate); *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 837-38 (9th Cir. 2019) (ordinance requiring retailers to provide warnings to customers about federal radio-frequency radiation exposure guidelines for cell phone users). For ease, we refer to laws that compel certain information to be communicated directly from one private entity to another as "direct disclosure requirements."

Laws that require disclosures of information, including both government reporting requirements and direct disclosure requirements, are subject to First Amendment scrutiny. *See NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1117 (9th Cir. 2024) ("[T]he forced disclosure of information . . . triggers First Amendment scrutiny."). However, such laws may be subject to different levels of scrutiny: rational basis review, intermediate scrutiny, or strict scrutiny.

For direct disclosure requirements, the analytical path for determining the applicable level of scrutiny is fairly well-settled. A direct disclosure requirement that

"compel[s] individuals to speak a particular message" or "alter[s] the content" of protected speech is generally viewed as a content-based "compelled speech" requirement subject to strict scrutiny, unless the content of the direct disclosure requirement qualifies as "commercial speech," which is entitled to less constitutional protection. *Compare Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), *with Cent. Hudson*, 447 U.S. at 562-63, *and Zauderer*, 471 U.S. at 651; *cf. Env't Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) (recognizing that government "may not constitutionally require an individual to disseminate an ideological message" but concluding that an EPA rule "requiring a provider of storm sewers . . . to educate the public about the impacts of stormwater discharge on water bodies and . . . the hazards of improper waste disposal falls short of compelling such speech"). If the direct disclosure requirement regulates "commercial speech," then courts apply either intermediate scrutiny, *see Cent. Hudson*, 447 U.S. at 564-66, or a lower level of scrutiny akin to rational basis review, *see Zauderer*, 471 U.S. at 651. *Nat'l Ass'n of Wheat Growers*, 85 F.4th at 1266, 1275.

For government reporting requirements, however, the correct analytical path is less clear. The parties advocate for two different approaches for determining the applicable level of scrutiny. Under PhRMA's preferred approach, all government reporting requirements are, for First Amendment purposes, the legal equivalent of direct disclosure requirements and should be analyzed the same way. That is, government reporting requirements are categorically viewed as content-based "compelled speech" requirements that are presumptively subject to strict scrutiny. It is important to recognize that, under this

approach, government reporting requirements as a general rule are subject to strict scrutiny—and the *only* exception is for reports that qualify as "commercial speech" entitled to less constitutional protection.[5] For ease, we refer to this approach as the "presumptively strict approach."

The State argues for a different approach for determining the applicable level of scrutiny. The State's alternative does not categorically equate government reporting requirements with direct disclosure requirements; nor does it categorically equate government reporting requirements with "compelled speech" requirements presumptively subject to strict scrutiny. However, if a government reporting requirement mandated that a covered entity or individual make a political or ideological statement, then it would be viewed as compelled speech that is presumptively subject to strict scrutiny.[6] *See United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) ("A First Amendment protection against compelled speech . . . has been found only in the context of governmental compulsion to disseminate a particular political or ideological message."); *cf. Full*

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[5] It is also important to recognize, in evaluating the merits of PhRMA's preferred analytical approach, that a content-based, compelled speech requirement that does not qualify as a commercial speech regulation is "presumptively unconstitutional" and must be struck down unless it withstands strict scrutiny. *See Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 766.

[6] Of course, government reporting requirements are also potentially subject to heightened or strict scrutiny under various other constitutional doctrines. *See, e.g.*, *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 57-76 (1974) (considering First, Fourth, and Fifth Amendment challenges to a government reporting requirement); *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 602, 611-19 (2021) (considering a freedom of association challenge to a government reporting requirement).

*Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108 (D.C. Cir. 2011) ("First Amendment concerns are paramount when the Government compels a speaker to endorse a position contrary to his beliefs, or to 'affirm[] a belief and an attitude of mind' he opposes." (alteration in original) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943))). Thus, under the State's alternative approach, a government reporting requirement *may* be subject to strict scrutiny, but that is not presumptively the correct standard of review. For ease, we refer to this alternative as the "potentially strict approach."

In our view, there are several compelling reasons to follow the State's potentially strict approach. For one, as the State notes, two of our sister circuits have taken this approach in cases addressing First Amendment challenges to government reporting requirements. In doing so, they have explicitly rejected the argument that government reporting requirements necessarily compel speech—and therefore are presumptively subject to strict scrutiny—simply because they mandate the disclosure of specific information.

In *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995), the Eighth Circuit considered a First Amendment challenge to IRS Form 8300, which requires taxpayers to report information related to cash transactions, including "the name, address, tax identification number, and other information about each payor and each person on whose behalf payment is made." *Id.* at 875. The court rejected the argument that Form 8300 "compel[s] speech," holding that although the "protection against compelled speech" applies "in the context of governmental compulsion to disseminate a particular political or ideological message," Form 8300 "requires [the plaintiff] only to provide the government with information which his clients have given

him voluntarily, not to disseminate publicly a message with which he disagrees." *Id.* at 878.

In *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011), the D.C. Circuit considered a First Amendment challenge to an SEC regulation requiring institutional investment managers to report quarterly to the SEC "the names, shares, and fair market value of the securities" over which the managers exercise control. *Id.* at 1104. This information was made publicly available unless managers sought and received an individual exemption from the SEC. *Id.* at 1104-05. Because exemption requests might require managers to, for example, "provide a description of their investment strategy and explain why disclosure would be detrimental," the plaintiff argued that the regulation compelled it to speak in violation of the First Amendment. *Id.* at 1105-06. However, the court applied a level of scrutiny "akin to the general rational basis test," and concluded that the regulation satisfied this standard. *Id.* at 1109 (citation omitted).[7] Like the Eighth Circuit in *Sindel*, the D.C. Circuit rejected the plaintiff's argument that the required reports to the SEC were "a form of compelled speech," holding that the regulation was not "a veiled attempt to 'suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" *Id.* at 1108-09 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

A First Circuit case, *Pharmaceutical Care Management Association v. Rowe*, 429 F.3d 294 (1st Cir.

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[7] Although the plaintiff in *Full Value Advisors* challenged subsections of the SEC regulation at issue that required public disclosures of its investment positions, the D.C. Circuit determined that this issue was not ripe for review and cabined its analysis to disclosures made only to the SEC. 633 F.3d at 1106-07, 1110.

2005), is also instructive. *Rowe* involved a direct disclosure requirement, not a government reporting requirement: the challenged state law required pharmacy benefit managers to disclose conflicts of interest and certain financial information to third parties with which they entered into contracts. *Id.* at 299. Nonetheless, the First Circuit's reasons for rejecting the plaintiff 's argument that the challenged disclosure requirement should be viewed as "compelled speech" suggest that it, too, would use the potentially strict approach to analyze a government reporting requirement. As the First Circuit explained:

> [The plaintiff's] First Amendment claim is completely without merit. So-called "compelled speech" may under modern Supreme Court jurisprudence raise a serious First Amendment concern where it effects a forced association between the speaker and a particular viewpoint. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (requiring all New Hampshire drivers to display "Live Free or Die" on their license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (requiring newspapers to afford political candidates a right to reply to editorial critiques). 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 [pharmacy benefit manager] 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. *Zauderer*, 471 U.S. 626, makes clear "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." *Id.* at 651. 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.

*Id.* at 316 (controlling concurrence).

Although *Sindel* and *Full Value Advisors* did not address laws that specifically required the government to make reported information available to the public,[8] the Supreme Court's reasoning in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), suggests that public dissemination of regulatory information collected by the government should not necessarily change the analytical framework. *Cf. NetChoice*, 113 F.4th at 1117-19 (rejecting the state's argument that a confidential government reporting requirement cannot unconstitutionally compel speech and subjecting the requirement to strict scrutiny).

In *Village of Schaumburg*, the Supreme Court struck down a local ordinance that required charitable

[8] Even where a statute or regulation does not specifically provide for the public disclosure of reported information, that information may be made available to the public through federal or state public records laws. *See, e.g.*, 5 U.S.C. § 552 (Freedom of Information Act).

organizations—in order to be eligible for a permit to engage in solicitation—to use a certain amount of their solicitation proceeds towards their charitable missions. 444 U.S. at 623-24. The Court held that this requirement did not withstand strict scrutiny and was not sufficiently tailored to the Village's asserted interest in fraud prevention. *Id.* at 636-37. It explained that "[t]he Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation," including through Illinois's existing financial disclosure requirements for charitable organizations. *Id.* at 637-38. Those state reporting requirements required charitable organizations to submit to the state a registration statement detailing "a variety of information about the organization and its fundraising activities," and these reports were "open to public inspection." *Id.* at 830 n.5 & 837 n.12.

In *Riley*, the Supreme Court considered the constitutionality of a direct disclosure requirement: the challenged North Carolina statute required fundraisers to disclose to potential donors the percentage of funds they had turned over to charities in the previous year when soliciting charitable donations. 487 U.S. at 786. The Court concluded that the direct disclosure requirement "alter[ed] the content" of fundraisers' speech during charitable solicitations, and it therefore applied strict scrutiny. *Id.* at 795, 798.[9] In concluding that the statute

[9] In *Riley*, the state argued that, even if charitable solicitations generally are fully protected speech, the challenged statute "regulate[d] only commercial speech" because the information the fundraiser was compelled to disclose to potential donors "relate[d] only to the professional fundraiser's profit from the solicited contribution." *Id.* at 795. The Supreme Court assumed without deciding that speech related to the fundraiser's "financial motivation

was not adequately tailored, the Court explained that "more benign and narrowly tailored options [were] available." *Id.* at 800. Most relevant here, the Court explained that "as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation." *Id.* In other words, at the same time that the Court held that a direct disclosure requirement—a law mandating disclosure of controversial financial information in the context of solicitation—was a "compelled speech" requirement subject to strict scrutiny, the Court strongly implied that a government reporting requirement was not—even if it would require fundraisers to report the same controversial financial information and disseminate it to the public.[10] *See also id.* at 795 ("[W]e do not suggest that

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for speaking . . . in the abstract is indeed merely 'commercial,'" but held that it lost "its commercial character when it [wa]s inextricably intertwined with" fully protected charitable solicitations—and such "intertwining" is what the challenged direct disclosure law effectively required. *Id.* at 795-96.

[10] In *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), the Tenth Circuit applied *Riley*'s reasoning to evaluate a First Amendment challenge to a Utah statute that, in relevant part, required professional fundraising consultants to meet certain registration and disclosure requirements. *Id.* at 1248. The statute required fundraisers to provide the state's consumer protection agency with, among other things, "a satisfactory statement of the factual basis for the projected percentage [of contributions] and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged, documentation to support the reasonableness of such flat fee." Utah Code § 13-22-9(1)(b)(vii)(D). Similar to the regulatory regime created by HB 4005, the state made these fundraiser reports available to the public. *See*

States must sit idly by and allow their citizens to be defrauded. . . . North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981." (citing *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.16 (1984))).

To be clear, a law requiring a regulated entity to express or endorse a political or ideological message would still be subject to strict scrutiny under the State's potentially strict approach. But the potentially strict approach would provide an analytical framework that would distinguish between government reporting requirements that "effect[] a forced association between the speaker and a particular viewpoint" and those involving only "routine disclosure of economically significant information designed to forward ordinary regulatory purposes" which typically will not "require an extensive First Amendment analysis." *Rowe*, 429 F.3d at 316 (controlling concurrence); *see also id.* ("The idea that these thousands of routine [government reporting] regulations require an extensive First Amendment analysis is mistaken.").

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*Am. Target Advert., Inc. v. Giani*, 23 F. Supp. 2d 1303, 1307 (D. Utah 1998). The Tenth Circuit recognized that charitable solicitations are protected speech but determined that the statute was a content-neutral regulation of that speech, and was therefore subject to only intermediate scrutiny. *Am. Target Advert.*, 199 F.3d at 1247. Citing *Riley*, the court concluded that the registration and disclosure requirements were narrowly tailored to the state's substantial interest in fighting fraud. *Id.* at 1248. Notably, the court did not treat the registration and disclosure requirements as "compelled speech" subject to strict scrutiny, instead applying intermediate scrutiny, even though the requirements impacted fully protected charitable solicitations, not lesser-protected commercial speech.

Another advantage of using the potentially strict approach to determine the applicable level of scrutiny is that it does not require us to evaluate, as a threshold question, whether the government reporting requirement should be categorized as a regulation of "commercial speech" by applying tests that were developed in a very different factual context. The commercial speech doctrine has primarily evolved in the context of regulations of commercial entities' advertising, including laws that restricted advertising, *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 62-63, 66-68 (1983); *Cent. Hudson*, 447 U.S. at 558-60, 561-63; and laws that required advertisements to contain specific disclosures (*i.e.*, direct disclosure requirements), *see Zauderer*, 471 U.S. at 633, 637-38.

Because the commercial speech doctrine originated in this advertising context, the traditional legal tests for determining whether speech is "commercial" reflect this paradigm. The Court set forth these tests in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). There, the Court considered a federal law that restricted the mailing of unsolicited advertisements for contraceptive devices. *Id.* at 61-62. The plaintiff, a manufacturer of contraceptives, sought to mail unsolicited advertisements, including informational pamphlets promoting its products but also discussing venereal disease and family planning. *Id.* at 67-68. It challenged the application of the federal statute to its proposed mailings on First Amendment grounds. *Id.* at 63. The plaintiff argued that the restricted speech was not commercial (and therefore fully protected) because the proposed mailings included non-commercial, educational information. *Id.* at 65-66.

In determining that the plaintiff's proposed mailings were "properly characterized as commercial speech," the Court explained that the "core notion of commercial

speech [is] 'speech which does no more than propose a commercial transaction.'" *Id.* at 66-67 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (cleaned up). The Court also identified three, non-dispositive factors that reflected the commercial nature of the informational pamphlets in particular: (1) the pamphlets were "conceded to be advertisements," (2) they referred to particular products, and (3) the plaintiff had an "economic motivation" for mailing the pamphlets. *Id.* at 66-67.

The tests articulated in *Bolger* were designed to determine the appropriate level of scrutiny to apply to laws that regulate voluntary speech from a regulated commercial entity to a public audience. They are therefore inapt for determining what level of scrutiny to apply to speech in an entirely different context—mandatory reports from the regulated entity to the government, which the government may then make available to the public. The submission of information to the government pursuant to a government reporting requirement typically does not "*propose* a commercial transaction," even if it involves the disclosure of information directly related to commercial transactions. *Id.* at 66 (emphasis added). It also does not neatly fit two of the factors identified in *Bolger*: A report to the government is not an "advertisement," and regulated entities and individuals typically produce these reports out of legal obligation, not economic motivation. *Id.* at 66-67.

Because of this conceptual mismatch, applying these tests strictly in the context of government reporting requirements produces counterintuitive results. *Cf. Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 535 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (explaining why "confining *Zauderer* to advertisement or product labels gives rise to

highly curious results"). It would be odd to subject speech in a consumer-facing advertisement to *less* scrutiny than speech in an annual report filed with a state regulatory body simply because it better fits the doctrinal tests for defining commercial speech. Consider, for example, if HB 4005 required manufacturers to prominently display information about price increases in direct-to-consumer television advertisements, rather than in annual reports filed with DCBS. In that circumstance, the traditional "definitions" of commercial speech would likely be satisfied, and yet, disclosure of this information by the State in DCBS reports, rather than by a manufacturer in an advertisement, is a less burdensome disclosure obligation. *See Riley*, 487 U.S. at 800-01. That is, "[i]t would be strange . . . if the same compelled . . . disclosure—providing the same information about the same product—commanded more demanding First Amendment scrutiny if it appeared in a single yearly report" instead of in every television advertisement. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 535 (Srinivasan, J., dissenting). This counterintuitive result underscores that, as a general matter, it makes little sense to determine the appropriate level of scrutiny to apply to government reporting requirements using the traditional definitions of commercial speech.[11]

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[11] The combination of the presumptively strict approach with the partial dissent's view of *Bolger*'s commercial speech standard would also produce results that are inconsistent with the Supreme Court's reasoning in *Riley*. Recall that in *Riley*, the Court concluded that the challenged direct disclosure requirement failed strict scrutiny in part because there was a less restrictive alternative: the state could "constitutionally" serve its governmental interests by requiring professional fundraisers to file "detailed financial disclosure forms" specifying the percentage of charitable donations retained by the fundraiser and then "publish[ing]" those forms. 487 U.S. at 795, 800.

In two recent cases, our court has applied strict scrutiny to evaluate government reporting requirements. However, as explained below, neither of those cases require us to adopt PhRMA's presumptively strict approach. In *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024), we considered a challenge to a California law that required "online businesses" to prepare reports "identifying, for each offered online service, product, or feature likely to be accessed by children, any risk of 'material detriment to children that arise from the data management practices of the business.'" *Id.* at 1109, 1116 (quoting Cal. Civ. Code § 1798.99.31). Every covered business was also required to assess "factors related to 'harm' prior to offering a new online service, product, or feature that is likely to be accessed by children." *Id.* at 1116.

Consistent with the potentially strict approach, we first addressed the question whether the challenged "DPIA report requirement" compelled speech, and we concluded that it "clearly compels speech by requiring covered businesses to opine on potential harm to children." *Id.* at 1117. We further explained that the reporting requirement "invites First Amendment

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Under the presumptively strict approach, that government reporting requirement would be subject to strict scrutiny unless the reported information qualified as commercial speech under *Bolger*. But mandatory reports to the government about how professional fundraisers profit from charitable donations do not "propose a commercial transaction," they are not "advertisements," and they are not produced out of an "economic motivation." *Bolger*, 463 U.S. at 66-67. Further, the Court in *Riley* described the financial disclosures at issue as "unfavorable" to the fundraisers. 487 U.S. at 800. Therefore, under the presumptively strict approach and the partial dissent's view of *Bolger*, the less restrictive and "constitutional" alternative identified by the *Riley* Court would be unconstitutional unless it withstood strict scrutiny.

scrutiny because it deputizes covered businesses into serving as censors for the State" by requiring business to make subjective decisions on whether or not material is "potentially harmful to children." *Id.* at 1118. That is, because the government reporting requirement mandated the covered entity to make a subjective opinion statement on a political issue, we concluded it was properly analyzed as a compelled speech requirement.[12] Next, we determined the appropriate level of scrutiny to apply. *Id.* at 1119. Because we had determined that the DPIA reporting requirement was a compelled speech requirement, it would be subject to strict scrutiny unless it regulated only "commercial speech . . . subject to a lesser standard than strict scrutiny." *Id.* at 1119-20. In resolving that issue, we again noted that the challenged requirement compelled covered entities to "opine on potential speech-based harms to children . . . disconnected from any economic transaction," and we concluded that "the subjective opinions compelled by [the law] are best classified as non-commercial speech" and therefore applied strict scrutiny. *Id.* at 1119-21.

*NetChoice* very briefly considered the fact that the challenged law was a government reporting requirement, and it did so only in rejecting the state's argument that the First Amendment is "wholly inapplicable" to

[12] The partial dissent suggests that the *NetChoice* panel did not view the DPIA report requirements as compelling any political or ideological messages, seemingly because the panel never used the words "political" or "ideological." Partial Dissent at 104-05. But the *NetChoice* panel made quite clear that it viewed the DPIA reporting requirement as "requir[ing] businesses to go beyond opining about their products or services to opine on highly controversial issues of public concern." 113 F.3d at 1120.

government reporting requirements.[13] *Id.* at 1117-18. In other words, *NetChoice* neither considered whether, nor conclusively held that, government reporting requirements are categorically compelled speech requirements presumptively subject to strict scrutiny.

Next, in *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024), we considered a challenge to a different California law, California's Assembly Bill 587 ("AB 587"), that required large social media companies to report to the state, among other things, whether and how they define several categories of content for purposes of their terms of service, including: hate speech or racism, extremism or radicalization, disinformation or misinformation, harassment, and foreign political interference. *Id.* at 894. But in *X Corp.*, unlike in *NetChoice*, we did not begin by expressly considering whether the challenged government reporting requirement compelled speech, and we did not answer that question by determining whether it required the covered entity to make subjective, political or ideological opinion statements. *Compare NetChoice*, 113 F.4th at 1116-18, *with X Corp.*, 116 F.4th at 899-900. Instead, we skipped over that question and started our analysis by asking whether the required "Content Category Reports" were commercial speech. *Id.*

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[13] *NetChoice* relied on *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021), for this proposition. We note that *Americans for Prosperity Foundation* considered the First Amendment right to association, not the compelled speech doctrine. That case concerned a challenge to a California law that required charitable organizations to submit Schedule B of IRS Form 990 to the state. *Id.* at 602. (Schedule B requires organizations to disclosure the names and addresses of significant donors. *Id.*) The Supreme Court concluded that the law violated First Amendment associational rights. *Id.* at 611-19. There is no indication, however, that the Court viewed any aspect of the reporting requirement as a content-based compelled speech requirement subject to strict scrutiny.

at 901. Then, we concluded that AB 587 did not regulate commercial speech because it required companies "to recast [their] content-moderation practices into language prescribed by the State, implicitly opining on whether and how certain controversial categories of content should be moderated." *Id.* at 901. And we therefore applied strict scrutiny. *Id.* at 903.

In both *NetChoice* and *X Corp.*, our application of strict scrutiny ultimately turned on the subjective and political or ideological nature of the information that the regulations required. Specifically, in both cases, we concluded that the government reporting requirement at issue forced regulated entities to opine on fraught political issues, such as what online content is "harmful to children" or what content constitutes "hate speech or racism." *See NetChoice*, 113 F.4th at 1117-18; *X Corp.*, 116 F.4th at 901-02. We therefore applied the rule that laws that regulate speech based on its expressive content, by "compel[ling] speakers to utter or distribute speech bearing a particular message," are subject to strict scrutiny. *Turner Broad.*, 512 U.S. at 642.

Using the potentially strict approach would have led to the same conclusion in both cases. That is, using the potentially strict approach, we would still conclude that the government reporting requirements at issue in *NetChoice* and *X Corp.* must be subject to strict scrutiny because they compelled private entities to make subjective, ideological opinion statements to the government by identifying what online content is "harmful to children" or what content constitutes "hate speech or racism." *See* 113 F.4th at 1117-18; 116 F.4th at 901-02. Because laws that require speakers to disseminate ideological messages are subject to strict scrutiny—whether in a government report or an advertisement—we would apply that standard. *See Turner Broad.*, 512 U.S.

at 642. However, we would reach this conclusion without applying the inapt commercial speech standards along the way. Rather, we would cut to the chase: because the government reporting requirements at issue in those cases mandate the "report" of political or ideological statements, they are subject to strict scrutiny—regardless of whether they otherwise look like commercial speech regulations under *Bolger*.

PhRMA reads *X Corp.* as effectively adopting the presumptively strict approach. That is, it reads *X Corp.* as supporting the broad proposition that, because government reporting requirements mandate the disclosure of specific information, they are categorically content-based, compelled speech regulations subject to strict scrutiny unless they qualify as regulations of "commercial speech." We are not persuaded by this reading of *X Corp.* for several reasons.

First, as explained above, our application of strict scrutiny in *X Corp.* turned on the fact that AB 587 required social media companies to "speak a particular message" by "opining on whether and how certain controversial categories of content should be moderated." *Id.* 899-901 (citation omitted). *X Corp.* did not expressly hold that *all* government reporting requirements are compelled speech requirements subject to strict scrutiny unless they regulate commercial speech. Indeed, reading *X Corp.* in this way would create considerable tension with the decisions of our sister circuits and with the Supreme Court's reasoning in *Riley* and *Village of Schaumburg*, which suggests that many government reporting requirements are not subject to strict scrutiny, regardless of whether they can be categorized as regulations of commercial speech. Second, and relatedly, *X Corp.* also did not reach the question of what level of scrutiny should apply if a government reporting requirement does not

qualify as a "commercial speech" regulation but does not compel the regulated entity to make subjective political or ideological statements. *See, e.g.*, *United States v. Kirilyuk*, 29 F.4th 1128, 1134 (9th Cir. 2022) ("[C]ases are not precedential for propositions not considered." (internal quotation marks and citation omitted)). Third, *X Corp.* did not consider the potential consequences of presumptively treating all government reporting requirements as compelled speech requirements subject to strict scrutiny.

Although, in our view, using the potentially strict approach followed by our sister circuits would be more doctrinally sound and avoid unintended consequences, we do not need to fully resolve whether *X Corp.* requires us to use the presumptively strict approach in this case, because both approaches lead us to the same conclusion. As explained further below, using the presumptively strict approach, we conclude that HB 4005's reporting requirement qualifies as a commercial speech regulation subject to either intermediate scrutiny or lower scrutiny under *Zauderer*, and that it withstands intermediate scrutiny. HB 4005 is distinguishable from the laws challenged in *X Corp.* and *NetChoice* because it does not compel the covered entities to make subjective political or ideological statements. For that same reason, HB 4005 would not be subject to strict scrutiny under the potentially strict approach discussed above.[14]

[14] PhRMA's First Amendment challenge focuses on its argument that HB 4005's reporting requirement unconstitutionally compels speech. It does not argue HB 4005's reporting requirement should be subject to strict scrutiny for any other reason.

b. Commercial Speech

Under the presumptively strict approach, to determine the level of scrutiny applicable to HB 4005's reporting requirement, we must first consider whether HB 4005's reporting requirement is properly categorized as commercial speech. As discussed, the "core notion of commercial speech [is] 'speech which does no more than propose a commercial transaction.'" *Bolger*, 463 U.S. at 66 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762) (cleaned up); *accord United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Courts also consider the three so-called "*Bolger* factors": (1) whether the speech is an advertisement, (2) whether the speech refers to a particular product, and (3) whether the speaker has an economic motivation. *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116 (9th Cir. 2021) (citing *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011)).[15]

Courts treat these legal tests "as just a starting point, however, and instead try to give effect to a 'common-sense

[15] The partial dissent suggests that these tests limit commercial speech to content "akin to something people would otherwise disclose in proposing commercial transactions." Partial Dissent at 86. However, "in the commercial context . . . [the government] often requires affirmative disclosures that the speaker might not make voluntarily." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 & n.1 (1995) (Stevens, J., concurring) (categorizing "Surgeon General's Warning' labels on cigarettes" as commercial speech). Indeed, it is entirely common for courts to conclude that regulatory disclosures related to a specific product are commercial speech, even where the specific information disclosed is directly *contrary* to the speaker's economic interest and therefore would not be disclosed absent regulation. *See, e.g.*, *Am. Beverage Ass'n*, 916 F.3d at 755-56 (health warning on advertisements for sugar sweetened beverages); *Nat'l Ass'n of Wheat Growers*, 85 F.4th at 1275 (carcinogen warnings for business whose products expose consumers to glyphosate); *CTIA*, 928 F.3d at 841-42 (warnings about radio-frequency radiation exposure

distinction' between commercial speech and other varieties of speech." *X Corp.*, 116 F.4th at 900 (quoting *Ariix*, 985 F.3d at 1115); *see also Ariix*, 985 F.3d at 1116 (explaining that the *Bolger* factors "are important guideposts, but they are not dispositive").[16] The "commercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *X Corp.*, 116 F.4th at 900 (quoting *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017)).

Our Circuit has characterized speech as commercial "even if not a clear fit" with these legal tests where the speech nonetheless "communicates the terms of an actual or potential [commercial] transaction." *Id.* at 901. We

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guidelines for cell phone users); *Am. Meat Inst. v. U.S. Dep't of Agri.*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc) (country of origin labeling on the packaging of meat products). And in any case, the partial dissent's assumption that the "pricing strategies" that manufacturers must disclose under HB 4005—*i.e.*, the "factors that contributed to the price increase[s]" of pharmaceutical drugs, Or. Rev. Stat. § 646A.689(3)(c)— are "not akin to anything people would otherwise disclose in proposing commercial transactions" is unfounded. Partial Dissent at 86. Companies routinely provide explanations for price increases in proposing commercial transactions. *See, e.g.*, Daniella Genovese, *Egg Surcharge Hits Diners' Wallets*, Fox Bus. (Feb. 7, 2025 13:32 ET), https://www.foxbusiness.com/lifestyle/egg-surcharge-hits-diners-wallets-experts-say-consumers-should-fear-menu-price-hikes-more (featuring a photo of a menu with a disclaimer explaining a temporary surcharge "due to the nationwide rise in cost of eggs"); Utpal M. Dholakia, *If You're Going to Raise Prices, Tell Customers Why*, Harv. Bus. Rev. (June 29, 2021) (describing a United Airlines message to customers explaining its decision to raise the price of its United Club membership).

[16] Indeed, in *Bolger* itself the Supreme Court emphasized that it did not "mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial." 463 U.S. at 67 n.14.

have, for example, applied the commercial speech doctrine to regulations requiring landlords to provide contact information for tenants' rights organizations before initiating buyout negotiations for condominium conversions, *see S.F. Apartment Ass'n v. City and County of San Francisco*, 881 F.3d 1169, 1174, 1176-77 (9th Cir. 2018); and to regulations requiring retailers to provide warnings about federal radio-frequency radiation exposure guidelines for cell phone users, *see CTIA*, 928 F.3d at 841-42. Similarly, in *Environmental Defense Center, Inc. v. EPA*, we applied the Supreme Court's reasoning in *Zauderer* in rejecting a compelled speech challenge to an EPA regulation that required municipal storm sewer providers to educate the public about the dangers of improper waste disposal. 344 F.3d at 849-51. We explicitly concluded that the "policy considerations" underlying the commercial speech doctrine applied in that context because the regulation required "market-participant" storm sewer providers to "inform the public how to dispose safely of toxins." *Id.* at 851 n.27.

Although the compelled disclosures in these cases did not "propose a commercial transaction," we applied the commercial speech doctrine because they nonetheless provided parties to "actual or potential" commercial transactions with information about those transactions.[17] *X Corp.*, 116 F.4th at 901; *see also NetChoice, LLC v. Paxton*, 49 F.4th 439, 446, 485-86 (5th Cir. 2022), *rev'd on other grounds sub nom. Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (applying the commercial speech doctrine to evaluate a state law requiring social media platforms to

[17] Notably, none of these decisions applied the factors identified in *Bolger*. 463 U.S. at 66-68; *see generally S.F. Apartment Ass'n*, 881 F.3d at 1176-80; *CTIA*, 928 F.3d at 841-49; *Env't Def. Ctr.*, 344 F.3d at 849-51.

publish information related to their content-moderation policies); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1206-07, 1223 (11th Cir. 2022), *rev'd on other grounds sub nom. Moody*, 603 U.S. 707 (same).

The reports required by HB 4005 likewise communicate the terms of potential commercial transactions. Specifically, the reports communicate product-specific economic information about prescription drugs that are available for purchase on the market. *See* Or. Rev. Stat. § 646A.689(2), (3). Much of the information required by HB 4005's reporting requirement is basic marketing information that manufacturers already disclose to the federal government and/or the public. *See, e.g.*, *id.* § 646A.689(3)(a), (i) (current and past list prices); *id.* § 646A.689(3)(b) (time drug has been on the market); *id.* § 646A.689(3)(d) (generic alternatives); *id.* § 646A.689(3)(g) (sales revenue); *id.* § 646A.689(3)(j) (prices in other countries); *see also* U.S. Food & Drug Admin., *Orange Book Preface* (Mar. 27, 2025), https://www.fda.gov/drugs/development-approval-process-drugs/orange-book-preface (providing background on the FDA's "Orange Book" report, which publicizes therapeutic equivalence evaluations of generic drugs to "serve as public information . . . in the area of drug product selection"); Or. Rev. Stat. § 689.515 (permitting generic substitution based on therapeutic equivalence evaluations made by the FDA). Indeed, the partial dissent agrees that much of this "general marketing information" "compels factual and uncontroversial information and probably does not violate the First Amendment." Partial Dissent at 80-81. The remaining information required by HB 4005's reporting requirement is economic information that is no less tethered to commercial transactions. *See* Or. Rev. Stat. § 646A.689(3)(e), (f) (costs incurred by manufacturers); *id.*

§ 646A.689(3)(c), (k) (factors contributing to price increases); *id.* § 646A.689(3)(h) (profit information).

HB 4005's reporting requirement thus improves the "free flow of commercial information" for all drug purchasers—both public and private. *Va. State Bd. of Pharmacy*, 425 U.S. at 765. Not only does HB 4005's reporting requirement provide drug pricing information to the State (itself a major drug purchaser in Oregon), but it also ensures private consumers have access to this information via public reports prepared by DCBS. *See* Or. Rev. Stat. § 646A.689(9). Indeed, the explicit purpose of HB 4005 is to provide market participants with information to facilitate future commercial transactions between drug manufacturers and market participants. *See* HB 4005, ch. 7 ("[T]he Legislative Assembly intends by this [Act] to permit purchasers, both public and private, as well as pharmacy benefit managers, to negotiate discounts and rebates for prescription drugs.").

Treating product-specific government reporting requirements as commercial speech makes sense in this case. Part of the reason that the First Amendment protects commercial speech is that such speech furthers the "consumer's interest in the free flow of commercial information." *Va. State Bd. of Pharmacy*, 425 U.S. at 764; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010) ("First Amendment protection for commercial speech is justified in large part by the information's value to consumers . . . ."); *Cent. Hudson*, 447 U.S. at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."). Notably, outside the context of commercial transactions, the information required by HB 4005 has no independent expressive meaning. *Cf. Zauderer*, 471 U.S. at 651 (noting

that the "interests at stake" in regulating commercial transactions "are not of the same order" as those where a speech regulation "prescribe[s] what shall be orthodox in politics, nationalism, religion, or other matters of opinion" (quoting *Barnette*, 319 U.S. at 642)). Where, as here, a government reporting requirement is closely tethered to the sale of a product and "assists consumers and furthers the societal interest in the fullest possible dissemination of information," it is properly categorized as commercial speech. *Cent. Hudson*, 447 U.S. at 561-62.[18]

The partial dissent argues that certain subsections of HB 4005's reporting requirement—namely, those that it views as related to "pricing strategy"[19]— require manufacturers to disclose information that "go[es] further" than communicating the terms of a potential transaction because the reports require manufacturers to express "opinions about and reasons for" their drug

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[18] Contrary to the partial dissent's assertions, we have not "articulate[d] a new legal test" for government reporting requirements. Partial Dissent at 95. Nor have we "discard[ed]" the *Bolger* factors. Partial Dissent at 79, 85. Rather, we have simply recognized that some aspects of the commercial speech doctrine are more instructive in this context than others. Our fact-cabined analysis reflects the reality that the "commercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *X Corp.*, 116 F.4th at 900 (quoting *First Resort*, 860 F.3d at 1272). Additionally, although the partial dissent characterizes our analysis as lacking a "limiting principle," Partial Dissent at 113, we highlight the close tether between the speech compelled by HB 4005 and commercial pharmaceutical transactions. Speech, such as this, that is incidental to a commercial transaction is not far removed from the "core" of commercial speech, *i.e.*, speech that "propose[s] a commercial transaction." *United Foods*, 533 U.S. at 409.

[19] The partial dissent agrees that other basic marketing information required by HB 4005 is "factual and uncontroversial commercial information." Partial Dissent at 80-81.

prices. Partial Dissent at 81-82, 91-95 (quoting *X Corp.*, 116 F.4th at 901).[20] We disagree. The economic-focused reports at issue here are a far cry from the "politically fraught" definitions at issue in *X Corp.* 116 F.4th at 902. The law under review in *X Corp.*, AB 587, required social media companies to identify what they believed to be "Hate speech or racism," "Extremism or radicalization," "Disinformation or misinformation" and "Foreign political interference," which is an intensely political exercise. *Id.* at 896. HB 4005's reporting requirement simply does not compel manufacturers to express any analogous normative view about their drug pricing,[21] nor does it require manufacturers to define their drug pricing in value-laden, state-prescribed language.[22] Rather, HB

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[20] Indeed, the partial dissent seems to imagine that HB 4005 requires manufacturers to report a detailed, play-by-play recount of internal discussions about pricing. Partial Dissent at 91-94, 98-100. However, the State represented at oral argument that DCBS would consider the following straightforward list of factors to be a satisfactory response to Or. Rev. Stat. § 646A.689(3)(c): "supply cost increases, research costs, and investor return."

[21] Unlike the information required by HB 4005, the speech compelled by AB 587 had independent expressive meaning outside the context of any commercial transaction. What constitutes "hate speech," for example, is a matter of public debate and concern outside the context of a social media company's terms of service (or, indeed, any commercial transaction). By contrast, it would make little sense to divorce the speech compelled by HB 4005, such as a pharmaceutical manufacturer's distribution costs, Or. Rev. Stat. § 646A.689(3)(f)(3), from specific product sales.

[22] The partial dissent asserts that reports required under HB 4005 "recast drug manufactures' pricing strategies into language prescribed by Oregon" because requiring manufacturers to report on various costs "impl[ies] that any increase in drug prices can be fairly justified only by increases in costs." Partial Dissent at 91. But under this view, laws requiring nutrition labels on food products would also be subjected to strict scrutiny simply because they require reporting

4005 requires manufacturers to report product-specific, economic information about their products such as current and past list prices, generic alternatives, and the length of time the drugs have been on the market. *Compare* Or. Rev. Stat. § 646A.689(3), *with X Corp.*, 116 F.4th at 894, *and NetChoice*, 113 F.4th at 1109, 1119-20.

PhRMA similarly argues that HB 4005's reporting requirement calls for "opinion[s] . . . about the reasons for high prescription prices." But no opinion is required for a manufacturer to disclose, as a matter of historical fact, the factors the company considered in setting its drug price. Contrary to PhRMA's arguments, HB 4005's reporting requirement does not "reinforce the State's message that manufacturers are the ones responsible for drug prices." Indeed, manufacturers are free to explicitly *reject* any such message and explain (to DCBS, market participants, and the public at large) the full range of factors that drive their pricing decisions. If, for example, a manufacturer raises the price of a drug to mitigate rising manufacturing costs, fund future research and development, offset a tax hike, or comply with new regulatory requirements, it remains entirely free to explain the impact of these

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based on categories prescribed by the state. *Contra Am. Beverage Ass'n*, 916 F.3d at 756. Moreover, even setting aside that the "factors that contributed to [a] price increase" are reported separately from these costs here, *see* Or. Rev. Stat. § 646A.689(3)(c), (e), (f), if consumers were to find an "implicit" message in the State's decision to request cost information from manufacturers, any such message would be attributable to the State. Just as consumers understand that the categories of information disclosed on nutrition labels (*e.g.*, added sugars, trans fats, protein) are selected by the government, it is clear here that the categories of information disclosed under HB 4005 are selected by the State. Of course, the "State can express [its] view[s] through its own speech," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011), and nothing about HB 4005 prevents a manufacturer from defining and disseminating its own message about drug pricing.

economic pressures on the drug's price. *See* Or. Rev. Stat. § 646A.689(3)(k) (requesting "[a]ny other information that the manufacturer deems relevant to the price increase"); Or. Admin. R. 836-200-0530(2)(h) (requiring manufacturers include "a narrative description and explanation of all major financial and nonfinancial factors" contributing to a price increase).

And although drug pricing decisions may implicate controversial public policy issues, this fact is insufficient to transform the required reports into noncommercial speech. *See Bolger*, 469 U.S. at 68 ("We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." (quoting *Cent. Hudson*, 447 U.S. at 563 n.5)); *Bd. of Trs. v. Fox*, 492 U.S. 469, 475 (1989) ("[C]ommunications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues." (internal quotation marks and citation omitted)); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (concluding that restrictions on solicitation speech of day laborers implicated commercial speech because, although "[t]he act of soliciting work as a day laborer may communicate a political message, . . . the primary purpose of the communication is to advertise a laborer's availability for work and to negotiate the terms of such work"). In this way, HB 4005's reporting requirement is similar to the hypothetical government reporting requirement that the Court tacitly approved of in *Riley*. There, the Court suggested that North Carolina could require professional fundraisers to submit financial reports that disclosed the percentage of solicitation funds actually turned over to charities within the last 12 months—and then disseminate those financial reports to the public. *Riley*, 487 U.S. at 800. As here, exposing how much money professional

fundraisers take from charitable donations could be considered "controversial" to the extent that it reflects fundraisers' profit-motivated decisionmaking, and publication of this information arguably went against the fundraisers' economic interests.[23]

That HB 4005 calls for the reporting of some information that may reflect internal decisionmaking also does not dissuade us from categorizing the reporting requirement as commercial speech.[24] Many routine financial regulations require the reporting of similar internal economic analysis. *See, e.g.*, 17 C.F.R. § 229.402(b) (requiring corporations to describe the "objectives of the [corporation's executive] compensation programs" including "[w]hat the compensation program is designed to reward" and "[w]hether and . . . how the

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[23] The partial dissent attempts to reconcile its reasoning with *Riley* by reframing the required disclosure in *Riley* as communicating the "price of [a professional fundraiser's] services." Partial Dissent at 111-12. But there is no difference in kind between requiring a professional fundraiser to publicly disclose "the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months," *Riley*, 487 U.S. at 786, and requiring a pharmaceutical manufacturer to disclose the factors that contributed to a price increase. Both regulations essentially require the covered entity to (indirectly) explain to customers what it is they are paying for, even if the covered entity would prefer not to provide such clarity.

[24] PhRMA's focus on the disclosure of "internal decisionmaking" attempts to inject concerns about confidentiality into the First Amendment analysis. But PhRMA cites no authority for the proposition that confidentiality has a role to play in our First Amendment analysis. In any event, HB 4005 does not broadly compel the public disclosure of confidential information. A manufacturer may designate the information as a trade secret in its report to DCBS, and the State may only disclose protected trade secret information under the public-interest exception. Or. Rev. Stat. § 646A.689(10)(a). The State has not done so since the law was enacted in 2018.

[corporation] has considered the results of the most recent shareholder advisory vote on executive compensation" in publicly disclosed SEC filings); *Rowe*, 429 F.3d at 299, 307, 310, 316 (controlling concurrence) (analyzing a regulation requiring pharmacy benefit managers to identify and disclose "conflicts of interest" and "financial and utilization information" to health benefit providers as commercial speech). The mere fact that a reporting requirement compels regulated entities to disclose information reflecting the company's internal decisionmaking does not strip that speech of its fundamentally commercial character.[25]

Having concluded that HB 4005's reporting requirement is properly categorized as commercial speech, our next step would normally be to determine whether the statute is subject to intermediate scrutiny under *Central Hudson*, or qualifies for a lower level of scrutiny under *Zauderer*.[26] *See Nat'l Ass'n of Wheat*

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[25] Although the degree to which a compelled disclosure reflects a company's internal strategies might bear on whether speech is "purely factual" for purposes of determining if *Zauderer* review is appropriate, 471 U.S. at 651, it does not bear on whether a reporting requirement regulates commercial speech.

[26] For HB 4005, application of the commercial speech doctrine to determine the appropriate level of scrutiny does not produce a doctrinally indefensible result. However, there are other longstanding government reporting requirements that would be subject to strict scrutiny under the presumptively strict approach—even if we treated the *Bolger* factors as a "just a starting point" (as *Bolger* instructs) and focused on whether the report "communicates the terms of an actual or potential [commercial] transaction." *X Corp.*, 116 F.4th at 900-01. Consider, for example, IRS Form 990, which requires *noncommercial* entities, including non-profit charitable organizations, to disclose information about their missions and "program service accomplishments," as well as detailed financial information (such as their revenues, sources of revenues, spending,

*Growers*, 85 F.4th at 1275. We need not decide this issue, however, because we conclude that HB 4005's reporting requirement survives even the more stringent standard, intermediate scrutiny under *Central Hudson*. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts . . . are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

### ii. Application of Intermediate Scrutiny

For HB 4005's reporting requirement to survive intermediate scrutiny under *Central Hudson*, the State must establish that the law "'directly advance[s]' a 'substantial' governmental interest, and [that] the means chosen [are] not . . . 'more extensive than necessary.'" *Nat'l Ass'n of Wheat Growers*, 85 F.4th at 1275 (quoting *Cent. Hudson*, 447 U.S. at 564-66).

*First*, we conclude that the State's asserted interests in HB 4005's reporting requirement are "substantial." *Cent. Hudson*, 447 U.S. at 566. When the Oregon Legislative Assembly passed HB 4005, it highlighted the State's "substantial public interest in the price and cost of prescription drugs," and explained that HB 4005 is specifically designed to: (1) "provide notice and disclosure of information relating to the cost and pricing of

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and most highly compensated employees). *See Form 990*, Internal Rev. Serv., https://www.irs.gov/pub/irs-pdf/f990.pdf; *see also Form 990*, Library of Cong. Rsch. Guide, https://guides.loc.gov/nonprofit-sector/form-990. Further, the 990 is a public document that can be accessed in a variety of ways, including on government websites. *See, e.g.*, *Tax Exempt Organization Search Tool*, Internal Rev. Serv., https://www.irs.gov/charities-non-profits/search-for-tax-exempt-organizations. Under the presumptively strict approach, this longstanding reporting requirement would likely be subject to strict scrutiny simply because it "compels" noncommercial entities to disclose noncommercial information.

prescription drugs in order to provide accountability for prescription drug pricing," and (2) "permit purchasers, both public and private, as well as pharmacy benefit managers, to negotiate discounts and rebates for prescription drugs consistent with existing state and federal law." HB 4005, ch. 7.

Although "consumer curiosity" alone is generally insufficient as a substantial state interest, *see Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001), the State's asserted interests here are not limited to transparency for its own sake. Rather, the State's transparency goals are intended to ensure the "preservation of a fair bargaining process" in negotiations related to drug purchasing. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996); *see also id.* at 502 ("It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993))); *Bolger*, 463 U.S. at 69 (highlighting the "substantial individual and societal interests in the free flow of commercial information" (internal quotation marks and citation omitted)).

The pharmaceutical drug market is characterized by significant informational asymmetries. *See* Robin Feldman & Charles Tait Graves, *Naked Price and Pharmaceutical Trade Secret Overreach*, 22 Yale J.L. & Tech. 61, 70-77 (2020) (explaining that in the pharmaceutical market, "perverse incentives, along with externalities and information asymmetries, operate to blunt the natural competitive forces society might otherwise enjoy"). The State has a substantial interest in reducing those asymmetries, facilitating informed commercial transactions, and improving the efficiency of

the pharmaceutical market. *See S.F. Apartment Ass'n*, 881 F.3d at 1177 (recognizing San Francisco's asserted interests in the "fairness of buyout negotiations" between landlords and tenants and the "reduct[ion] [in] the likelihood that tenants will accept 'unfair' buyout agreements" as substantial); *cf. Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("For purposes of [the *Central Hudson*] test, there is no question that [the State's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."). This is particularly true given the State's role as a direct purchaser of pharmaceutical drugs and a major payer in the health care system, and given the magnitude of the State's expenditures on prescription drugs. *See* Brief for the State of Cal., et al. as Amici Curiae, at 15 (noting the Oregon Health Authority spent more than $1.3 billion in 2022 on prescription drugs for those enrolled in Oregon's Medicaid and children's health program).

*Second*, we conclude that HB 4005's reporting requirement "directly advances" these substantial interests. *Cent. Hudson*, 447 U.S. at 566. To meet the "direct advancement" requirement, the State must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. However, even "in a case applying strict scrutiny," the State may "justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether"—or even "based solely on history, consensus, and simple common sense." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (internal quotation marks and citation omitted).

The district court concluded that the State had not established how HB 4005 would directly advance its asserted interests because the State had failed to point to data showing that HB 4005 would "actually reduce the

cost of prescription drugs in Oregon." *Summary Judgment Opinion*, 724 F. Supp. 3d at 1202. It is true that, in its summary judgment briefing, the State failed to cite any empirical evidence linking drug pricing transparency laws to lower drug prices. But the State has never claimed that HB 4005's reporting requirement itself will directly lower drug prices.[27] Rather, the State's stated goal in enacting HB 4005 was to reduce information asymmetries in the pharmaceutical market and provide drug purchasers with leverage in negotiations with manufacturers. It is common sense that collecting and publishing information about drug pricing, costs, and pharmaceutical market conditions "directly advances" this goal. *Cf. Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 415 (D.C. Cir. 2012) ("The government interest—ensuring the accuracy of commercial information in the marketplace—is clearly and directly advanced by a regulation requiring that the total, final price [of commercial airfare] be the most prominent."); Medicare and Medicaid Programs; Regulation To Require Drug Pricing Transparency, 84 Fed. Reg. 20732, 20744 (May 10, 2019) ("Price transparency helps improve market efficiencies by helping consumers make informed

[27] Although HB 4005's stated legislative goal is not to lower drug prices, amici curiae have provided evidence showing a correlation between drug pricing transparency laws and reductions in drug price increases. For example, the Oregon Coalition for Affordable Prescriptions cites data from Vermont showing that in the four years after the State passed a drug price transparency law in 2016, there was a 79% decline in the number of drugs reaching the per-year price increase threshold that triggered the law's reporting requirements. Brief for the Or. Coalition for Affordable Prescriptions as Amici Curiae, at 12 (citing Johanna Butler, *Drug Price Transparency Laws Position States to Impact Drug Prices*, Nat'l Acad. for State Health Pol'y (Jan. 10, 2022), https://nashp.org/drug-price-transparency-laws-position-states-to-impact-drug-prices).

choices and the disclosure of price information clearly and directly advances this interest.").

*Third*, we conclude that the State's chosen means of speech regulation here are not "more extensive than necessary to further the State's interest[s]." *Cent. Hudson*, 447 U.S. at 569-70. In its briefing before this court, PhRMA does not argue that a more limited disclosure would suffice or identify any specific subsection of HB 4005's reporting requirement that it asserts is unnecessary to advance the State's interests. Rather PhRMA's sole argument is that HB 4005's reporting requirement is impermissibly underinclusive because it applies only to pharmaceutical manufacturers, and does not require other supply chain participants to provide any drug pricing information. However, "[a]s a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer*, 471 U.S. at 651 n.14; *see also Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995) ("The First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates [the problem]."). Moreover, PhRMA's "argument holds even less water here because the narrow tailoring requirement guards against over-regulation rather than under-regulation." *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 911 (9th Cir. 2009).

Additionally, courts have repeatedly characterized the mechanism of disclosure here—wherein the State rather than a regulated entity makes disclosed information available to the public—as narrowly tailored. For example, in *Riley*, the Court concluded that the North Carolina statute at issue, which required fundraisers to directly disclose the percentage of funds they had turned over to charities, was not narrowly tailored because there

were "more benign and narrowly tailored options." *Id.* at 800. Again, the Court explained that "as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation." *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (explaining that, in the context of campaign finance, "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance"); *Nat'l Ass'n of Wheat Growers*, 85 F.4th at 1283 (explaining that a more narrowly tailored alternative for a product warning would be for the state to "post information about glyphosate on its own website"); *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 214 (5th Cir. 2011) ("[T]here is nothing stopping Texas from requiring [a regulated entity] to file financial disclosure forms, which Texas could publish without burdening the [entity] with unwanted speech."). Under the State's chosen means of regulation here, manufacturers remain free to disseminate their own messages directly to consumers and to the public at large. *See Va. State Bd. of Pharmacy*, 425 U.S. at 770 ("[P]eople will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

Ultimately, *Central Hudson* review requires only "a reasonable fit between the means and ends of the regulatory scheme." *Lorillard*, 533 U.S. at 561. We conclude that HB 4005's reporting requirement is appropriately tailored and survives intermediate scrutiny.

### iii. Severability

In this appeal, the State again argues that, even if PhRMA were to prevail, it is entitled only to a judgment severing and invalidating Or. Rev. Stat. § 646A.689(3)(c), which requires manufacturers to report the "factors that contributed to the price increase." Because we conclude that all subsections of HB 4005's reporting requirement are constitutional under the First Amendment, we do not reach this argument. We note, however, that when striking down a state statute as unconstitutional, "'the normal rule' is that 'partial, rather than facial, invalidation is the required course.'" *Project Veritas v. Schmidt*, 125 F.4th 929, 960 n.29 (9th Cir. 2025) (en banc) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

Here, PhRMA only addressed § 646A.689(3)(c) in its summary judgment briefing. As a result, the State's opposition to PhRMA's summary judgment motion only addressed § 646A.689(3)(c). Similarly, the district court only analyzed § 646A.689(3)(c) in its preliminary oral ruling. Nevertheless, PhRMA subsequently proposed a declaratory judgment invalidating the entirety of § 646A.689(3). Although the State then raised severability in its brief objecting to PhRMA's proposed declaratory judgment, the district court invalidated the entire reporting requirement because it considered the State's severability argument waived. *Summary Judgment Opinion*, 724 F. Supp. 3d at 1197 n.6. At no point did the district court ever provide substantive analysis on any subsection except § 646A.689(3)(c). Moreover, because PhRMA's motion for summary judgment only addressed § 646A.689(3)(c), the State had no reason to raise severability in its opposition to PhRMA's summary judgment motion. Thus, the State could not have waived

the severability issue in its opposition to PhRMA's motion for summary judgment.

But even if the State had waived the argument, our en banc court recently expressed "doubt" that declining to consider severability based on waiver "would be the proper course," explaining that "the Supreme Court has previously faulted our court for failing to consider severability before invalidating an entire state statute." *Project Veritas*, 125 F.4th at 960 n.29 (citing *Brockett*, 472 U.S. at 507; *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-31 (2006); *New York v. United States*, 505 U.S. 144, 186 (1992)). So even if some subsections of Or. Rev. Stat. § 646A.689(3) did not survive the applicable level of scrutiny, the appropriate next step would be to sever them.

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In sum, assuming *arguendo* that HB 4005's reporting requirement is subject to intermediate scrutiny, we conclude that it is a permissible regulation of commercial speech. We thus hold that the State, not PhRMA, is entitled to summary judgment on PhRMA's First Amendment claim.

**B. Fifth Amendment Takings Claim**

We next turn to whether HB 4005's public-interest exception constitutes an unconstitutional taking of private property under the Fifth Amendment. For the reasons below, we hold that PhRMA is not entitled to summary judgment in this facial challenge.

"The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation.'" *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 184 (2019) (alteration in

original) (quoting U.S. Const. amend. V).[28] Here, PhRMA argues that the public-interest exception is a facial violation of the Takings Clause because, each and every time the exception is invoked, the State takes manufacturers' property—specifically, their trade secrets—without providing just compensation. The State advances two primary arguments: (1) that PhRMA's claim is nonjusticiable, and (2) that PhRMA cannot prevail on the merits of its facial claim.

**i. Justiciability**

Both parties acknowledge that, to date, DCBS has never invoked the public-interest exception and never publicly disclosed any of the thousands of purported trade secrets filed with DCBS under HB 4005. The State argues that, because DCBS has yet to invoke the exception, PhRMA's claim is nonjusticiable. The pre-enforcement posture of this facial challenge raises two issues: Article III standing and ripeness. We discuss each in turn.

a. Article III Standing

Here, PhRMA asserts associational standing on behalf of its member pharmaceutical and biotechnology manufacturers. "To satisfy associational standing requirements, an organization must demonstrate that (1) at least one of its members has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision." *California Rest. Ass'n*

[28] The Takings Clause applies against the States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

*v. City of Berkeley*, 89 F.4th 1094, 1099 (9th Cir. 2024).[29] The State argues that PhRMA cannot establish this first prong, *i.e.*, that any of its members has suffered an injury in fact. We disagree.

The State argues that PhRMA cannot establish an injury in fact in its facial challenge because the law's enactment had no immediate effect on private property. This argument is unavailing. To establish injury in fact, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411, 414 n.5 (2013)); *see also In re Zappos.com, Inc.*, 888 F.3d 1020, 1026 (9th Cir. 2018). Standing alone, the fact that the public-interest exception has never been invoked does not persuade us that the alleged harm here is, as the State argues, "purely speculative." Indeed, in a hearing before the district court, when the State was asked whether DCBS's decisions not to invoke the public-interest exception have been "influenced by the pendency of this litigation," counsel stated that this was "possible." Where, as here, "the State has not disavowed any intention of invoking the [challenged] provision," manufacturers face a "credible threat" of public disclosure of their trade secrets. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 302 (1979). Importantly, PhRMA's

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[29] Associational standing also requires that "the interests [the organization] seeks to protect are germane to the organization's purpose" and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). The State does not dispute that PhRMA has established these elements of associational standing, and we agree.

theory of standing does not rest on a "speculative multi-link chain of inferences" about possible future events, *In re Zappos.com*, 888 F.3d at 1026, nor does it depend on the independent actions of third parties, *see Washington v. U.S. Food & Drug Admin.*, 108 F.4th 1163, 1175 (9th Cir. 2024). Rather, PhRMA's theory rests on a single determination by DCBS that disclosure of a claimed trade secret is in the "public interest." *See* Or. Rev. Stat. § 646A.689(10)(a). Once that determination is made, disclosure under HB 4005 is mandatory. *See id.* § 646A.689(9) (explaining that unless the public-interest exception applies, DCBS "*shall* post to its website" information disclosed by manufacturers (emphasis added)). We thus conclude that the risk of future injury is sufficiently nonspeculative to establish injury in fact.

The remaining Article III standing requirements are also satisfied. The risk of future harm faced by PhRMA's members is self evidently "fairly traceable" to the conduct being challenged—the invocation of the public-interest exception.

Redressability is also satisfied here. In considering Article III redressability, the focus is primarily on "the connection between the alleged injury and requested judicial relief." *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). PhRMA's requested relief here is a declaratory judgment recognizing that any invocation of the public-interest exception without simultaneously providing just compensation would violate the Fifth Amendment. A declaratory judgment in PhRMA's favor would redress manufacturers' injuries by making a "definitive determination of the legal rights of the parties." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007); *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 62 (9th Cir. 2024). In other words, even

though a declaratory judgment itself would not provide immediate relief to PhRMA's members, the preclusive effect of the judgment would provide manufacturers relief by binding the State in any subsequent lawsuits seeking compensation for unconstitutional takings under the challenged provision. *Cf. Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.").

To be sure, in this context there is significant overlap between constitutional standing and ripeness issues. But, for Article III standing purposes, it suffices to conclude that the preclusive effect of a declaratory judgment in PhRMA's favor would redress manufacturers' alleged injuries.

b. Ripeness

We also conclude that PhRMA's takings claim is ripe for review. "[T]he ripeness inquiry contains both a constitutional and a prudential component." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (quoting *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993)). The constitutional component of the ripeness inquiry focuses on whether the issues presented are "definite and concrete, not hypothetical or abstract." *Id.* (quoting *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). Here, this inquiry "coincides squarely with standing's injury in fact prong," *id.*, and for the reasons discussed above, *see supra* Section III.B.i.a, we conclude that PhRMA's claim meets constitutional ripeness requirements.

Turning to prudential ripeness, in the context of a takings claim, the key question is whether the plaintiff has "received a 'final decision regarding the application of the

[challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations.'" *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 734 (1997) (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)). "[O]ur analysis is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (quoting *Abbott Laby's v. Gardner*, 387 U.S. 136, 148 (1967)).

Generally, in the takings context, "[o]nce the government is committed to a position . . . the dispute is ripe for judicial resolution." *Pakdel v. City & County of San Francisco*, 594 U.S. 474, 479 (2021). It is true that the State has yet to define the circumstances under which "[t]he public interest . . . require[s] disclosure." Or. Rev. Stat. § 646A.689(10)(a). However, PhRMA has chosen to litigate this case as a facial challenge and seeks a declaration stating that every disclosure under the public-interest exception—regardless of why that disclosure was made—constitutes an unconstitutional taking. Resolving this facial claim does not involve probing fact-specific DCBS public-interest determinations, and thus there is no finality issue that renders this claim unripe. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) (en banc) ("Facial challenges are exempt from [prudential finality requirements] because a facial challenge by its nature does not involve a decision applying the statute or regulation."); *see also Suitum*, 520 U.S. at 736 n.10 ("[F]acial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an uphill battle since it is difficult to demonstrate that mere enactment of a piece of

legislation deprived the owner of economically viable use of his property." (cleaned up)).

To be sure, whether any individual invocation of the public-interest exception constitutes an unconstitutional taking is a fact-specific, individualized inquiry. *See infra* Section III.B.ii. But we conclude that this issue is properly addressed as part of the merits of PhRMA's facial claim. No additional factual development is necessary for this court to decide whether every invocation of the exception constitutes a taking. Because the "issue presented is fit for judicial resolution," *Abbott Laby's*, 387 U.S. at 153, we see no reason to withhold a decision on the merits.

### ii. Merits of the Takings Clause Claim

Because we conclude that PhRMA's facial takings claim is justiciable, we next turn to the merits.

As a threshold matter, we note that manufacturers have a protectable property interest in their claimed trade secret information to the extent that the information is "cognizable as a trade-secret property right under [state] law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984); *see also Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Confidential business information has long been recognized as property."); *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1374 (9th Cir. 1981); *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1282 (9th Cir. 2021). Here, Oregon law recognizes a property interest in trade secrets, *see* Or. Rev. Stat. § 307.020(1)(a)(I) (defining trade secrets as intangible personal property for property tax purposes); *State ex rel. Sports Mgmt. News v. Nachtigal*, 921 P.2d 1304, 1309 (Or. 1996) (recognizing that Oregon's Uniform Trade Secrets Act "protect[s] the property interests of the holder of [a] trade secret"), and thus trade secrets submitted to DCBS

constitute protectable property under the Fifth Amendment.[30]

a. Legal Standard

We next turn to the proper legal standard for evaluating PhRMA's takings claim. The Supreme Court has articulated two categories of takings under the Fifth Amendment. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147-49 (2021). Where the government "physically acquires private property for a public use," a "per se" taking has occurred. *Id.* at 147-48. But where the government "instead imposes regulations that restrict an owner's ability to use his own property," courts "appl[y] the flexible test developed in *Penn Central*." *Id.* at 148.

PhRMA does not assert that HB 4005 involves a "physical" taking but nonetheless argues that the public-interest exception should be considered a per se, "categorical" taking because it "denies [manufacturers] all economically beneficial or productive use" of their property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). This argument is unpersuasive for three reasons.

First, in the only Supreme Court case addressing an alleged taking of trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court categorized the alleged taking as a regulatory taking and looked to the *Penn Central* factors. *Id.* at 1005-06. Second, it is far from clear

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[30] We note that the definition of a "trade secret" incorporated by reference in HB 4005 is not identical to the definition in Oregon's Uniform Trade Secrets Act. *Compare* Or. Rev. Stat. § 192.345(2) (HB 4005 definition), *with id.* § 646.461(4) (Oregon Uniform Trade Secrets Act definition). However, the parties have not suggested that there is any material difference in these definitions, and the State does not dispute that trade secrets submitted under HB 4005 are property protected by the Fifth Amendment.

that *Lucas*'s categorical approach extends beyond real property to intangible personal property. *Lucas* involved a land-use regulation and the Supreme Court framed the inquiry as whether the governmental action "denies an owner economically viable use *of his land*." 505 U.S. at 1016 (emphasis added). Indeed, *Lucas* explicitly distinguished land from personal property, explaining that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a plaintiff] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 1027-28. Third, even if *Lucas*'s categorical approach were applicable to intangible personal property, it is far from clear that every disclosure made under the public-interest exception will "den[y] *all* economically beneficial . . . use" of a manufacturer's trade secret in all cases. 505 U.S. at 1015 (emphasis added); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 330 (2002) ("Anything less than a 'complete elimination of value,' or a 'total loss,' . . . require[s] the kind of analysis applied in *Penn Central*." (quoting *Lucas*, 505 U.S. at 1019 n.8)). As discussed below, the economic impact of a disclosure will likely vary case by case, depending on the trade secret at issue and the extent of the information actually disclosed by DCBS. *See infra* Section III.B.ii.b.2.

We therefore categorize PhRMA's claim as a potential regulatory taking governed by the standards articulated in *Penn Central*.

b. Application of *Penn Central*

We begin by highlighting again that PhRMA has chosen to litigate this case as a facial challenge. Because "'[c]laims of facial invalidity often rest on speculation' about the law's coverage and its future enforcement" and

"'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways," the Supreme Court has "made facial challenges hard to win." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008)); *see also Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988); *Suitum*, 520 U.S. at 736 n.10; *Willis v. City of Seattle*, 943 F.3d 882, 886 (9th Cir. 2019).

Indeed, given the fact-intensive nature of the *Penn Central* framework, this court has repeatedly noted that "[i]t is not clear that a facial challenge can be made under *Penn Central*." *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012); *see also Guggenheim*, 638 F.3d at 1118 & n.32; *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1126 n.3 (9th Cir. 2013). As in these previous cases, we "assume, without deciding, that a facial challenge can be made under *Penn Central*." *Guggenheim*, 638 F.3d at 1118. However, we stress that PhRMA faces an "uphill battle," *Suitum*, 520 U.S. at 736 n.10, and "cannot succeed on [its] facial challenge unless [it] 'establishes that no set of circumstances exists under which the law would be valid,' or [it] shows that the law lacks a 'plainly legitimate sweep,'" *Moody*, 603 U.S. at 723 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (cleaned up).

When considering whether a regulation constitutes a taking under *Penn Central*, courts generally consider three factors: (1) the regulation's interference with reasonable investment-backed expectations, (2) the economic impact of the regulation, and (3) the character of the government action. 438 U.S. at 124. We conclude that, under this "ad hoc," fact-specific framework, PhRMA is not entitled to summary judgment on this facial challenge. *Id.* at 124.

1. Reasonable Investment-Backed Expectations

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Monsanto*, 467 U.S. at 1005 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Moreover, "[a]s a general matter, 'in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.'" *CDK Glob.*, 16 F.4th at 1282 (quoting *Lucas*, 505 U.S. at 1027-28). Here, we conclude that the disclosure of trade secrets under the public-interest exception will not, in every instance, upset reasonable investment-backed expectations.

*First*, reasonable expectations are necessarily tempered in areas "that ha[ve] long been the source of public concern and the subject of government regulation." *Monsanto*, 467 U.S. at 1007; *see also Maine Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012) ("As a baseline proposition, [plaintiff's] expectations are substantially diminished by the highly regulated nature of the industry in which it operates."); *Rowe*, 429 F.3d at 316 (controlling concurrence) (concluding that pharmacy benefit managers "should . . . have expected the possibility" of disclosure of trade secrets given the "heavily regulated nature of the healthcare industry"). The pharmaceutical industry is unquestionably an industry with a long history of government regulation. *See, e.g.*, Pure Food and Drugs Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, 770-71 (prohibiting drug labels from being false or misleading and requiring labels to list presence and amount of certain ingredients). Importantly, regulation has not been limited to health and

safety concerns. Increasingly, state and national governments have enacted regulations that directly address transparency in the pharmaceutical market. *See, e.g.*, 29 C.F.R. § 2590.715-2715A3(b); Vt. Stat. Ann. tit. 18, §§ 4633-4637; Cal. Health & Safety Code §§ 127675-12785; Minn. Stat. Ann. § 62J.84; N.J. Stat. Ann. §§ 45:14-82.1-82.11; N.Y. Ins. Law § 111-a. As a starting point, then, manufacturers ought to be aware of the heightened possibility that regulations may be enacted requiring disclosure of the exact type of information that may be commonly claimed as a trade secret under HB 4005.

*Second*, "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of . . . expectations." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012) (explaining that "the property owner's distinct investment-backed expectations" are "often informed by the law in force in the State in which the property is located"). Oregon law has precluded trade secret misappropriation claims based on the public disclosure of trade secrets where "the public interest requires disclosure" since the State first adopted the Uniform Trade Secrets Act in 1987. *See* 1987 Or. Laws Ch. 537 § 8(3) (Oregon Uniform Trade Secrets Act, now codified at Or. Rev. Stat. § 646.473(3)); 1973 Or. Laws Ch. 794 § 11 (Oregon's Public Records Law, now codified at Or. Rev. Stat. § 192.345(2)). The State's general practice of disclosing trade secrets in furtherance of the public interest further diminishes manufacturers' reasonable expectations of strict confidentiality in all cases.

*Third*, concluding that manufacturers have reasonable expectations of strict confidentiality of trade secrets submitted to the State under HB 4005 would be in significant tension with *Monsanto*, 467 U.S. 986. In

*Monsanto*, the Supreme Court considered whether the EPA's disclosure of trade secret data submitted by Monsanto, a pesticide manufacturer, under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") constituted an unconstitutional taking. *Id.* at 990. The Court analyzed Monsanto's takings claim during three different time periods defined by two amendments to the statutory scheme.

Under FIFRA, which was first adopted in 1947, all pesticides must be registered with the federal government before their sale in interstate commerce. *Id.* at 990-91. Registration applications include various confidential information, including the formula for the pesticide and various health, safety, and environmental data. *See id.* at 991-93. As originally enacted, the statutory scheme was "silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration." *Id.* at 1008. In 1972, Congress undertook comprehensive amendments to FIFRA and added a new provision related to the public disclosure of data submitted to EPA by pesticide manufacturers in support of a registration application. Under the new provision, pesticide manufacturers could designate disclosed information as a trade secret. *Id.* at 992. If so designated, EPA was prohibited from publicly disclosing this information. *Id.* In 1978, in part to clarify ambiguities in this regulatory scheme, Congress enacted additional amendments. *Id.* at 993. The 1978 amendments permitted the public disclosure of all health, safety, and environmental data—even if data was claimed as a trade secret. *Id.* at 995-96.[31]

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[31] Other types of trade secret information (*e.g.*, manufacturing and quality control processes) were exempted from the disclosure requirement. *Id.* at 996 & n.5.

The Court determined that EPA's disclosure of data between the 1972 and 1978 amendments could constitute a taking as "disclosure conflicts with the explicit assurance of confidentiality . . . contained in the statute during that period." *Id.* at 1013. However, the Court held that Monsanto could have had no reasonable expectation of strict confidentiality for information disclosed to EPA either before 1972 or after 1978, and thus the disclosure of data submitted by Monsanto during this time could not constitute an unconstitutional taking. Before 1972, when the statutory scheme was silent as to the disclosure of trade secret information, the Court explained that:

> [T]he [federal] Trade Secrets Act is not a guarantee of confidentiality to submitters of data, and, absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest.

*Id.* at 1008-09. As to data submitted after 1978, the Court concluded that:

> If, despite the . . . data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a

> manner that was authorized by law at the time of the submission. . . . [A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

*Id.* at 1006-07.

HB 4005's public-interest exception is materially indistinguishable from the third time period at issue in *Monsanto*, *i.e.*, post-1978 amendments. HB 4005 explicitly authorizes the disclosure of trade secrets submitted to the State if disclosure is in the public interest. If manufacturers choose to run the risk of public disclosure of their trade secrets to do business in the highly regulated pharmaceutical industry, they "can hardly argue that [their] reasonable investment-backed expectations are disturbed when [the State] acts to . . . disclose the data in a manner that was authorized by law at the time of the submission." *Monsanto*, 467 U.S. at 1006-07.

The district court concluded that *Monsanto* was inapposite because there, pesticide manufacturers "voluntarily provided the trade secrets at issue," whereas here there is "no quid pro quo." *Summary Judgment Opinion*, 724 F. Supp. 3d at 1190. However, just as in *Monsanto*, the benefit provided to manufacturers is the ability to sell a highly regulated product in a government-regulated market. In *Monsanto*, the Supreme Court explained that in "those situations where [Monsanto] deems the [trade secret] data to be protected from disclosure more valuable than the right to sell in the United States," it can "decide to forgo registration in the

United States and sell a pesticide only in foreign markets." 467 U.S. at 1007 n.11. Here, manufacturers have a similar choice. If they decide the value of protecting their trade secrets from potential disclosure to be more valuable than the right to sell in Oregon, they can decide to forego pharmaceutical sales in the state and limit their product sales to other states and foreign markets.

PhRMA argues that such a choice is illusory and allowing a manufacturer to sell a legal product is not a valuable government benefit comparable to the regulatory permit at issue in *Monsanto*. This argument is not entirely without support. In *Horne v. Department of Agriculture*, the Supreme Court concluded that a regulation requiring "the [plaintiffs] to turn over 47 percent of their raisin crop[] in exchange for the 'benefit' of being allowed to sell the remaining 53 percent" was not a "similar voluntary exchange" to the exchange in *Monsanto*. 576 U.S. 350, 366 (2015); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (distinguishing *Monsanto* on the basis that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'").

However, we conclude that this case is much closer to *Monsanto* than to *Horne*. Access to highly regulated markets has not historically been conceived as a constitutional right. *See, e.g.*, *Corn Prods. Ref. Co. v. Eddy*, 249 U.S. 427, 431 (1919) ("[A] manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold."); *Nat'l Fertilizer Ass'n v. Bradley*, 301 U.S. 178, 182 (1937). The "valuable government benefit" of permitting a manufacturer to sell products in the highly

regulated pesticide market is no different in kind than the "valuable government benefit" of permitting a manufacturer to sell products in a highly regulated pharmaceutical market. *Monsanto*, 467 U.S. at 1007. The claim at issue in *Horne*, where plaintiffs challenged the *physical* taking of a raisin crop, involved a materially different market and a materially different government action. Indeed, in *Horne*, the Court explicitly noted that a law requiring raisin growers to physically turn over a portion of their crop was factually distinct from "[a] case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards." 576 U.S. at 366.

*Finally*, manufacturers' reasonable expectations may differ significantly depending on the specific trade secret information and the public interest at issue in a given disclosure. A wide variety of information can be protected as a trade secret under Oregon law. *See* Or. Rev. Stat. § 192.345(2) (defining a trade secret to include, but not be limited to a "formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information"). Manufacturers' reasonable confidentiality expectations will vary depending on how similar information has been historically regulated under preexisting state and federal law. Especially where a claimed trade secret is related to a drug's health and safety information, confidentiality expectations may be particularly diminished given the long history of government disclosure requirements for this type of information. *See, e.g.*, *Corn Prods.*, 249 U.S. at 431-32 ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."); 15 U.S.C. § 2613(d)(3)

(providing for the disclosure of data submitted under the Toxic Substances Control Act where "necessary to protect health or the environment against an unreasonable risk of injury to health or the environment").

Ultimately, given the facial nature of PhRMA's claim and the broad sweep of trade secret protection, we cannot say that every disclosure of a trade secret under HB 4005 will upset reasonable investment-backed expectations. We thus conclude that this factor does not support PhRMA's facial takings claim. We note that in *Monsanto*, the Supreme Court concluded that "the force of this factor is so overwhelming . . . that it disposes of the taking question." 467 U.S. at 1005. However, given the inherently fact-specific nature of the regulatory takings inquiry, we also address the additional *Penn Central* factors.

2. Economic Impact of the Regulation

In evaluating the economic impact of a challenged regulation under *Penn Central*, courts assess the extent to which the regulation "will unreasonably impair the value or use of [the plaintiff's] property." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). In other words, "[w]e 'compare the value that has been taken from the property with the value that remains in the property.'" *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 630-31 (9th Cir. 2020) (quoting *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018)). Here, because the economic impact of the public-interest exception may vary based on the extent of the disclosure, we conclude that this factor also does not support PhRMA's facial takings claim.

PhRMA argues that each time that DCBS publicly discloses a trade secret under the public-interest exception, the trade secret is rendered entirely worthless

because the value of a trade secret lies in its confidentiality. This argument is not entirely without merit. HB 4005 incorporates the definition of a trade secret as information with commercial value "known only to certain individuals within an organization . . . which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it." Or. Rev. Stat. § 192.345; *see id.* § 646A.689(10)(a). As explained by the Supreme Court in *Monsanto*, "[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished." 467 U.S. at 1002; *see also Hartley Pen Co. v. U.S. Dist. Ct.*, 287 F.2d 324, 328 (9th Cir. 1961) ("[T]he property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the [trade secret] then the property disappears." (citation omitted)).

However, it is far from clear that *every* invocation of the public-interest exception will necessarily disclose the information that provides the trade secret owner with its "competitive edge." *See Monsanto*, 467 U.S. at 1012. As defined in HB 4005, trade secret protection extends to *any* information that is valuable and secret enough to afford an economic advantage over competitors, including "compilation[s] of information." Or. Rev. Stat. § 192.345. If, in the context of a compilation trade secret, the State were to disclose only a portion of the data making up the claimed trade secret, it is plausible that the trade secret could retain much, if not all, of its economic value. *See Imperial Chem. Indus. Ltd. v. Nat'l Distillers & Chem. Corp.*, 342 F.2d 737, 742 (2d Cir. 1965) (collecting cases for the proposition that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified

process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret"). In other words, to hold the public-interest exception unconstitutional on its face, we would have to conclude that HB 4005 mandates broad disclosure of *all* the data making up a claimed trade secret in every case. However, in this pre-enforcement challenge, it is entirely plausible that DCBS could make a determination that a more limited disclosure is all that the public interest requires.

To be sure, many trade secrets implicated by HB 4005 may constitute a single piece of data, and disclosure of that data may entirely extinguish the value of the trade secret. But in this facial challenge, PhRMA cannot "establish[] that *no* set of circumstances exists under which the law would be valid." *Moody*, 603 U.S. at 723 (emphasis added) (quoting *Salerno*, 481 U.S. at 745). "[PhRMA] chose to litigate th[is] case[] as [a] facial challenge[], and that decision comes at a cost." *Id.* Therefore, this factor does not support PhRMA's takings claim.

3. Character of the Government Action

Finally, "the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'—may be relevant in discerning whether a taking has occurred." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Cent.*, 438 U.S. at 124). This case clearly falls into the latter category. *See CDK Glob.*, 16 F.4th at 1282 ("Regulations commonly require regulated entities to disclose certain information. . . . [N]o one conceives of

such requirements as physical takings."); *see also MHC Fin.*, 714 F.3d at 1128 (concluding that a rent control ordinance was "much more an 'adjust[ment of] the benefits and burdens of economic life to promote the common good' than it is a physical invasion of property" (quoting *Penn Cent.*, 438 U.S. at 124)).

Moreover, because the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," the Supreme Court has "recognized that this question 'necessarily requires a weighing of private and public interests.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987) (quoting *Agnis v. Tiburon*, 447 U.S. 255, 260-61 (1980)). Here, the public-interest exception does not permit disclosure of trade secret information unless and until DCBS makes an affirmative determination that disclosure is in the public interest. To be sure, the balance of private and public interests will differ depending on the nature of the public interest claimed by DCBS and the trade secret information at issue. But assessed facially, we cannot conclude that "no set of circumstances exist" where a significant public interest would clearly outweigh a manufacturer's private interest in a trade secret. *See Keystone*, 480 U.S. at 485 (concluding that "the character of the governmental action involved here leans heavily against finding a taking" where the government had "acted to arrest what it perceives to be a significant threat to the common welfare"); *see also CDK Glob.*, 16 F.4th at 1283 (concluding this factor did not support finding a regulatory taking where the state legislature determined "the statute promotes the common good through the advancement of consumer privacy and competition").

Thus, this factor also fails to support PhRMA's takings claim.

* * *

The proper weighing of the *Penn Central* factors varies from case to case, and courts have sometimes found individual factors to be dispositive. *Compare Hodel v. Irving*, 481 U.S. 704, 716 (1987) (concluding the "extraordinary" character of the regulation to be dispositive), *with Monsanto*, 467 U.S. at 1005 (concluding the lack of reasonable investment-backed expectations to be dispositive). Here, however, a weighing of the factors does not affect our analysis because none of the *Penn Central* factors support PhRMA's facial taking claim. We thus conclude that the State, not PhRMA, is entitled to summary judgment on the Fifth Amendment takings claim.

## IV. CONCLUSION

For the foregoing reasons, the district court erred in granting summary judgment in favor of PhRMA on its First Amendment and Fifth Amendment claims and in entering final declaratory judgment. Accordingly, we reverse the district court's entry of final judgment and remand with instructions to enter summary judgment for the State on PhRMA's First Amendment and Fifth Amendment claims.

**REVERSED AND REMANDED.**

BEA, Circuit Judge, concurring in part and dissenting in part:

The First Amendment to our Constitution, applicable to the States through the Fourteenth Amendment, protects people's "right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The question in this case is whether the government can, without passing strict scrutiny,[1] force an unwilling speaker to opine on an intensely debated and politically fraught subject because some potential listeners, including the government itself, can take advantage of that opinion for their own economic or political interests.[2]

My colleagues answer this question in the affirmative. They hold that an Oregon statute and its implementing regulation need not pass strict scrutiny when compelling drug manufacturers to disclose their internal pricing strategies because the purchasers of their drug products, including the State of Oregon itself, can take advantage of such information when negotiating

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[1] Under strict scrutiny, a government regulation is "presumptively unconstitutional and may be justified only if the government proves that [the regulation is] narrowly tailored to serve compelling state interests." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018).

[2] Where there is a willing speaker, the First Amendment protects both the speaker's right to speak and the listeners' right to listen. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976). Accordingly, courts have struck down regulations that abridge willing speakers' right to speak in the interest of their audiences' right to hear, as the Supreme Court did in *Virginia State Board of Pharmacy*. *See id.* at 763–65. In the same vein, courts have also upheld regulations that tackle inaccurate or misleading commercial speech by willing speakers to, for example, protect their audiences from possible deception. *See, e.g.*, *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 650–53 (1985). This case does not involve such a willing speaker's speech.

prices against these drug manufacturers. Maj. Op. at 40–42.

In so holding, my colleagues discard the well-established legal tests articulated by the Supreme Court in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); disregard our Circuit's binding precedents in *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024), and *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024); and deliver extensive dicta on how installing a novel analytical framework could help usher in a "modern government" that requires individuals and entities to turn in much private information. *See* Maj. Op. at 16–54.

My colleagues might be right that an attempt to impose wide-ranging reporting requirements is "a common feature of modern government," *id.* at 16, but it is the hallmark of our *lawful* government to demand such disclosures only within the confines of our Constitution. As the majority blurs and breaches these well-settled Constitutional boundaries, I respectfully dissent.[3]

I.

Pharmaceutical Research and Manufacturers of America ("PhRMA") challenged certain reporting requirements imposed by Oregon's Prescription Drug Price Transparency Act ("HB 4005") as violative of the First Amendment. Maj. Op. at 6–7. HB 4005 requires drug manufacturers to report, *inter alia*, detailed information about their pricing strategies for some

[3] I concur that the plaintiff-appellee's facial challenge on the Fifth Amendment ground fails because Oregon's long-standing public interest exception in its state trade secret laws undermines the reasonableness of any expectation of absolute protection of trade secrets in Oregon. Maj. Op. at 67. The plaintiff-appellee chose to litigate its Fifth Amendment claim as a facial challenge; "that decision comes at a cost." *Id.* at 75 (citation omitted).

prescription drugs to the Oregon Department of Consumer and Business Services ("DCBS") and instructs the DCBS to publish such information unless an exception applies. *Id.* (citing Or. Rev. Stat. § 646A.689(3), (9), (10)(a)). On appeal is the district court's declaratory judgment that invalidated Section 646A.689(3) of HB 4005 as offending the First Amendment.[4] *Id.* at 13 (citing *Pharm. Rsch. & Manufacturers of Am. v. Stolfi*, No. 6:19-CV-01996, 2024 WL 1144401 (D. Or. Feb. 16, 2024)).

A.

Section 646A.689(3) requires drug manufacturers to disclose two types of information. First, it demands disclosure of certain general marketing information for each prescription drug covered by HB 4005 ("General Marketing Information Disclosure Requirement"), including the length of time that the drug has been marketed, its introductory price, its price increases over time, its sales revenue, and its prices in other countries. Or. Rev. Stat. § 646A.689(3)(a), (b), (g), (i), (j). In my view, HB 4005's General Marketing Information Disclosure Requirement compels factual and uncontroversial commercial information and probably does not violate the First Amendment. *See Zauderer v. Off. Of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985). So far, so good.

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[4] Our review is not limited to Section 646A.689(3)(c) of HB 4005. *See* Maj. Op. at 12–15 (noting that PhRMA advanced arguments only against this one of many provisions under Section 646A.689(3)). It is the district court's judgment—not the statements in its opinion or the parties' arguments below—that we review on appeal. *See California v. Rooney*, 483 U.S. 307, 311 (1987). The district court's judgment declared the entire Section 646A.689(3) of HB 4005 unenforceable as violative of the First Amendment, so our review extends to the entire Section 646A.689(3).

But Section 646A.689(3) demands much more. One should not be misled when the majority portrays HB 4005 as if it contained only this General Marketing Information Disclosure Requirement. *See* Maj. Op. at 7, 40, 43. This requirement is not the point of contention here.

What is really in dispute is Section 646A.689(3)'s additional requirement that drug manufacturers disclose their pricing strategies ("Pricing Strategy Disclosure Requirement"). Section 646A.689(3) obligates drug manufacturers to disclose, "in the form and manner prescribed by" the DCBS, all the "factors that contributed to the price increase[s]" of the drugs covered by HB 4005. Or. Rev. Stat. § 646A.689(3)(c). The state's implementing regulations clarify the statute's onerous requirements: drug manufacturers "must" include "narrative description[s] and explanation[s] of all major financial and nonfinancial factors that influenced the[ir] decision[s] to increase the [prices] of the [relevant] drug product[s] and to decide on the amount[s] of the increase[s]."[5] Or. Admin. R. 836-200-0530(2)(h) (2019). And Section 646A.689(3) further lists several factors that Oregon deems potentially relevant to drug prices and forces drug manufacturers to disclose information pursuant to these prescribed factors: research and development costs, manufacturing costs, marketing costs, distribution costs, costs of safety and effectiveness research, the availability of generic substitutes, attributable profits, and so forth. Or. Rev. Stat. § 646A.689(3)(d), (e), (f), (h), (k); *see also id.* § 646A.689(l)

[5] While this appeal is pending, the DCBS amended its regulation, which now asks drug manufacturers to furnish this pricing strategy information "voluntarily." Or. Admin. R. 836-200-0530(2) (2025). As the mandatory language in Section 646A.689(3) of HB 4005 remains unchanged, this amendment of the DCBS's regulation affects neither the majority's analysis nor mine. *See, e.g.*, Maj. Op. at 44–45.

(requiring drug manufacturers to produce documents to support the disclosed information).

In my view, HB 4005's Pricing Strategy Disclosure Requirement compels non-commercial speech and cannot survive strict scrutiny under the First Amendment.[6] My dissent thus focuses on HB 4005's Pricing Strategy Disclosure Requirement and the DCBS implementing regulation thereunder.[7]

B.

"It is well-established that the First Amendment protects 'the right to refrain from speaking at all'" and, accordingly, any "forced disclosure of information" "triggers First Amendment scrutiny." *NetChoice*, 113 F.4th at 1117 (quoting *Wooley*, 430 U.S. at 714). "When a state 'compels individuals to speak a particular message,' the state 'alters the content of their speech'" and engages in a content-based regulation. *X Corp.*, 116 F.4th at 900 (quoting *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018)) (cleaned up). Such a content-based regulation must withstand strict scrutiny unless it compels only commercial speech. *Id.* at 899–900. Hence, the First Amendment analysis in this case turns on whether the speech compelled by HB 4005's Pricing

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[6] Although the district court did not apply strict scrutiny when it invalidated Section 646A.689(3) of HB 4005 as violative of the First Amendment, we can affirm the judgment below on any ground supported by the record. *See Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1190 (9th Cir. 1998). Oregon does not claim Section 646A.689(3) can survive strict scrutiny, so the only question is whether strict scrutiny applies in the first place.

[7] I would remand this case so that the district court could decide in the first instance whether HB 4005's Pricing Strategy Disclosure Requirement is severable from the remainder of Section 646A.689(3). *See* Maj. Op. at 54–55.

Strategy Disclosure Requirement ("Pricing Strategy Disclosures") constitutes commercial speech.

The "starting point" for this commercial speech inquiry is a "common-sense" one: Courts ask whether HB 4005's Pricing Strategy Disclosures do "no more than propose a commercial transaction." *Id.* at 900 (quoting *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021), and *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)). My colleagues perform essentially no analysis under this test; they recite it and move on. *See* Maj. Op. at 36–38. In my view, HB 4005's Pricing Strategy Disclosures are a far cry from a proposal for commercial transactions. After all, rational sellers do not propose commercial transactions by disclosing detailed rationales underlying their pricing decisions to potential buyers.

As a corollary of this "commercial transaction proposal" test, our Circuit has held that a compelled disclosure constitutes commercial speech if it "communicates the terms of an actual or potential transaction." *X Corp.*, 116 F.4th at 901. While the General Marketing Information Disclosures under HB 4005 may communicate transaction terms,[8] the Pricing Strategy Disclosures convey far more than mere commercial

[8] The majority asserts that HB 4005 may lawfully compel drug manufacturers to identify the generic competitors of their drug products because this type of information constitutes common terms of commercial transactions. This is not the kind of commercial transactions with which I am familiar; to my knowledge, sellers usually do not inform potential buyers of cheaper alternatives competitive to the sellers' own products. The majority has reached this counterintuitive conclusion seemingly because the U.S. Food and Drug Administration and pharmacies have made such information publicly available. *See* Maj. Op. at 40. This reasoning misconceives our compelled speech doctrine. Just because a message is otherwise publicly available does not mean the government can freely force a person to be a carrier of that message.

terms. One need only ask oneself if a buyer of a Ford pickup truck would expect the dealer to tell him—as the terms of the potential transaction between them—*all the major* financial and nonfinancial factors that influenced the pickup's price, including, for example, the Ford Dearborn management's internal estimates of how competitors may price comparable pickups, its internal evaluation of competitors' business strengths, or its internal forecasts of tax credits and tariffs. Probably not.

Not denying this, the majority shifts the focus by stating in passing that HB 4005's Pricing Strategy Disclosures concern "economic information that is no less tethered to commercial transactions" than are actual terms of these transactions. Maj. Op. at 40; *see also id.* at 42 n.18 ("Speech, such as [the one compelled by HB 4005] . . . is not far removed from the 'core' of commercial speech, *i.e.*, speech that 'propose[s] a commercial transaction.'" (citation omitted)). But this vague standard of what is *closely* tethered to or what is not *far* removed from true commercial speech is not the "commercial transaction proposal" test that the Supreme Court and our Circuit have long applied.

Our inquiry should have ended here: Strict scrutiny should apply because HB 4005's Pricing Strategy Disclosure Requirement compels non-commercial speech that does much more than just propose a commercial transaction.

If, however, one were to believe that HB 4005's Pricing Strategy Disclosure Requirement somehow presents "a close question" as to whether it compels non-commercial speech, the Supreme Court in *Bolger*, 463 U.S. at 66–67, has set forth some "important guideposts" to help us decide such a close case. *X Corp.*, 116 F.4th at 900 (discussing the "so-called *Bolger* factors"). *Bolger*

teaches that "strong support" for finding speech to be commercial exists where the following factors are satisfied: (1) "the speech is an advertisement"; (2) "the speech refers to a particular product"; and (3) "the speaker has an economic motivation." *X Corp.*, 116 F.4th at 900 (quoting *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011), which cited *Bolger*, 463 U.S. at 66–67). The first and third *Bolger* factors counsel against finding commercial speech here: HB 4005's Pricing Strategy Disclosures are not akin to advertisements, and no drug manufacturer has economic motivations to volunteer such disclosures, else PhRMA would not have brought this case.

This, again, should have ended our inquiry, even were ours a close case. But the majority simply recounts the *Bolger* factors and fails to apply them meaningfully.

Worse, the majority declares that the "commercial transaction proposal" test and the *Bolger* factors are not a "neat[] fit" and thus "inapt" for determining the proper level of First Amendment scrutiny where, as here, a law mandates companies to report information to the government and directs the government to publish the reported information. Maj. Op. at 29. According to the majority, a "submission of information to the government" "typically does not '*propose* a commercial transaction,'" even if the submission contains only commercial speech. *Id.* (emphasis in original) (citation omitted). And it "would be odd" to apply less First Amendment scrutiny to a mandated display of a price increase in a consumer-facing advertisement than to a compelled disclosure of the same information in a government-facing report. *Id.* at 29.

That, if true, would indeed be odd. But the majority misunderstands the relevant doctrinal tests. Our

precedents instruct us to consider whether the content of the speech compelled in a government submission is akin to something people would otherwise disclose in proposing commercial transactions. The inquiry focuses on the content, not the format, of the compelled speech.[9] Under our precedents, HB 4005's Pricing Strategy Disclosure Requirement compels non-commercial speech not because drug manufacturers' submissions to the DCBS serve no function of proposing commercial transactions, but because detailed pricing strategies are not akin to anything people would otherwise disclose in proposing commercial transactions, as discussed above. By the same logic, speech that communicates such quintessential transaction terms as a price increase—the type of information that HB 4005's General Marketing Information Disclosure Requirement compels—would constitute commercial speech wherever it appears, be it a consumer-facing advertisement or a government-facing report. Commercial speech does not lose its commercial nature because it is made in a government submission rather than in the process of proposing a transaction.

Therefore, our doctrinal tests, if understood correctly, are not inapt here.

II.

In fact, our doctrinal tests are very much apt in this case, as they were in *X Corp.* *See* 116 F.4th at 899–903. Like this case, *X Corp.* involved a law that required

[9] Of course, the fact that certain speech already appears in the format of a product advertisement is evidence that the speech is something people would disclose in proposing commercial transactions. Hence the first *Bolger* factor. And if certain speech refers to a specific product, that factor is evidence that the speech might be something people would deliver in proposing commercial transactions. Hence the second and third *Bolger* factors.

companies to report information to the government and directed the government to publish the reported information. Reviewing that law under the First Amendment, the *X Corp.* panel did not find it necessary to abandon the "commercial transaction proposal" test or the *Bolger* factors. *See* 116 F.4th at 902 (reprimanding the district court for its deviation from the doctrinal tests for discerning commercial speech). Rather, the *X Corp.* panel, unlike the majority here, deemed these well-established legal tests a proper fit and applied them faithfully.

A.

In *X Corp.*, X Corp., the owner of the social media platform X (formerly known as Twitter), sought a preliminary injunction against the enforcement of California State Assembly Bill 587 ("AB 587"). *Id.* at 894. Broadly speaking, AB 587 required large social media companies, including X Corp., to submit reports to the California Attorney General, (1) disclosing social media companies' terms of services and any existing content moderation policies ("TOS"), and (2) identifying from those TOSs specific terms, policies, and practices, if any, that address several content categories prescribed by the State of California, including hate speech, racism, misinformation, radicalization, and so forth ("TOS Category Report"). *See id.* at 895–97 (quoting Cal. Bus. & Prof. Code § 22677). AB 587 then directed the Attorney General to publish these reports. Cal. Bus. & Prof. Code § 22677(c).

Regarding the TOS Category Reports in particular, Section 22677(a)(3) of AB 587 required social media companies to report whether and, if so, how they defined the content categories listed by California. *Id.* at 896. Section 22677(a)(4)(A) also required social media

companies to report their content moderation policies, if any, that addressed these content categories pursuant to the social media companies' own definitions. *Id.* And Section 22677(a)(5) further required social media companies to report the high-level statistics as to how they had been moderating these content categories, if they had moderated them at all (e.g., the total number of flagged items of content in each category). *Id.* at 896–97. Under this disclosure regime, as the *X Corp.* panel observed, "[n]o matter how a social media company chooses to moderate [the content on its platform], the company will face backlash from its users and the public." *Id.* at 899 n.8. "That is true even if the company decides not to define the enumerated [content] categories, because [it] will draw criticism for under-moderating [its] [social media platform]." *Id.*

The district court denied X Corp. a preliminary injunction, holding that X Corp. was unlikely to prevail because both the TOSs and the TOS Category Reports constituted commercial speech and, accordingly, their compelled disclosure likely did not violate the First Amendment. *X Corp. v. Bonta*, No. 2:23-CV-01939, 2023 WL 8948286, at *1–2 (E.D. Cal. Dec. 28, 2023). With respect to the TOSs, the district court found that they were "part of a commercial transaction and appear[ed] to satisfy the *Bolger* factors." *Id.* at *1. As to the TOS Category Reports, the district court found that they did "not so easily fit the traditional definition of commercial speech." *Id.* at *2. Sound familiar? Much like the majority here, the district court in *X Corp.* nonetheless held that the TOS Category Reports constituted commercial speech, without conducting any meaningful analysis under the doctrinal commercial speech tests. *See id.*; *see also X Corp.*, 116 F.4th at 902.

We reversed the district court's ruling on the TOS Category Reports. *X Corp.*, 116 F.4th at 904. We held that, while social media platforms' TOSs "m[ight] be commercial speech," the TOS Category Reports were "different in character and kind" because they would reveal social media companies' "opinions about and reasons for" their TOSs. *Id.* at 901.

Specifically, the *X Corp.* panel first found that the TOS Category Reports did "not satisfy the usual definition of commercial speech—i.e., speech that does no more than propose a commercial transaction." *Id.* (cleaned up) (citations omitted). The panel further reasoned that the TOS Category Reports "fail[ed] to satisfy at least two of the three *Bolger* factors": The compelled disclosures were not advertisements, and social media companies did not have any economic motivation in disclosing the TOS Category Reports. *Id.* (citations omitted). Therefore, after faithfully applying these doctrinal tests, the *X Corp.* panel concluded that the TOS Category Reports compelled non-commercial speech.

Additionally, the *X Corp.* panel distinguished social media companies' TOS Category Reports from their TOSs:

> [T]he [TOS] Category Reports are not commercial speech. They require a company to recast its content-moderation practices in language prescribed by the State, implicitly opining on whether and how certain controversial categories of content should be moderated. As a result, few indicia of commercial speech are present in the Content Category Reports.
>
> . . .

> . . . [T]he [TOS] Category Reports go further [than merely communicating the terms of actual or potential transactions]: they express a view *about* those terms by conveying whether a company believes certain categories should be defined and proscribed.
>
> . . .
>
> . . . The [TOS] Category Report provisions would require a social media company to convey the company's policy views on intensely debated and politically fraught topics, including hate speech, racism, misinformation, and radicalization, and also convey how the company has applied its policies. . . .

*Id.* at 901–02 (emphasis in original). For all these reasons, the *X Corp.* panel held that the TOS Category Reports amounted to non-commercial speech and, accordingly, AB 587 likely failed strict scrutiny. *Id.* at 903.

B.

So too is the case here. While drug prices—like social media platforms' TOSs—are terms of commercial transactions, the detailed breakdown of and the internal rationales for these prices—like the TOS Category Reports—do much more than just propose a commercial transaction, and they do not resemble advertisements or anything that drug manufacturers would have an economic motivation to disclose.

Additionally, HB 4005's Pricing Strategy Disclosures go further than merely communicating the pricing terms for actual or potential transactions: They recast drug manufacturers' pricing strategies in language prescribed by Oregon and force drug manufacturers to voice their views as to how drugs are and should be priced.

"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." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). Here, HB 4005's Pricing Strategy Disclosure Requirement prescribes language that focuses primarily on costs, implying that any increase in drug prices can be fairly justified only by increases in costs, rather than other factors such as drug manufacturers' insights and foresights regarding the relevant market demands and competitive dynamics.[10] *See* Or. Rev. Stat. § 646A.689(3).

Of course, drug manufacturers can offer explanations other than costs for their pricing decisions. *See* Or. Rev. Stat. § 646A.689(3)(c), (k); Or. Admin. R. 836-200-0530(2)(h) (2019). In doing so, however, drug manufacturers would have to divulge their overall pricing strategies, which are driven by not only cold numbers but also a host of qualitative judgments. Thomas T. Nagle & Georg Müller, THE STRATEGY AND TACTICS OF PRICING: A GUIDE TO GROWING MORE PROFITABLY 21, 172 (7th ed. 2024) ("There is no substitution for managerial experience and judgment when setting prices. . . . [P]rice setting usually . . . balances costs, customer value, strategic goals, and potential competitive responses."). A pharmaceutical company's pricing strategy may reveal its subjective assessment of customer demands, *id.* at 26–55, its

[10] The majority argues that this implied message would be attributed only to Oregon because the public knows drug manufacturers are forced by HB 4005. *See* Maj. Op. at 43–44 n.22. This argument, if it were to carry the day, would uproot our compelled speech doctrine under the First Amendment, as any message compelled by the government would henceforth be deemed attributable only to the government.

marketing and communication strategies,[11] *see id.*, at 56–76, 158–63, and even its opinion on issues of public concern. In fact, failure to consider public concern is a textbook mistake:

> Take the example of a pharmaceutical company that purchased an old prescription drug and hiked the price many-fold. The price change may have been considered economically rational—after all, the drug had few substitutes and consequently demand was very inelastic. Yet what the company failed to consider was the power of community-held norms of fairness in the decision and the resulting backlash against it and the entire pharmaceutical industry in general by an outraged public.

*Id.* at 154.

A drug manufacturer might consider at what level a price spike would spark public outcry and thereby cap any

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[11] Granted, companies may sometimes find it advantageous to communicate publicly certain rationales behind their pricing decisions. *See* Nagle & Müller, *supra*, at 170–72; *see also* Maj. Op. at 36–37 n.15. That some companies have elected or have been encouraged to engage in such a communication strategy every now and then does not license Oregon to compel similar speech in all circumstances. More importantly, HB 4005's Pricing Strategy Disclosures are different in character from disclosures typically involved in such a voluntary communication strategy. HB 4005's Pricing Strategy Disclosure Requirement requires drug manufacturers to disclose *all the major* financial and nonfinancial factors that influenced their pricing decisions, thereby denying drug manufacturers the freedom to tailor what to disclose and what to withhold about their pricing decisions. *See, e.g.*, Maj. Op. at 36–37 n.15 (citing Utpal M. Dholakia, *If You're Going to Raise Prices, Tell Customers Why*, HARV. BUS. REV. (June 29, 2021), which advised companies to consider crafting "vivid and compelling stor[ies] for why the price[s] [are] being increased that focus[] on customer value").

price increase below that level. In the relevant internal discussions, employees might opine on a myriad of controversial topics: whether a free market should allow drug manufacturers to set prices as they see fit; to what extent public sentiments against drug manufacturers are justified; and whether the government has adequate political will and power to quell a given price increase. HB 4005's Pricing Strategy Disclosure Requirement would compel disclosure of all these nuanced views regarding how drugs are and should be priced. As such, HB 4005's Pricing Strategy Disclosure Requirement does not simply compel "product-specific, economic information." Maj. Op. at 44.

Moreover, HB 4005's Pricing Strategy Disclosures would prompt drug manufacturers to express their broader views on the intensely debated and politically fraught topic of allegedly inflated prescription drug prices. PhRMA argues that HB 4005 seeks to reinforce Oregon's message that drug manufacturers are responsible for the allegedly inflated drug prices in our country, as HB 4005 did not require other participants in the pharmaceutical industry—pharmacy benefit managers, for instance—to make similar disclosures. In rejecting this argument, the majority envisions that drug manufacturers are free to refute Oregon's political message by opining that other market participants may have contributed to drug price increases. *See id.* at 44–45. In other words, the majority acknowledges that HB 4005's Pricing Strategy Disclosure Requirement will probably drag drug manufacturers into a public debate as to who is to blame for the allegedly inflated drug prices.

Therefore, HB 4005's Pricing Strategy Disclosures convey drug manufacturers' "opinions about and reasons

for" their drug prices.[12] *X Corp.*, 116 F.4th at 901. To follow *X Corp.*, we must treat HB 4005's Pricing Strategy Disclosure Requirement as compelling non-commercial speech and subject it to strict scrutiny.

C.

Departing from *X Corp.*'s teaching, the majority articulates a new legal test. To decide whether a regulatory disclosure constitutes commercial speech, my colleagues ask two questions: (1) whether the disclosure would improve the "free flow of commercial information"; and (2) whether the disclosure is "incidental to a commercial transaction." Maj. Op. at 40, 42 n.18.

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[12] Relying on Oregon's purported representations at oral argument, the majority maintains that the "DCBS would consider the following straightforward list of factors to be a satisfactory response to Or. Rev. Stat. § 646A.689(3)(c): 'supply cost increases, research costs, and investor return.'" *Id.* at 43 n.20. To begin with, we review the constitutionality of HB 4005 as legislated, not as how counsel hypothesized it should be read. More importantly, Oregon conceded only that a straightforward list of factors such as supply cost increases, research costs, and investor return would suffice "if [it in fact] explains the price increase." Oral Arg. at 2:41-3:33. What if it does not explain the price increase? Suppose a drug manufacturer decides to raise the price for its domestically manufactured drugs because, in its opinion, its competitors are likely to suffer significant tariffs for their foreign-manufactured generic substitutes. Does HB 4005 compel the drug manufacturer to disclose this rationale and the underlying opinions and analyses by demanding the disclosure of "all major financial and nonfinancial factors" that influenced drug manufacturers' pricing decisions? Or. Admin. R. 836-200-0530(2)(h) (2019); *see also* Or. Rev. Stat. § 646A.689(3)(c), (k); *id.* § 646A.689(l) (requiring drug manufacturers to produce supporting documents). Of course, it does. In fact, Section 646A.689(3)(c)'s very function is to capture nuanced financial and nonfinancial considerations other than, for example, research costs, of which other HB 4005 sections including Sections 646A.689(3)(e) and 646A.689(3)(f)(D) already demand disclosure.

Given that any disclosure, almost by definition, would improve the free flow of information, the majority's new test depends on just its second question. To answer that question, the majority determines whether a forced disclosure "has no independent expressive meaning" outside the context of commercial transactions. *Id.* at 41; *see also id.* at 42 n.18.

But even under the majority's newly minted test, HB 4005's Pricing Strategy Disclosures constitute non-commercial speech. As detailed above, drug manufacturers' pricing strategies can be influenced by many factors, including drug manufacturers' views on issues of public concern such as how drugs should be priced and who should be held responsible for the allegedly inflated drug prices. The majority does not explain why such views have no independent expressive meaning outside the drug sale context.

Not only that, but the majority's test and reasoning effectively overrule *X Corp.*, 116 F.4th 888, which is impermissible in our Circuit, *see Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003). To illustrate this point, let's apply the majority's test and reasoning to *X Corp.* 116 F.4th 888. In *X Corp.*, how social media companies chose to define and moderate different content on their platforms had little independent expressive meaning outside of their social media services. The number of items of content concerning hate speech that X Corp. had flagged—one part of a typical TOS Category Report under AB 587, *id.* at 896–97—carried little standalone expressive meaning other than describing X Corp.'s content moderation practices in its social media services.

The majority argues that, the speech compelled by HB 4005 in this case would not exist absent commercial transactions, whereas in *X Corp.*, "[w]hat constitute[d]

'hate speech,' for example, [was] a matter of public debate and concern outside the context of a social media company's terms of service (or, indeed, any commercial transaction)." Maj. Op. at 43 n.21. The majority misreads AB 587. AB 587 compelled social media companies to disclose how they had defined and moderated such content categories as hate speech for purposes of running their social media platforms, not what *should* constitute hate speech in the abstract or in the public forum. *See X Corp.*, 116 F.4th at 896–97. In fact, the TOS Category Reports compelled by AB 587 were derived from social media companies' TOSs, which were largely "directed to [their] potential consumers" and might "presumably play a role in [these consumers'] decision of whether to use the platform." *Id.* at 902 n.10. As such, the TOS Category Reports would not come into existence absent social media companies' provision of their services.

Therefore, the TOS Category Reports would have amounted to commercial speech under my colleagues' novel test and myopic reasoning, contrary to what the *X Corp.* panel concluded less than a year ago. As this panel lacks the authority to overrule such published opinions of this Court as *X Corp.*, I cannot join my colleagues. *See Miller*, 335 F.3d at 899.

D.

To distinguish *X Corp.*, the majority advances three arguments. *First*, the majority argues that, while issues such as hate speech are "intensely political," prescription drug prices are not. Maj. Op. at 43. Why? As far as I can tell, the majority cites nothing but its own common sense. *See id.* at 38.

But it is unclear whether the majority's common sense aligns with our country's when it comes to what is or is not politically charged. *See, e.g.*, *Fact Sheet:*

*President Donald J. Trump Announces Actions to Get Americans the Best Prices in the World for Prescription Drugs*, THE WHITE HOUSE (July 31, 2025), https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-president-donald-j-trump-announces-actions-to-get-americans-the-best-prices-in-the-world-for-prescription-drugs/ (announcing that the executive branch sent "letters to leading pharmaceutical manufacturers outlining the steps they must take to bring down the prices of prescription drugs in the United States. . . ."); Sarah Fioroni, *Five Things to Know: Healthcare and the U.S. Election*, GALLUP (Sept. 30, 2024), https://news.gallup.com/poll/651386/five-things-know-healthcare-election.aspx (reporting that 47% of the respondents in a September 2024 preelection healthcare subject survey ranked "reducing drug costs" as "the single most or among the most important issues determining their votes" in the 2024 presidential election). First Amendment protections cannot depend on a judge's self-determined and unelaborated common sense regarding what is "intensely political" and what is not.[13]

*Second*, the majority asserts that, while AB 587 called for social media companies' opinions, HB 4005 simply

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[13] That prices and costs are economic concepts does not automatically mean that HB 4005's Pricing Strategy Disclosures are nonpolitical. Suppose Congress passes a law requiring companies to disclose whether and, if so, how tariffs have contributed to the prices they charge. Does this hypothetical law necessarily compel only commercial speech simply because prices and tariffs are economic concepts? I am not so sure. *See* Wyatte Grantham-Philips & Josh Boak, *Amazon Is Not Planning to Break Out Tariff Costs Online as White House Attacks Potential Move*, THE ASSOCIATED PRESS (Apr. 29, 2025), https://apnews.com/article/amazon-tariff-prices-trump-white-house-8598569632263872a6c04f7ef330c0fd. In my view, a person's speech is not automatically subject to a lower level of scrutiny simply because it involves economic concepts.

requires drug manufacturers to disclose, "as a matter of historical fact," their considerations in setting drug prices. Maj. Op. at 44. This assertion is incorrect as to both AB 587 and HB 4005. AB 587 directed social media companies to disclose, as a matter of historical fact, whether their TOSs defined and moderated such content categories as hate speech, what their definitions of those content categories encompassed, and how their moderation practices addressed those content categories. *X Corp.*, 116 F.4th at 896–97. To be clear, AB 587 did not require social media companies to express any "normative" view in "value-laden" language. Maj. Op. at 43. If a social media company's TOSs did not address any of the content categories prescribed by AB 587, an answer of "not applicable" under that category would suffice, and no additional narratives or explanations were necessary. *X Corp.*, 116 F.4th at 901 n.9. Notwithstanding this ostensible call for only factual disclosures, the *X Corp.* panel struck down AB 587 because it forced social media companies to opine "implicitly" on whether and how certain content categories should be defined and proscribed. *Id.* at 901.

The same reasoning applies here. Even assuming HB 4005's Pricing Strategy Disclosure Requirement covers only what factors, as a matter of historical fact, drug manufacturers considered in setting their prices, that requirement still compels drug manufacturers to opine *implicitly* on how their drugs should be priced, as discussed above. What's more, HB 4005's Pricing Strategy Disclosure Requirement demands not only a recount of historical facts, but also "narrative[s]" and "explanation[s]" of what drug manufacturers "deem[]" to have "contributed to the price increase[s]" of the relevant drugs. Or. Rev. Stat. § 646A.689(3)(c), (k); Or. Admin. R. 836-200-0530(2)(h) (2019); *see also Narrative*, BLACK'S

LAW DICTIONARY (12th ed. 2024) (defining a "narrative" to mean "[a]n account or description of a *selected* set of events, facts, experiences, or the like; a story" (emphasis added)); *Explanation*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining an "explanation" to mean a statement made in the "activity or process of expounding, *interpreting*, or making something intelligible" and/or the "*interpretation or meaning given* to something by someone who expounds it" (emphases added)). This means drug manufacturers must voice the reasons which, in their judgment and interpretation, caused the relevant drug price increases. As such, the majority cannot distinguish *X Corp.* by portraying HB 4005's Pricing Strategy Disclosure Requirement as more factual than AB 587's TOS Category Report provisions—if anything, Oregon calls for more opinions and judgments than did California.

Finally, the majority asserts that treating HB 4005's Pricing Strategy Disclosures as commercial speech is at odds with our case laws regarding retail product warnings. Maj. Op. at 37–38 n.15, 43–44 n.22. Like the *X Corp.* panel, I disagree. 116 F.4th at 901. Granted, our Circuit has treated certain retail product warnings as commercial speech, even though the traditional legal tests for finding commercial speech could sometimes suggest otherwise. *Id.* But retail product warnings constitute a "limited" exception inapplicable here. *Id.* Retail product warnings describe the products being sold to the public or communicate the terms of the relevant transactions, whereas HB 4005's Pricing Strategy Disclosures—much like AB 587's TOS Category Reports—"go further" by at least "implicitly" conveying drug manufacturers' "opinions about and reasons for" their drug prices. *Id.* Therefore, cases regarding retail product warnings are inapposite.

## III.

The majority has much more to say beyond disposing of the case before us. In dicta, the majority formulates a novel framework for future speech compulsion cases under the First Amendment. I address these dicta lest they become precedential in our Circuit. *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (Kozinski, J., concurring).

The majority first distinguishes "government reporting requirements" (i.e., laws that require entities and individuals to report information to the government and direct the government to publish such reported information) from "direct disclosure requirements" (i.e., laws that compel communication of certain information directly from one individual or private entity to another). Maj. Op. at 17–18. The majority then argues that, while "direct disclosure requirements" are presumptively subject to strict scrutiny unless the commercial speech exception applies, "government reporting requirements" need to pass strict scrutiny only when they compel political or ideological statements. *Id.* at 18–21. My colleagues call this new framework a "potentially strict" approach, as opposed to the "presumptively strict" approach that I have discussed so far. *Id.* at 19–20. With this new framework, my colleagues would like to skirt the commercial speech inquiry where, as here, a government reporting requirement is at issue. *Id.* at 27–28.

Perhaps unsure about this fresh framework, my colleagues elaborate it only in dicta.[14] Though rather

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[14] *See* Maj. Op. at 36 ("Although, in our view, using the potentially strict approach followed by our sister circuits would be more doctrinally sound and avoid unintended consequences, we do not need to fully resolve whether *X Corp.* requires us to use the presumptively

lengthy—almost twice the length of the majority's discussion of strict scrutiny's inapplicability in this case, *compare id.* at 16–36, *with id.* at 36–48—these dicta are not well-reasoned, a requirement for dicta to become precedential in our Circuit. *See Johnson*, 256 F.3d at 914. In my view, these dicta contravene the binding precedents of our Circuit and lack support in the other cases that the majority discusses.[15]

A.

Of course, most conspicuous is the absence of the majority's novel framework in *X Corp. See* 116 F.4th 888. My colleagues admit that absence. Maj. Op. at 33–34. But they argue that their framework would nevertheless lead to the same conclusion as came the *X Corp.* panel. *Id.* at 34. This argument does not change the fact that our *X Corp.* panel never endorsed the majority's framework, explicitly or implicitly.

Moreover, the majority's new framework contradicts another binding precedent in our Circuit: *NetChoice*, 113 F.4th 1101.[16] In *NetChoice*, a trade association of online businesses sued the California Attorney General, seeking to invalidate as violative of the First Amendment the

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strict approach in this case, because both approaches lead us to the same conclusion.").

[15] I also note that HB 4005's Pricing Strategy Disclosure Requirement, as discussed above, compels drug manufacturers to opine on an "intensely debated and politically fraught" subject, *X Corp.*, 116 F.4th at 902, so it should be subject to strict scrutiny even under the majority's "potentially strict" approach.

[16] *NetChoice* and *X Corp.* were argued on the same day before the same panel, and both opinions were authored by Judge Milan D. Smith. *Compare X Corp.*, 116 F.4th 888, *with NetChoice*, 113 F.4th 1101. The *NetChoice* opinion preceded the *X Corp.* opinion by about half a month; there is no reason to believe *X Corp.* departed from *NetChoice* in any meaningful way.

California Age-Appropriate Design Code Act ("CAADCA"), a statute aimed at protecting children's privacy and influencing online products' designs to this end. *Id.* at 1108. At issue was CAADCA's reporting requirement (i.e., Data Protection Impact Assessment Report, or "DPIA report"), which compelled online businesses to identify risks of "material detriment to children" and to create a timed plan mitigating these risks. *Id.* at 1109–10 (quoting Cal. Civ. Code § 1798.99.31(a)(1), (a)(2)). Although the CAADCA, like HB 4005, imposed a government reporting requirement, the *NetChoice* panel analyzed the DPIA report requirement using the traditional "commercial transaction proposal" test and the *Bolger* factors. *Id.* at 1119–20. After concluding that the DPIA report requirement forced online businesses to "do far 'more than propose a commercial transaction'" and that the requirement satisfied none of the *Bolger* factors, *id.* (citations omitted), the *NetChoice* panel applied strict scrutiny and held that the DPIA report requirement fell "well short of satisfying strict First Amendment scrutiny," *id.* at 1121, 1122.

Despite this reasoning and holding, my colleagues believe *NetChoice* supports their framework because the *NetChoice* panel engaged in a threshold inquiry before determining whether the DPIA reports constituted commercial speech. That threshold inquiry, in the majority's view, was whether the DPIA report requirement mandated the covered online businesses to make an opinion statement "on a political issue." Maj. Op. at 32.

But the majority is mistaken. The *NetChoice* panel simply inquired, as a threshold matter, whether the DPIA report requirement compelled speech *or conduct*, a traditional threshold inquiry for any case concerning the Free Speech Clause of the First Amendment. *See, e.g.*,

113 F.4th at 1117 ("Nor can we, as the State suggests, ignore that the DPIA [report] requirement compels speech simply because other parts of the CAADCA may primarily or exclusively regulate non-expressive conduct. The primary effect of the DPIA [report] provision is to compel speech, distinguishing it from statutes where the compelled speech was 'plainly incidental to the [law's] regulation of conduct.'"); *id.* at 1118 (reasoning that, even if the DPIA report requirement compelled the conduct of mitigating risks to children, the DPIA report requirement still triggered strict First Amendment scrutiny because it "deputize[d] covered businesses into serving as censors for the State," thereby interfering with these businesses' "editorial choices" and forcing them to determine "what material is potentially harmful to children"). Nowhere did the *NetChoice* panel apply or approve the majority's new framework. *See id.* at 1116–18.

What's more, had the majority's framework controlled the *NetChoice* panel, it would have concluded that the DPIA report requirement did not compel any political or ideological messages and thus need not pass strict scrutiny, opposite to what *NetChoice* held. The *NetChoice* panel never described the DPIA reports as "political" or "ideological." *See generally* 113 F.4th 1101. My colleagues appear to admit as much, Maj. Op. at 32 n.12, and they fail to explain why they believe opinions about what harms children, which the DPIA report requirement compelled, amounted to political or ideological messages, whereas opinions about drug pricing in this case do not.[17] *See id.* at 34.

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[17] My colleagues note that "the *NetChoice* panel made quite clear that it viewed the DPIA reporting requirement as 'requir[ing] businesses to go beyond opining about their products or services to opine on

Therefore, the majority's new framework conflicts with the Ninth Circuit's binding precedents.

B.

The majority instead resorts to two cases from other Circuits, both predating our decisions in *X Corp.* and *NetChoice*: *Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101 (D.C. Cir. 2011), and *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995). *See* Maj. Op. at 21–22. Neither of these cases is binding upon us; nor are they persuasive. I discuss them in turn.

In *Full Value Advisors*, Full Value Advisors, LLC, an institutional investment manager, challenged one of the Securities Exchange Act's disclosure requirements because it allegedly compelled speech in violation of the First Amendment. 633 F.3d at 1104. Specifically, Section 13(f)(1) of the Act required institutional investment managers to file quarterly reports with the SEC, disclosing the names, shares, and fair market values of the securities that the managers controlled ("Quarterly Reporting Requirement"). *Id.* (citing 15 U.S.C. § 78m(f)(1) and 17 C.F.R. § 240.13f-1(a)(1)). The SEC was required to publish this reported information unless an exemption applied. *Id.* 1104–05 (citing 15 U.S.C. § 78m(f)(2), (f)(3)). To request an exemption, an investment

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highly controversial issues of public concern.'" Maj. Op. at 32 n.12 (quoting *NetChoice*, 113 F.3d at 1120). Obviously, a controversial issue of public concern is not necessarily a political or ideological issue, so this quote from *NetChoice* does not support the majority's new legal framework. More importantly, the *NetChoice* panel made the relevant statement when it explained why the DPIA report requirement did not simply refer to a particular product under the second *Bolger* factor. *NetChoice*, 113 F.3d at 1120. Thus, this quote highlights the fact that *NetChoice* did not apply or approve my colleagues' novel framework. Quite the opposite, the *NetChoice* panel performed the traditional *Bolger* analysis.

manager had to "submit enough information" to the SEC for it to "make an informed judgment as to the merits of the request" ("Exemption Application Requirement"). *Id.* at 1105.

The D.C. Circuit held that the Exemption Application Requirement did not violate the First Amendment.[18] *Id.* at 1109. Observing that the SEC, "not the public," was the "only audience" of investment managers' exemption applications, the court reasoned that "[c]ompelling disclosure to the [SEC] alone so the [SEC] may determine whether [an exemption is] warranted is a rational means of achieving" the goal of protecting institutional investors' confidential information. *Id.* at 1108.

*Full Value Advisors* stands for the unremarkable proposition that a party seeking relief before an adjudicator must offer—if needed, on a confidential basis—sufficient evidence to convince the adjudicator, "as in the case of compulsion to give evidence in court." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring). This proposition has little relevance to this case, which does not involve the compelled production of evidence in an adjudicatory setting.

In any event, the D.C. Circuit cabined its holding in *Full Value Advisors* to the context of confidential submissions for securities regulation. *See* 633 F.3d at 1109. As Justice Breyer once opined, securities regulation "involves 'a different balance of concerns' and 'calls for different applications of First Amendment principles.'" *Id.* (quoting *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003)

[18] The D.C. Circuit did not opine as to whether the Quarterly Reporting Requirement violated the First Amendment, since Full Value Advisors's First Amendment claim in that regard was unripe. *Id.* at 1106–07.

(Breyer, J., dissenting from the dismissal of certiorari as improvidently granted)). This call for different applications of First Amendment principles undergirded the D.C. Circuit's opinion in *Full Value Advisors* but is inapplicable in this case. Therefore, *Full Value Advisors* cannot lend support to the majority's new framework.

Let's then turn to *Sindel*, another case on which the majority relies. In *Sindel*, the government sued attorney Richard Sindel to enforce an IRS summons that requested missing information from the IRS Form 8300 that Sindel filed to report certain cash transactions relating to his legal services. 53 F.3d at 875–76. The government argued that Sindel, pursuant to the instructions in IRS Form 8300, should have provided identifying information regarding the payors of the underlying cash transactions. *Id.* The Eighth Circuit held that "the First Amendment protection against compelled speech d[id] not prevent [the] enforcement of the summons." *Id.* at 878. The court reasoned that "[t]here is no right to refrain from speaking when 'essential operations of government may require it for the preservation of an orderly society[]—as in the case of compulsion to give evidence in court.'" *Id.* (quoting *Barnette*, 319 U.S. at 645 (Murphy, J., concurring)). Because the IRS summons in that case required "Sindel only to provide the government with information which his clients ha[d] given him voluntarily, not to disseminate publicly a message with which he disagree[d]," the Eighth Circuit held that the summons compelled neither Sindel's nor his client's speech. *Id.* at 877–78.

Assuming *Sindel* was correctly decided, it is distinguishable. Compelling drug manufacturers to disclose their internal pricing strategies is in no way analogous to requiring citizens to provide the government with certain basic transaction information to facilitate the

essential governmental operations of tax collection and illegality detection. The majority does not attempt to (and could not reasonably) argue that learning and publishing drug manufacturers' detailed pricing strategies constitute the "essential operations" of the Oregon government "for the preservation of an orderly society." *Id.* at 878.

To the extent *Sindel* seems to suggest that a speech compulsion claim under the First Amendment may arise only where the government forces a person to "disseminate publicly a message with which he disagrees," this suggestion conflicts with the law in our Circuit. *Id.* In *X Corp.*, AB 587 asked what constituted hate speech, in social media companies' views, but AB 587 did not impose any hate speech definition of its own. 116 F.4th at 896–97. In *NetChoice*, the DPIA report requirement urged online businesses to ascertain whether their operations could harm children, but the DPIA report requirement itself did not define what should be deemed harmful to children. 113 F.4th at 1109–10. Both AB 587 and the DPIA report requirement were transparency measures. In neither case did the challenged law ask any person to disseminate any views with which he disagreed. And yet, in both cases, strict scrutiny applied. Thus, *Sindel* is not persuasive in our Circuit.

Therefore, neither *Full Value Advisors* nor *Sindel* is applicable here. Nor did they espouse the analytical framework that the majority now advocates.[19]

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[19] The majority also relies on *Pharmaceutical Care Management Association v. Rowe*, 429 F.3d 294 (1st Cir. 2005), a case involving a direct disclosure requirement, not a government reporting requirement. Maj. Op. at 22–24. At issue in *Rowe* was Maine's Unfair Prescription Drug Practices Act ("UPDPA") that regulated

C.

The majority also posits that two Supreme Court cases are, if not in direct support, at least not inconsistent with its new framework: *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Riley*, 487 U.S. 781. *See* Maj. Op. at 24–27. As both cases are distinguishable for the same reason, I discuss them together.

In *Schaumburg*, Citizens for a Better Environment ("CBE"), a nonprofit organization, "requested permission to solicit contributions in the Village" of Schaumburg. 444 U.S. at 624–25. The Village denied CBE's request because CBE could not demonstrate it would use 75% of received contributions for charitable purposes as required by the Schaumburg Village Code. *Id.* at 625. CBE thus sued the Village, claiming that the 75% requirement violated the First Amendment. *Id.* The Supreme Court agreed, holding that this 75% requirement did not withstand strict scrutiny. *Id.* at 636.

My colleagues recognize that *Schaumburg* concerned the curtailment of charitable solicitation speech—a type

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pharmacy benefit managers ("PBM"). 429 F.3d at 298. The UPDPA required the PBMs to act as fiduciaries for their health benefit provider clients in Maine and, accordingly, adhere to certain fiduciary duties including disclosing to the clients their conflicts of interest, self-dealing, and financial arrangements with third parties. *Id.* at 299. "None of the disclosures [were] available to the public." *Id.* Pharmaceutical Care Management Association ("PCMA") alleged that the UPDPA's disclosure requirement violated the First Amendment, but the First Circuit disagreed. *Id.* at 316 (controlling concurrence). Contrary to the majority's new framework, *Rowe* did not distinguish government reporting requirements from direct disclosure requirements. *Id.* And unlike HB 4005 here, the UPDPA simply imposed a fiduciary duty upon the PBMs in certain contractual setup, and the resulting factual disclosure requirement was just a derivative to such a fiduciary duty. *See id.* at 299.

of speech that is fully protected by strict First Amendment scrutiny—not any compelled disclosures of charitable usage percentages. *See* Maj. Op. at 24. To find support for their framework, however, my colleagues seize on the following language from the Supreme Court's discussion of why the 75% requirement was not narrowly tailored under strict scrutiny:

> The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. . . . Efforts to promote disclosure of the finances of charitable organizations [] may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.

444 U.S. at 637–38.

*Riley* was also about percentages of charitable usage. 487 U.S. at 795. At issue there was the North Carolina Charitable Solicitations Act's requirement that "professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity." *Id.* Assuming, without deciding, that the charitable usage disclosure compelled by the Act constituted commercial speech, the Supreme Court held that the timing of this disclosure, which had to be made before a fundraiser's solicitation for funds, rendered it "inextricably intertwined with otherwise fully protected speech," i.e., charitable solicitation. *Id.* at 796. Strict scrutiny thus applied. *Id.* at 798.

Reading *Riley*, my colleagues again focus on the Supreme Court's discussion as to why this charitable usage disclosure requirement was not narrowly tailored:

> [M]ore benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.

*Id.* at 800.

According to my colleagues, *Schaumburg* and *Riley* suggest that the Supreme Court would agree with their new framework, which treats government reporting requirements and direct disclosure requirements differently and abandons the commercial speech doctrine in cases involving government reporting requirements. Maj. Op. at 24–27. In my view, this interpretation of *Schaumburg* and *Riley* is unconvincing because it depends on the false premise that the charitable usage disclosures hypothesized in *Schaumburg* and *Riley* constituted non-commercial speech that would warrant strict scrutiny if compelled by direct reporting requirements.

But the information regarding the percentages of donations that are used for charity constitutes commercial speech, for it communicates the prices—a quintessential transaction term—that nonprofit organizations charge for their services managing and dispensing donations. Disclosing how much of the received donations that a nonprofit organization passes on to intended charities tells the public the amount of donations that the nonprofit organization retains for itself; that is, the price of its services. It is analogous to the commission fees that people pay for brokerage

services in the securities transaction context. Those commissions fees are distinct from the value of the securities that brokers help people transact, and disclosing those commission fees simply communicates the prices of the brokerage services. Understood as such, the Supreme Court in *Schaumburg* and *Riley* suggested only that the government could require charitable organizations to display the price tags of their services more prominently. By contrast, HB 4005's Pricing Strategy Disclosure Requirement does not merely require drug manufacturers to broadcast their price increases. Rather, it forces a full disclosure of drug manufacturers' pricing strategies, i.e., the "opinions about and reasons for" their drug prices. *X Corp.*, 116 F.4th at 901. *Schaumburg* and *Riley* cannot rescue HB 4005's Pricing Strategy Disclosure Requirement from strict scrutiny.

IV.

We have never applied anything other than strict scrutiny to the kind of speech that HB 4005's Pricing Strategy Disclosure Requirement compels. As the Supreme Court has cautioned, we must be "reluctant to mark off new categories of speech for diminished constitutional protection." *Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 767 (citation omitted).

In this case, my colleagues break new ground because society has an "interest in the fullest possible dissemination of information." Maj. Op. at 41 (citation omitted). The governmental power countenanced by this reasoning "has no clear limiting principle." *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (Kennedy, J.) (plurality opinion) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." (citing G. Orwell, Nineteen Eighty-Four (1949)

(Centennial ed. 2003))). I am not prepared to countenance a government that can compel an unwilling speaker to speak simply because the government and some others, for their own economic or political interests, would like to hear.

My colleagues also suggest that we subject government reporting requirements to a more lenient level of First Amendment scrutiny than we do for direct disclosure requirements. *See* Maj. Op. at 16–20. I fear this suggestion would encourage the government to circumvent strict First Amendment scrutiny by converting various kinds of existing and prospective direct disclosure requirements to government reporting requirements. I am not prepared to condone such a loophole either.

Following *X Corp.* and *NetChoice*, we must subject HB 4005's Pricing Strategy Disclosure Requirement to strict scrutiny because it compels drug manufacturers to engage in non-commercial speech on an intensely debated and politically fraught topic: prescription drug prices. Oregon does not claim HB 4005's Pricing Strategy Disclosure Requirement survives strict scrutiny. Therefore, I dissent from the majority's disposition of PhRMA's First Amendment claim.

**APPENDIX B**

[FILED: MARCH 19, 2024]

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON**

| | |
|---|---|
| **PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA**,<br>Plaintiff,<br>v.<br>**ANDREW STOLFI**, in his official capacity as Director of the Oregon Department of Consumer and Business Services,<br>Defendant. | Case No. 6:19-cv-01996-MO<br><br>**OPINION** |

Jonathan M. Hoffman, David W. Cramer, and Thomas W. Purcell, MB Law Group, LLP, 117 SW Taylor St., Suite 200, Portland, OR 97204. Allon S. Kedem, Elisabeth S. Theodore, Jeffrey L. Handwerker, and R. Stanton Jones, Arnold & Porter Kaye Scholer LLP, 601 Massachusetts Ave. NW, Washington, D.C. 20001. Attorneys for Plaintiff.

Carla Scott, Shaunee Vanessa Morgan, and Brian Simmonds Marshall, Oregon Department of Justice, 100 SW Market Street, Portland, OR 97201. Attorneys for Defendant.

**MOSMAN, District Judge.**

The parties filed cross-motions for summary judgment. As this Court ruled at oral argument, and for the reasons to follow, Pharmaceutical Research and Manufacturers of America ("PhRMA") is entitled to summary judgment on its Takings Clause and First Amendment claims, and neither party is entitled to summary judgment on PhRMA's Commerce Clause claim. As clarified upon the entry of declaratory judgment and in this Opinion, Oregon is entitled to summary judgment on PhRMA's Supremacy Clause claim.

## BACKGROUND

In 2018 the Oregon legislature enacted a law providing for "drug-pricing transparency." House Bill 4005, codified at O.R.S. 646A.680–692 ("HB 4005"). HB 4005 requires pharmaceutical manufacturers to report information about specific new prescription drugs and historical information about pricing for existing drugs to the Oregon Department of Consumer and Business Services ("DCBS").

> [A] manufacturer shall report the information described in subsection (3) of this section to the department regarding each prescription drug for which:
>
> (a) The price was $100 or more for a one-month supply or for a course of treatment lasting less than one month; and
>
> (b) There was a net increase of 10 percent or more in the price of the prescription drug described in paragraph (a) of this subsection over the course of the previous calendar year.

§ 2(2).

HB 4005 defines "price" as the wholesale acquisition cost ("WAC") as defined in 42 U.S.C. § 1395w-3a(c)(6)(B). That section, in turn, provides,

> The term "wholesale acquisition cost" means, with respect to a drug or biological, the manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, not including prompt pay or other discounts, rebates or reductions in price, for the most recent month for which the information is available, as reported in wholesale price guides or other publications of drug or biological pricing data.

42 U.S.C. § 1395w-3a(c)(6)(B).

For each prescription drug described in subsection 2, a manufacturer must report the following information:

> (a) The name and price of the prescription drug and the net increase, expressed as a percentage, in the price of the drug over the course of the previous calendar year;
>
> (b) The length of time the prescription drug has been on the market;
>
> (c) The factors that contributed to the price increase;
>
> (d) The name of any generic version of the prescription drug available on the market;
>
> (e) The research and development costs associated with the prescription drug that were paid using public funds;
>
> (f) The direct costs incurred by the manufacturer:

(A) To manufacture the prescription drug;

(B) To market the prescription drug;

(C) To distribute the prescription drug; and

(D) For ongoing safety and effectiveness research associated with the prescription drug;

(g) The total sales revenue for the prescription drug during the previous calendar year;

(h) The manufacturer's profit attributable to the prescription drug during the previous calendar year;

(i) The introductory price of the prescription drug when it was approved for marketing by the United States Food and Drug Administration and the net yearly increase, by calendar year, in the price of the prescription drug during the previous five years;

(j) The 10 highest prices paid for the prescription drug during the previous calendar year in any country other than the United States;

(k) Any other information that the manufacturer deems relevant to the price increase described in subsection (2)(b) of this section; and

(l) The documentation necessary to support the information reported under this subsection.

§ 2(3). If a manufacturer fails to comply with HB 4005's reporting requirements, it is subject to a civil penalty "not to exceed $10,000 per day of violation." § 3(2).

DCBS is required to post the manufacturers' reported information on its website unless (1) the information is a trade secret under Oregon law and (2) the

public interest does not require disclosure. § 2(10). The parties refer to this as the "public-interest exception."

According to Cassandra Soucy, the Drug Pricing Transparency Coordinator at DCBS, as of May 26, 2020, 1,112 reports had been filed under HB 4005. Declaration of Cassandra Soucy ("Soucy Decl."), ECF 30 ¶ 4. DCBS posted information that was not claimed as a trade secret to its website. *Id.* ¶ 5. As of May 2020, DCBS had not disclosed any information a drug manufacturer claimed as a trade secret, and manufacturers had asserted 4,865 such claims. *Id.*

As of August 2020, DCBS had not made a final decision about whether any trade secrets claimed by PhRMA members were trade secrets and whether the public interest would require disclosure of those trade secrets. Supplemental Declaration of Cassandra Soucy ("Supp. Soucy Decl."), ECF 39 ¶ 5.

Both parties moved for partial summary judgment. Plaintiff's Motion for Partial Summary Judgment ("Pl.'s MSJ"), ECF 25; Defendant's Combined Motion for Partial Summary Judgment and Opposition to Plaintiff's Moton for Partial Summary Judgment ("Def.'s MSJ & Opp. to Pl.'s MSJ"), ECF 29. On June 16, 2023, the parties filed a Stipulated Amendment to Complaint Removing Certain Claims Without Prejudice, ECF 60. The only claims pending are those addressed by the parties' motions for partial summary judgment. *Id.* This Court held oral argument on January 11, 2024 and ruled orally, holding that the public-interest exception violated the Takings Clause of the Fifth Amendment; the public-interest exception did not violate the Supremacy Clause; there are disputes of fact as to whether HB 4005 violates the Commerce Clause; and HB 4005's reporting requirements violate the First Amendment. Plaintiff

provided a proposed declaratory judgment, and the parties briefed their responses to that proposed judgment. This Court adopted Plaintiff's proposed declaratory judgment with a modification suggested by Oregon on the preemption claim.

## LEGAL STANDARDS

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001).

When parties file cross-motions for summary judgment, the court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *A.C.L.U. of Nev. v. City of Las Vegas*, 466 F.3d 784, 790–91 (9th Cir. 2006) (quotation marks and citation omitted). In evaluating the motions, "the court must consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011) (citation omitted).

## DISCUSSION

Before addressing each of PhRMA's claims, two preliminary matters require discussion: standing and the standard for facial challenges.

## A. Associational Standing

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (citation, footnote, brackets, and internal quotation marks omitted). For each claim, PhRMA needs to establish standing. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought." (citations omitted)). In its Complaint, PhRMA notes that it brings this action "on behalf of itself and its members." ECF 1 ¶ 1.

PhRMA concedes that it lacks standing to bring its claims on its own behalf, but it contends it can sue in a representational capacity. An association has standing to sue on behalf of its members if (1) "its members would otherwise have standing to sue in their own right," (2) "the interests it seeks to protect are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The second and third elements are satisfied—protecting pharmaceutical manufacturers from unconstitutional regulation is germane to PhRMA's purpose as a trade group of those manufacturers, and because PhRMA is pursuing a facial challenge, the participation of the individual members is unnecessary. As to the first element, like any Article III standing inquiry, an association must show that one of its members "(1) suffered an injury in fact, (2) that is fairly traceable to

the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). For each of PhRMA's claims, this Opinion begins by addressing whether PhRMA's members would have standing.

### B. Facial Challenges

PhRMA brings facial challenges to the public-interest exception and reporting requirements of HB 4005. "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [statute] would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Such constitutional challenges are considered the most difficult to mount successfully. *Willis v. City of Seattle*, 943 F.3d 882, 886 (9th Cir. 2019) (citation omitted).

### C. Fifth Amendment Taking

HB 4005 requires PhRMA's members to submit trade secrets to DCBS, and, if DCBS determines that the disclosure of those trade secrets would benefit the public interest, it must disclose them. In PhRMA's view, this amounts to a threatened unconstitutional taking, because as soon as a trade secret is published it loses its value. Oregon responds that the public-interest exception has not yet been invoked, and Oregon has put in place procedural safeguards to ensure that pharmaceutical companies have an opportunity to be heard before a trade secret is disclosed.

### 1. PhRMA Has Standing to Bring Its Takings Claim

As noted at the outset, to establish standing, a plaintiff must show (1) an injury in fact, (2) a causal connection between the injury and the alleged conduct, and (3) redressability. An "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc.*, 578 U.S. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

*Injury and Causation.* "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). When a plaintiff's course of conduct is "arguably affected with a constitutional interest" and "the injury is certainly impending," that is enough for the injury-in-fact requirement. *Id.* Trade secrets are a form of property. *See Carpenter v. United States*, 484 U.S. 19, 26 (1987); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984). Therefore, the Fifth Amendment, applied to the states and judicial action, affords property protection for trade secrets. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Public disclosure of a trade secret destroys its value. *See Hartley Pen Co. v. U.S. Dist. Ct.*, 287 F.2d 324, 328 (9th Cir. 1961) ("[T]he property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the process then the property disappears." (citation omitted)). If DCBS invoked the public-interest exception and posted a PhRMA member's trade secret online, then the statute would have caused the disclosure of the trade secret and uncompensated destruction of its value.

*Redressability*. PhRMA seeks a declaratory judgment[1] that the public-interest exception authorizes takings without just compensation, a constitutional violation. Oregon argues that this type of relief is not available for takings claims. In recent years, the Supreme Court has addressed the availability of declaratory and injunctive relief for takings claims in the context of ripeness, which this Court will address in the next subsection. For purposes of the *standing* analysis, this Court asks whether, if granted, the relief sought would rectify the injury. That question is easily answered—yes. A declaratory judgment in PhRMA's favor would rectify the threatened injuries.

**2. PhRMA's Takings Claim Is Ripe**

To the extent there is a difference between constitutional standing and ripeness in the takings context,[2] it does not alter the analysis here. In pre-enforcement challenges, standing and ripeness often "boil down to the same question." *See Susan B. Anthony List*, 573 U.S. at 157 n.5. As a general matter, a facial challenge to a statute under the Takings Clause may be considered

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[1] PhRMA has abandoned any claims for injunctive relief. *See* ECF 44 at 3 ("PhRMA does not seek an injunction here.").

[2] *See N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229–30 (10th Cir. 2021) (holding that *Williamson County*'s ripeness test is prudential, not jurisdictional); *Pharm. Rsch. & Mfrs. of Am. v. Williams*, 64 F.4th 932, 950–51 (8th Cir. 2023) (Gruender, J., concurring) (concurring insofar as the majority opinion "does not decide the question of whether the availability of equitable relief implicates standing" for a takings claim); *Va. Hosp. & Healthcare Ass'n v. Kimsey*, No. 20-2176, 2022 WL 604049, at *4 & n.3 (4th Cir. Mar. 1, 2022) ("Whether the district court's grounds for dismissing the Takings and Preemption Claims were, as the court thought, Rule 12(b)(1) issues of Article III standing—or were instead Rule 12(b)(6) issues of the viability of those Claims—is a question that we acknowledge but need not resolve today.").

ripe for adjudication if the enforcement of the statute would necessarily result in a taking of property by the government. *See Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981); *see also Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 736 n.10 (1997) (explaining that a facial challenge in the takings context is usually ripe "the moment the challenged regulation or ordinance is passed").

A trio of more recent Supreme Court decisions address ripeness in takings cases. In *Knick v. Township of Scott*, the Court explained that "[a] property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government." 139 S. Ct. 2162, 2179 (2019). "As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *Id.* at 2176.

Two years later, the Supreme Court clarified in *Pakdel v. City & County of San Francisco* that "administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position." 594 U.S. 474, 480 (2021) (per curiam). The Court reasoned that "[the finality] requirement ensures that a plaintiff has actually been injured by the Government's action and is not prematurely suing over a hypothetical harm. Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government regulation has gone too far, the court must first know how far the regulation goes. Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution." *Id.* at 479 (citation, brackets, and internal quotation marks omitted).

That same year, the Supreme Court decided *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). In that case, the plaintiff sought a preliminary injunction to prevent a physical taking, and the defendants moved to dismiss. *Id.* at 145–46. The lower courts denied the preliminary injunction motion and granted the motion to dismiss, but the Supreme Court reversed the Ninth Circuit's judgment and remanded. The Supreme Court did not explicitly address whether a preliminary injunction was appropriate or available to the plaintiff in *Cedar Point*. But at least one circuit court has viewed *Cedar Point* as a tacit endorsement of the principle that a plaintiff may have a ripe takings claim even prior to an actual physical taking occurring. *See Barber v. Charter Township of Springfield*, 31 F.4th 382, 389 (6th Cir. 2022). Given this reading of *Cedar Point*, and other guidance from the Supreme Court, the Sixth Circuit concluded that "a claim for injunctive relief is ripe if the government has reached a final decision that will enable a future physical taking." *Id.*

Here, under the plain terms of the statute, a disclosure under the public-interest exception would result in the taking of a trade secret. DCBS has no discretion—if a trade secret would benefit the public interest, then it must disclose it. This is not a land use case in which there is some mechanism for the government to grant a variance that has not yet been finalized. Nor, on this record, is there a known mechanism for PhRMA's members to seek compensation. The law here, and how it will apply to the pharmaceutical companies, is set. PhRMA has therefore shown "*de facto* finality" sufficient for its claim to ripen. *Pakdel*, 594 U.S. at 479. This claim is ripe for review. *See Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 52–54 (1st Cir. 2001), *on reh'g en banc*, 312 F.3d 24, 30 (1st Cir. 2002) (En banc "review does not include

revisiting the issues of whether the tobacco companies' claims are ripe . . . .").

### 3. PhRMA Is Entitled to Summary Judgment on Its Takings Clause Claim

Having concluded that PhRMA's members, and so PhRMA, have standing, and the takings claim is ripe for adjudication, this Court next addresses the merits of the takings claim. Because this is a facial challenge, PhRMA must show that the public-interest exception would result in an unconstitutional taking in all applications.

Oregon argues that this claim fails because "PhRMA has not met its burden of proving that H.B. 4005 will 'take' trade secrets in *all* of its applications." Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 16. PhRMA responds that it need only prove that the *public-interest exception* will "take" trade secrets whenever invoked. Plaintiff's Reply and Opposition ("Pl.'s Reply & Opp. to Def.'s MSJ"), ECF 34 at 9–11. PhRMA's framing is correct. On this claim, it is only challenging the public-interest exception, so the question is whether the public-interest exception will amount to an unconstitutional taking every time it is invoked, not HB 4005 writ large.

In general, Supreme Court precedent distinguishes between two types of takings: physical takings and regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323–24 (2002); *Reilly*, 312 F.3d at 33. The only Supreme Court case to address the appropriate categorization for a taking in the trade secret context is *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). There, the Court considered whether certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act constituted a taking. *Id.* at 990. Those provisions authorized the Environmental Protection Agency to disclose publicly some of the data

submitted by companies applying for registration of pesticides. *Id.* The Court applied the regulatory takings test under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), to determine whether the statute worked a compensable taking of companies' trade secrets. *Id.* at 1004–14. Based on this precedent, this Court will analyze the public-interest exception under the regulatory takings scheme.

In *Ruckelshaus*, the Supreme Court identified several factors for courts to consider in determining whether a regulatory taking has occurred, including "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 1005 (citations omitted). The following analysis addresses each of these factors in turn.

*Character of the Governmental Action*. In assessing the character of the governmental action, this Court considers how the government regulates and what that regulation does to the property interest—here, the pharmaceutical companies' trade secrets. *See Reilly*, 312 F.3d at 41 (citing *Hodel*, 481 U.S. at 716). This Court takes this to mean it should look at the way in which the taking fits into the regulatory scheme, and the regulatory impact on the property. The public-interest exception mandates disclosure of the companies' trade secrets when the public interest so requires. On its face, HB 4005 does not explain how DCBS determines when the public interest requires publication of a trade secret. Practically, "[t]his places an extremely low burden on [Oregon]," *id.* at 44, which results in irrevocable individual loss. Further, "it is not at all clear that protecting the overall integrity of the [trade secrets] will interfere with [Oregon's] goal[s]." *Id.* This factor supports finding the application of the public-interest exception to work a taking.

*Economic Impact*. The law regarding economic impact is fairly straightforward. The inquiry is whether the regulation "impair[s] the value or use of [the] property" according to the owners' general use of their property. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). Here, disclosure of a trade secret will destroy that trade secret's value. To be sure, the trade secret that is revealed may not be the pharmaceutical company's most valuable secret, but it is nonetheless information that gains value through being generally unknown to the public. Disclosure necessarily destroys all of that value. This factor favors finding that the public-interest exception works a taking.

*Reasonable Investment-Backed Expectations*. "Courts protect only reasonable expectations. Ideally, the relevant inquiry should recognize that not every investment deserves protection and that some investors inevitably will be disappointed." *Reilly*, 312 F.3d at 36 (emphasis omitted). In *Ruckelshaus*, the Supreme Court focused solely on this last factor because "the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data." 467 U.S. at 1005. There, the Court made clear that, "[i]f, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id.* at 1006–07. This result—that a company cannot claim it had a reasonable investment-backed expectation in secrecy when it submitted trade secrets to a government entity knowing that the government may disclose those trade secrets—

has been repeated in later cases. *See Reilly*, 312 F.3d at 38; *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 315 (1st Cir. 2005) (Boudin, C.J., and Dyk, J., jointly concurring and providing the controlling majority for the Takings Clause issue) ("There is no basis for forward-looking injunctive relief with respect to rebate contracts entered into after the statute's effective date.").

But in each of these cases, the entities voluntarily provided the trade secrets at issue. When that voluntariness is lacking, either because there is no quid pro quo, as there was in *Ruckelshaus*, or because disclosure is required, as in *Reilly*, then the regulatory takings factors, analyzed as a whole, point toward finding a taking or a threatened taking for purposes of a facial challenge. *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (explaining that in *Ruckelshaus* the Court found that the Takings Clause was not violated because trade secrets were exchanged for the right to a valuable government benefit). And here, voluntariness is lacking. PhRMA's members were simply obligated to disclose by Oregon's positive law. Thus, this Court finds that PhRMA's members have a reasonable investment-backed expectation that the state will maintain the secrecy of the information that qualifies for trade secret protection. Because the members did not voluntarily hand over this information—in fact, they disclosed under protest—they are entitled to that expectation despite knowing of the public-interest exception. Because all the factors support finding a regulatory taking, this Court finds that the exercise of the public-interest exception works a regulatory taking.

*Availability of Declaratory Relief.* "As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *Knick*, 139 S. Ct. at 2176. A recent

case from the Eighth Circuit is instructive in interpreting what constitutes an "adequate provision" under state law. There, the court held that injunctive and declaratory relief were available—and so, in that court's view, a takings claim was redressable—where the state's inverse condemnation procedure did not afford an adequate legal remedy. *Williams*, 64 F.4th at 946. The state law required drug manufacturers to provide insulin for free to residents who met certain criteria. *Id.* at 937. To receive just compensation for these repeated takings, manufacturers would be bound to litigate a multiplicity of suits so long as the law remained in effect, which the Eighth Circuit considered an inadequate remedy. *Id.* at 945. Relying on *Knick* and *Pakdel*, the Eighth Circuit reversed the district court's dismissal for lack of standing. *Id.* at 950.

Likewise here. Pharmaceutical companies are required to hand over trade secrets knowing that DCBS is under an obligation to disclose those trade secrets if the public interest so requires. As of May 2020, manufacturers had identified 4,865 trade secrets in their submissions to DCBS. Soucy Decl., ECF 30 ¶ 5. Unless just compensation is provided, a taking of private property for public use occurs with each mandated public disclosure. True, no such public disclosure has yet occurred. But PhRMA is left to guess whether that is due to this pending litigation or something else. In the meantime, the very real threat of destructive disclosure suffices for declaratory relief.

Even assuming some of the identified trade secrets do not qualify as such under the terms of the statute, pharmaceutical companies are still left in the same position as the plaintiffs in *Williams*: litigating a multiplicity of suits involving the same underlying takings. Oregon did not address the availability of a state

compensation scheme until its reply, and it did not argue the adequacy of that scheme given these circumstances. *See* Defendant's Reply ("Def.'s Reply to Pl.'s MSJ"), ECF 38 at 11–12.[3] "[T]he legal remedy of damages is not 'complete, practical and efficient,' because it requires a repetitive succession of inverse condemnation suits. An inverse condemnation action to reimburse a manufacturer for each discrete alleged taking is incapable of compensating the manufacturers for the repetitive, future takings that will occur under the Act's requirements. By contrast, equitable relief would protect manufacturers from those future harms." *Williams*, 64 F.4th at 945 (quoting *Terrace v. Thompson*, 263 U.S.197, 214 (1923)); *see also E. Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.").

### D. Preemption

PhRMA argues that HB 4005's public-interest exception is preempted by the federal Defend Trade Secrets Act ("DTSA"), 18 U.S.C. §§ 1832–39. Oregon responds that it is not impossible to comply with both statutes, and that the public-interest exception does not frustrate the congressional purpose underlying the DTSA.

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[3] This Court acknowledges that the briefing for this case was completed after *Knick* but before *Pakdel*. Nevertheless, Oregon did not respond to PhRMA's notice of supplemental authority addressing the Eighth Circuit's decision reversing the district court in *Williams*, *see* ECF 56, nor did it address the adequacy of the state's compensation scheme at oral argument on January 11, 2024.

### 1. PhRMA Has Standing to Bring Its Preemption Claim

Because DCBS must disclose trade secrets that fall within the public-interest exception, there is the threat of possible disclosure of a trade secret, which could potentially constitute misappropriation under the DTSA. Along these same lines, misappropriation under the DTSA would impact a pharmaceutical company's property interest in its trade secret. In other words, the DTSA provides a civil cause of action for the loss of a trade secret, and if HB 4005 requires Oregon to disclose trade secrets despite the DTSA, then the pharmaceutical company has a concrete and particularized, though at this stage merely threatened, injury. This threatened enforcement of the public-interest exception, and concomitant injury despite a federal statute guarding against such injury, is sufficient for the injury-in-fact requirement. Likewise, there is no question that the public-interest exception would be the cause of the injury. And, according to PhRMA, severing the public-interest exception from HB 4005 would redress the injury. This Court is satisfied that PhRMA has standing to assert the preemption claim.

### 2. Oregon Is Entitled to Summary Judgment on the Preemption Claim

PhRMA argues that the public-interest exception is preempted by the DTSA. It relies on two types of conflict preemption. First, it argues that the disclosure mandated by the exception constitutes "misappropriation" of a trade secret under federal law, such that compliance with both statutes would be impossible. Second, it argues the public-interest exception is an obstacle to the full accomplishment of the DTSA's purposes and objectives

because it nullifies the trade secrets that federal law protects. Pl.'s MSJ, ECF 25 at 22.

The DTSA authorizes the "owner of a trade secret that is misappropriated" to bring a civil action, 18 U.S.C. § 1836(b)(1), and grants the United States district courts original jurisdiction over such cases, 18 U.S.C. § 1836(c). Two provisions of the DTSA are relevant for the preemption analysis. First, the DTSA "does not prohibit or create a private right of action" in regard to "any otherwise lawful activity conducted by a governmental entity of . . . a State." 18 U.S.C. § 1833(a)(1). Second, the DTSA "shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret." 18 U.S.C. § 1838.

As for § 1833(a)(1), PhRMA argues that "[t]his sort of broadly worded saving clause 'does not bar the ordinary working of conflict preemption principles.'" Pl.'s MSJ, ECF 25 at 28 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)). Instead, it goes on, "Congress typically uses such language, which is scattered throughout the U.S. Code, to indicate that federal law is not meant to 'dominate the field' exclusively." *Id.* (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987)). According to PhRMA, saving clauses like § 1833(a)(1) do not "override principles of conflict preemption, and the Supreme Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)).

As for § 1838, PhRMA treats this as the linchpin of understanding the relationship between the DTSA and

state-law schemes. It argues that this section shows that, "while Congress did not want to preempt trade secret *protections* provided by state law, Congress *did* want to preempt other, non-remedial forms of state law." Pl.'s MSJ, ECF 25 at 27.

There is a dearth of authority on the DTSA and its interaction with state laws. PhRMA points this Court to a situation from Nevada. There, a state law, SB 539, required drug manufactures to report information about reasons for certain price increases. Pl.'s Reply & Opp. to Def.'s MSJ, ECF 34 at 15. As here, PhRMA challenged the law, arguing that it violated the Takings Clause and the Supremacy Clause. *Id.* Nevada conceded that disclosure of trade secrets under that law would constitute 'misappropriation' for which a court may award relief pursuant to the DTSA, and it adopted regulations that prevented disclosure of trade secrets as defined by federal law. *Id.* PhRMA voluntarily dismissed its claims without prejudice.

For its part, Oregon cites a case from the District of Massachusetts, *Fast Enterprises, LLC v. Pollack*, Civil Action No. 16-CV-12149-ADB, 2018 WL 4539685 (D. Mass. Sept. 21, 2018), which involved a Massachusetts public records law. Plaintiff sued the Secretary and CEO of the Massachusetts Department of Transportation with the goal of enjoining her from disclosing its trade secrets pursuant to the public records law. The court concluded that it lacked subject matter jurisdiction. In particular, the court held that § 1833(a)(1), the saving clause, meant that a DTSA claim could not be maintained against a state performing lawful state activities.

**i. Impossibility Preemption**

PhRMA argues that it is impossible to comply with both the public-interest exception and the DTSA, and so

the public-interest exception is preempted by federal law. Pl.'s MSJ, ECF 25 at 22–25. Federal law preempts state law when it is impossible to comply with both sets of laws. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). Impossibility preemption has been recognized as a "demanding defense." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

Oregon responds that, "[i]n the speculative event that DCBS posts a PhRMA member's trade secrets online, it would not constitute misappropriation because it would only occur after the drug manufacturer was afforded robust due process to prevent disclosure pursuant to administrative rules promulgated under H.B. 4005." Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 12 (citations and emphasis omitted). This argument is unpersuasive—process alone does not keep disclosure from being misappropriation. *See* Pl.'s Reply & Opp. to Def.'s MSJ, ECF 34 at 15 ("Whatever 'process' the State chooses to undertake *before* disclosing a trade secret under the public-interest exception, the fact remains that every such disclosure still qualifies as a misappropriation under the DTSA.").

But it is not clear that disclosure would be misappropriation under the DTSA. The DTSA defines misappropriation, in part, as disclosure of a trade secret of another without express or implied consent by a person who, at the time of disclosure, knew or had reason to know that the knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret. 18 U.S.C. § 1839(5). DCBS is not under an absolute duty to maintain secrecy because HB 4005 permits disclosure in certain circumstances. Because disclosure under the public-interest exception would not constitute misappropriation under the DTSA, then it would be possible to comply with both sets of laws.

Likewise, taken on its face, the saving clause in § 1833(a)(1) would prevent PhRMA's members from bringing a claim under the DTSA for the state's disclosure of its trade secrets. It is possible to comply with both statutes.

**ii. Obstacle Preemption**

Federal law also impliedly preempts state laws that pose an "obstacle" to the "full purposes and objectives" of Congress. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In its obstacle preemption cases, the Supreme Court has held that state law impermissibly interferes with federal goals if it frustrates Congress's intent to adopt a uniform system of federal regulation; conflicts with Congress's goal of establishing a regulatory "ceiling" for certain products or activities; or impedes the vindication of a federal right. *See id.*; *Geier*, 529 U.S. at 875, 879; *Felder v. Casey*, 487 U.S. 131, 153 (1988).

The Supreme Court has cautioned that obstacle preemption does not justify a "freewheeling judicial inquiry" into whether state laws are "in tension" with federal objectives; such a standard would undermine the principle that "it is Congress rather than the courts that preempts state law." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011).

Here, the parties agree broadly that the objective of the DTSA is to provide a private cause of action and remedies for owners of trade secrets. *See* Pl.'s MSJ, ECF 25 at 27; Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 13–14. They diverge on the specifics—PhRMA sees the DTSA as promoting innovation and American jobs, whereas Oregon trains on the DTSA's focus on providing a remedy for those who have had their trade secrets stolen.

By its text, the DTSA protects against misappropriation of trade secrets—it creates a federal regime, which works in tandem with state trade secrets regimes, to ensure holders of trade secrets have recourse should their trade secrets be disclosed. And by its text, the DTSA does not appear to be intended to cabin the ability of states to impose reporting requirements. Therefore, Oregon is entitled to summary judgment on the preemption claim.

### E. Dormant Commerce Clause

PhRMA argues that HB 4005 facially violates the dormant Commerce Clause because, by tying its reporting requirements to the federally defined WAC, it directly controls interstate commerce. Oregon responds that HB 4005 does not regulate or discriminate against extraterritorial commerce, and any impact HB 4005 has on out-of-state commerce is constitutionally permitted.

#### 1. PhRMA Has Standing to Bring its Commerce Clause Claim

PhRMA has standing to assert its dormant Commerce Clause claim because, according to PhRMA, HB 4005 through its current operation is controlling commerce by imposing regulatory consequences on nationwide price changes. If PhRMA is correct, then the manufacturers are being regulated by an unconstitutional statute, and such regulation is a legally cognizable harm that a declaratory judgment can remedy. *See Lujan*, 504 U.S. at 562.

#### 2. Neither Party Is Entitled to Summary Judgment on the Commerce Clause Claim

"The Constitution vests Congress with the power to 'regulate Commerce . . . among the several States.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023)

(ellipsis in original) (quoting U.S. Const., art. I, § 8, cl. 3). The Supreme Court has held that the Commerce Clause "also 'contain[s] a further, negative command,' one effectively forbidding the enforcement of 'certain state [economic regulations] even when Congress has failed to legislate on the subject.'" *Id.* (alterations in original) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)).

It is useful to note what PhRMA is *not* arguing. PhRMA does not argue that HB 4005 discriminates against out-of-state economic interests. *See* Pl.'s Reply & Opp. to Def.'s MSJ, ECF 34 at 22. PhRMA does not argue that HB 4005 has the practical effect of controlling commerce outside of Oregon. Pl.'s Resp. to Def.'s Notice of Suppl. Authority, ECF 58 at 1 ("PhRMA does not contend that the Disclosure Law has the practical effect of controlling out-of-state commerce." (emphasis omitted)). Instead, PhRMA argues that HB 4005 directly "controls commerce in all 50 States by imposing regulatory consequences on nationwide price moves" and that this "violate[s] the Commerce Clause per se." Pl.'s MSJ, ECF 25 at 31 (alteration in original) (quoting *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993)).

This argument is similar to that made by PhRMA in *PhRMA v. David*. *See* ECF 43. There, SB 17, a California law, tied disclosure requirements for pharmaceutical manufacturers to the WAC, similar to HB 4005. In particular, SB 17 required the manufacturer of a prescription drug to notify certain purchasers at least 60 days before increasing the drug's federally defined WAC if (1) a course of therapy has a WAC of more than $40, and (2) the proposed increase would result in a cumulative increase of 16 percent or more over the two calendar years before the current year. Manufacturers were required to

provide the date and amount of the planned increase, as well as a statement as to whether a change or improvement in the drug necessitated the price increase and describing the change, if one occurred. PhRMA argued that SB 17 directly regulated commerce by tying state reporting requirements to the federally defined WAC.

The district court held that PhRMA was not entitled to summary judgment. It reasoned, "PhRMA relies on a general proposition that because the WAC is federally defined and must be uniform nationwide, SB 17 directly regulates out-of-state drug prices. However, this alone does not render SB 17 unconstitutional. There are genuine disputes of material fact as to whether providing advance notice of certain increases in a prescription drug's WAC results in either direct or extraterritorial regulation." *Pharm. Rsch. & Mfrs. of Am. v. David*, 510 F. Supp. 3d 891, 900 (E.D. Cal. 2021), *aff'd and remanded sub nom. Pharm. Rsch. & Mfrs. of Am. v. Landsberg*, No. 21-16312, 2022 WL 2915588 (9th Cir. July 25, 2022).

The Ninth Circuit affirmed:

> The district court correctly determined that "PhRMA claims SB 17 directly impacts out-of-state drug prices but what that impact may actually be remains unclear." While PhRMA argues that the advance notice provision freezes drug prices nationwide, WAC is a nationwide list price set by manufacturers for each drug that does not reflect the final transaction price. In its opposition to summary judgment, California presented expert testimony that changes in WAC are not directly tied to changes in a drug's final transaction price. Additionally, while PhRMA correctly notes that WAC is sometimes

> used in negotiations of drug prices in federal Medicare reimbursement and state Medicaid reimbursement programs, California's experts explained that the frequency of WAC's use in these reimbursement formulas and WAC's precise effects in calculating reimbursement amounts remains unclear. With regard to private contractual negotiations, the district court correctly found that PhRMA provides no "explanation or examples as to how these market transactions will be impacted, especially since such contracts involve negotiations on a wide array of factors, including rebates and discounts." And PhRMA fails to identify a single party unable to increase the WAC on a pharmaceutical drug due to SB 17's advance notice requirement.

*Landsberg*, 2022 WL 2915588, at *1. After the Ninth Circuit affirmed, PhRMA stipulated to dismissal with prejudice.

PhRMA argues that the district court's Commerce Clause conclusion rested on a factually and legally incorrect distinction between its case and *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993). ECF 44. PhRMA continues to rely heavily on *NCAA v. Miller* for its dormant Commerce Clause argument.

*NCAA v. Miller* dealt with a Nevada statute that "require[d] any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed." 10 F.3d at 637 (footnotes omitted). Many of these procedures were not required by the NCAA's own

enforcement program, and the statute allowed a Nevada state district court to enjoin any NCAA proceeding that violated the statute. *Id.* The statute also prohibited the NCAA from expelling its Nevada members. *Id.*

Individuals from the University of Nevada, Las Vegas ("UNLV"), who were charged with NCAA rules violations, asserted their right to have the proceedings comply with the Nevada statute. *Id.* The NCAA then sought declaratory and injunctive relief in federal court, arguing that the statute violated the Commerce Clause and the Contracts Clause. *Id.* "The district court found that the Statute violate[d] both the Commerce Clause and the Contracts Clause and enjoined its application to the NCAA's proceeding . . . ." *Id.*

On appeal, the Ninth Circuit agreed with the district court's conclusion but not its reasoning. The Ninth Circuit held that the statute violated the Commerce Clause per se because it directly regulated interstate commerce. *Id.* at 638. The statute "regulate[d] only interstate organizations which are engaged in interstate commerce." *Id.* "In order to avoid liability . . . , the NCAA would [have been] forced to adopt Nevada's procedural rules for Nevada schools" for enforcement proceedings throughout the country. *Id.* The Ninth Circuit further noted that the statute's "extraterritorial reach also violate[d] the Commerce Clause because of its potential interaction or conflict with similar statutes in other jurisdictions." *Id.* "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)).

Given the information available at this stage, this Court cannot determine the practical effect of HB 4005 on interstate commerce. Hypothetically, if a pharmaceutical

manufacturer feared changing the WAC because of the Oregon reporting requirements, then Oregon could "control" out-of-state commerce. But *NCAA v. Miller* is not so on-point as to resolve the question as a matter of law. In *NCAA v. Miller*, Nevada was forcing organizations to institute certain procedural protections whenever it instituted a proceeding involving someone from Nevada. Given the nature of the NCAA's relationship with its member institutions, they would have been unlikely to grant UNLV such a special status, with its attendant competitive advantages. It was not far-fetched to assume that the Nevada statute would destroy the NCAA.[4] Here, Oregon is forcing companies to provide information whenever an essentially interstate figure increases. The companies can *do* whatever they choose, but there is a chance they must *tell* Oregon. *Compare Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 672–73, 675 (4th Cir. 2018) (striking down a Maryland price gouging law as violating the dormant Commerce Clause because it "instruct[ed] prescription drug manufacturers that they are prohibited from charging an 'unconscionable' price in the initial sale of a drug, which occurs outside [the state's] borders"). But this record does not establish anything like the extraterritorial impact at issue in *NCAA v. Miller*.[5]

This Court's prior ruling on the Takings Clause claim also bears on this analysis. If pharmaceutical companies

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[4] It is worth noting that at the time of the Nevada litigation, UNLV was competing in men's basketball at the highest level, and won a national championship in 1990. This all happened under Coach Jerry "Tark the Shark" Tarkanian and amidst several NCAA investigations.

[5] Because this Court finds that *NCAA v. Miller* does not control the outcome of this issue, it does not address whether *NCAA v. Miller* remains good law in light of *National Pork Producers*.

were forced to choose between handing over trade secrets with no assurance as to compensation and avoiding the Oregon market, then that Hobson's choice could bring HB 4005 more in line with the regulations in *NCAA v. Miller*. However, without that provision, this Court cannot conclude as a matter of law that HB 4005 violates the Commerce Clause. Having to report to Oregon could result in companies making different choices in other states, but PhRMA has not provided evidence of that result. Likewise, because the effect of HB 4005 is not known, Oregon is also not entitled to judgment as a matter of law.

### F. First Amendment

At the outset, this Court notes that the parties assume that HB 4005's reporting requirements[6] regulate speech protected by the First Amendment. *See* Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 19–27. PhRMA argues that strict scrutiny applies because HB 4005 regulates private speech, and that the reporting requirements do not satisfy strict scrutiny. PhRMA further argues that even under rational basis review, the reporting requirements are facially unconstitutional. Oregon responds that the reporting requirements are

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[6] In the briefing on the proposed declaratory judgment, Oregon suggested that PhRMA's First Amendment arguments reached only HB 4005 § 2(3)(c), which requires pharmaceutical companies to explain the factors that contributed to a price increase. *See* ECF 75. Oregon asked this Court to sever only that subsection from the statute. *Id.* Because Oregon did not raise this severability argument in its briefs or at oral argument, this Court declined to enter its proposed judgment and declines to address these arguments in this Opinion. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 n.10 (9th Cir. 2011) (en banc) (facial attack under the First Amendment) ("Because the City has waived any argument regarding severability by failing to raise it in its briefs or at oral argument, we do not consider it here." (citations omitted)).

subject only to rational basis review because they compel disclosure of commercial speech, and that the reporting requirements satisfy that level of scrutiny.

**1. PhRMA Has Standing to Bring Its First Amendment Claim**

PhRMA has standing to assert its First Amendment claim. PhRMA alleges that HB 4005's reporting requirements infringe on its members' First Amendment right to free speech by "compelling manufacturers—and only manufacturers—to speak." Pl.'s MSJ, ECF 25 at 31–38. Forced compliance with an "unlawful regulation" is itself a legally cognizable harm, which the court can remedy by declaring the regulation invalid. *Lujan*, 504 U.S. at 562. In other words, the injury is being forced to speak and, according to PhRMA, endorse Oregon's messaging, while other entities are not. HB 4005's reporting requirements cause that injury, and a decision that those requirements violate the First Amendment would redress the injury.

**2. PhRMA Is Entitled to Summary Judgment on Its First Amendment Claim**

The First Amendment imposes stringent limits on the government's authority either to restrict or compel speech by private citizens and organizations. *See Texas v. Johnson*, 491 U.S. 397 (1989); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). To succeed on a facial challenge under the First Amendment, PhRMA must show that a "substantial number of [HB 4005's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *See Wash. State Grange*, 552 U.S. at 449 n.6 (citation and internal quotation marks omitted).

### a. HB 4005's Reporting Requirements Regulate Commercial Speech

The parties disagree about the type of speech HB 4005 regulates. PhRMA argues that HB 4005 regulates companies' private speech, not commercial speech. Oregon responds that manufacturers need only disclose commercial speech. As explained below, this Court concludes that HB 4005's reporting requirements regulate commercial speech.

PhRMA provides a string of cases standing for the proposition that commercial speech is defined as "speech that does no more than pose a commercial transaction." Pl.'s Reply & Opp. to Def.'s MSJ, ECF 34 at 28 (citation omitted). According to PhRMA, because the disclosures required under HB 4005 do not pose a commercial transaction, the speech is not commercial. But a recent Ninth Circuit case, *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107 (9th Cir. 2021), complicates the analysis. There, the Ninth Circuit explained that while commercial speech is usually defined, as PhRMA suggests, as speech that does no more than propose a commercial transaction, this definition is "just a starting point" and courts should "try to give effect to a common-sense distinction between commercial speech and other varieties of speech." *Id.* (citations and internal quotation marks omitted). In the Ninth Circuit, the "commercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *Id.* (quoting *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017)).

"[S]peech that does not propose a commercial transaction on its face can still be commercial speech." *Id.* (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983)). "Where the facts present a close question,

'strong support' that the speech should be characterized as commercial speech is found where [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (citations omitted). These are the "*Bolger* factors." *Id.* "These so-called *Bolger* factors are important guideposts, but they are not dispositive." *Ariix, LLC*, 985 F.3d at 1116 (citations omitted).

Here, the speech is not an advertisement—the pharmaceutical companies are not trying to sell drugs through the HB 4005 disclosures. But the speech does refer to a particular product in that it centers on the drugs for which the disclosures are required. As for the third *Bolger* factor, the Ninth Circuit has explained that it "asks whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had any economic motivation." *Ariix, LLC*, 985 F.3d at 1116. "[E]conomic motivation is not limited simply to the expectation of a direct commercial transaction with consumers. Courts have found commercial speech even when it involves indirect benefits, such as benefits to employee compensation, improvements to a brand's image, general exposure of a product, and protection of licensees' interests. Importantly, the type of economic motivation is not the focus; rather, the crux is on whether the speaker had an adequate economic motivation so that the economic benefit was the primary purpose for speaking." *Id.* at 1117 (citations and footnote omitted). "[T]he question is context-specific and requires determining whether the speaker's purpose primarily turns on the economic benefit that the speaker receives from the speech." *Id.* at 1117 n.7.

Applying the *Bolger* factors, whether HB 4005 regulates commercial or private speech is a close

question. The disclosure requirements are triggered by price changes and introductions of products to the market, and the content of the disclosures relates to costs and pricing. HB 4005 at its core deals with the economics of prescription pricing. The pharmaceutical companies are acting out of an economic motivation in that they are compelled to provide that economic information in order to participate in the market. But recognizing the option to participate in a market as an economic motivation for purposes of categorizing speech could result in state laws that regulate all sorts of information receiving a lower level of scrutiny by virtue of being merely associated with a market.

Taking at face value *Ariix*'s instructions that neither the proposing-a-transaction test nor the *Bolger* factors are dispositive and that courts should "try to give effect to a common-sense distinction between commercial speech and other varieties of speech," 985 F.3d at 1115–16, this Court takes a wholistic approach to disclosures under HB 4005. Viewing the context of the disclosures as a whole, the speech at issue here is best categorized as commercial speech.

**b. Intermediate Scrutiny Applies**

As the Ninth Circuit recently explained, "The Supreme Court recognizes two levels of scrutiny governing compelled commercial speech. First, under *Central Hudson* [*Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980)], the Court applies intermediate scrutiny, which requires the government to directly advance a substantial governmental interest, and the means chosen must not be more extensive than necessary. Second, there is the lower standard applied in *Zauderer* [*v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)], which requires the

compelled speech be reasonably related to a substantial government interest and not be unjustified or unduly burdensome." *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1275 (9th Cir. 2023) (citations and internal quotation marks omitted). "To qualify for review under *Zauderer*, the compelled commercial speech at issue must disclose 'purely factual and uncontroversial information.'" *Id.* at 1275 (quoting *Zauderer*, 471 U.S. at 651).

Oregon would have this Court apply *Zauderer* because, in its view, that standard necessarily applies to compulsions of commercial speech. Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 19–27. PhRMA would have this Court distinguish *Zauderer* and its progeny. Those cases, it argues, "involved a law that compelled disclosure of the features of a good or service in connection with offering it for sale." Pl.'s Reply & Opp. to Def.'s MSJ, ECF 34 at 32 (citations omitted). Further, PhRMA argues, HB 4005 requires pharmaceutical companies to distribute controversial messages, making *Zauderer* inapplicable. *Id.* at 33.

This Court begins by addressing whether the disclosures mandated by HB 4005 concern "purely factual and uncontroversial information." First, HB 4005 generally asks for disclosures of purely factual information, such as the time the drug has been on the market and the name of any generics. The only non-factual information HB 4005 asks for is the pharmaceutical companies' narrative explanations justifying certain increases in price. But this is not the kind of non-factual information courts consider problematic under *Zauderer*—the government is not asking pharmaceutical companies to share the government's opinion, but their own explanations and opinions. Second, *Zauderer* requires that the disclosure be uncontroversial. The Ninth Circuit has articulated a

nexus requirement between the potentially controversial aspects of the speech and the organization's opposition to the speech:

> We do not read the Court as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial. The dispute in [*National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"),] was whether the state could require a clinic whose primary purpose was to oppose abortion to provide information about "state-sponsored services," including abortion. While factual, the compelled statement took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission. Under these circumstances, the compelled notice was deemed controversial within the meaning of *Zauderer* and *NIFLA*.

*CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019); *see also Nat'l Ass'n of Wheat Growers*, 85 F.4th at 1277 ("*NIFLA* tells us that the topic of the disclosure and its effect on the speaker is probative of determining whether something is subjectively controversial."). Here, HB 4005 requires pharmaceutical companies to speak on a controversial topic and, in particular, justify why they fall on one side—what Oregon deems the wrong side—of that controversy. The pharmaceutical companies are the only entity involved in that controversy required to offer an explanation to the public. This Court finds that HB 4005's reporting requirements, viewed in the context of drug prices and health care costs, concern controversial information and *Zauderer* does not apply.

This Court notes that the analysis required under *Zauderer* is an uneasy fit for the facts here. Take *Zauderer* itself as an example. There, the state compelled an attorney to disclose information in addition to the advertising he was already engaging in. 471 U.S. at 651. The message required by the government was an addendum. And the same is true for many cases applying *Zauderer*'s rationale. *See, e.g.*, *CTIA*, 928 F.3d 832; *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019) (en banc); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); *Rowe*, 429 F.3d 294; *Env't Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). A principle emerges from these applications: A factual, uncontroversial addition to already-occurring commercial communication is not so offensive to the freedom of speech to require an exacting level of scrutiny. For those situations, a level of scrutiny akin to rational basis will suffice.

As this case illustrates, however, compulsions of commercial speech are not always of the type addressed by *Zauderer*. Here, the pharmaceutical companies are not already engaged in commercial speech to which the disclosures compelled under HB 4005 are appended. *See Am. Beverage Ass'n*, 916 F.3d at 753. Nor are the companies operating storefronts in which the government requires the sharing or posting of certain information. *See CTIA*, 928 F.3d 832; *Am. Hosp. Ass'n v. Azar*, 468 F. Supp. 3d 372, 391 (D.D.C.) (explaining that *Zauderer* applied in part because the compelled disclosure was "directly relevant to the terms under which the services will be available," namely payment rendered (quotation marks , citation, and alteration omitted)), *aff'd*, 983 F.3d 528 (D.C. Cir. 2020). Instead, by participating in the

Oregon market, the pharmaceutical companies are required to share with Oregon, for public dissemination, information Oregon deemed relevant to prescription drug pricing. While Oregon does not dictate the content of the disclosed information, it does pose the questions the pharmaceutical companies must answer. This, too, counsels against applying *Zauderer* here.

**c. HB 4005's Reporting Requirements Cannot Survive Intermediate Scrutiny**

Having concluded that *Zauderer*'s lower level of scrutiny is inapplicable, this Court turns to *Central Hudson*. Under the *Central Hudson* standard, the government may compel a disclosure of commercial speech only if (1) it directly advances a substantial governmental interest, and (2) the restriction is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. The fit between the legislature's ends and its means "need not be perfect nor the single best to achieve those ends, but one whose scope is narrowly tailored to achieve the legislative objective." *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1111 (9th Cir. 2004) (citation omitted). Oregon bears the burden of justifying its disclosure law. *See Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); *Bolger*, 463 U.S. at 71 n.20. As the Supreme Court has made clear, "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770–71 (citations omitted); *see also Ibanez v. Fla. Dep't of Bus. & Prof. Reg., Bd. of Acct.*, 512 U.S. 136, 143 (1994) ("The State's burden is not slight . . . .").

Oregon contends that HB 4005 serves "to provide accountability for prescription drug pricing to permit purchasers, both public and private, as well as pharmacy benefit managers, to negotiate discounts and rebates for prescription drugs consistent with existing state and federal law." Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 23. Oregon further argues that it has a substantial interest "in providing Oregon prescription drug buyers with better information about the price of prescription drugs." Def.'s Reply to Pl.'s MSJ, ECF 38 at 17; *see also id.* at 18 (Reporting requirements under HB 4005 "reflect [Oregon's] attempt to provide accountability for prescription drug pricing and increase consumer knowledge of the prescription drug market." (citations omitted)).

Assuming that these are substantial interests, Oregon has nevertheless failed to show how HB 4005 will in fact directly advance them.[7] The requirement that a regulation directly advance the asserted interest is "critical," because without it, the government "could [interfere with] commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (citation omitted). To establish direct advancement, the government may refer "to studies and anecdotes pertaining to different locales altogether, or even . . . based solely on history, consensus, and simple common sense." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (citations and internal quotation marks omitted). Oregon claims that the "[s]elf-reported

[7] As mentioned elsewhere, Oregon argued in its briefing and at oral argument that rational basis review applies because HB 4005 compels speech. Thus, Oregon did not squarely address the direct advancement and narrow tailoring requirements under *Central Hudson*.

information from drug manufacturers about the various factors that contribute to rising drug prices" will result in increased transparency, which "can then be expected to enhance information available in the market and allow markets to function more efficiently, which would benefit consumers, including the state, which itself is a large purchaser of prescription drugs." Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 24. In its briefing before this Court, Oregon cites no studies or anecdotal evidence to support these assertions, and, without more, they amount to little more than speculation. *Cf. Am. Hosp. Ass'n v. Azar*, 468 F. Supp. 3d at 395 n.25 ("The agency's reliance on numerous studies here is hardly comparable to the pure speculation undergirding other agency actions that have been struck down under *Central Hudson*." (citations omitted)) (collecting cases).

Indeed, during the public hearings for HB 4005, when asked how the law would "actually reduce the cost of prescription drugs in Oregon," one state representative responded, "I don't think we know yet." ECF 31, Ex. 1 at 15–16. The representative went on, "I think we'll learn a lot as we watch this law play out. . . . And my hope would be is that we gain some understanding about why the cost of these medications go up, and then maybe we can make smarter regulation." *Id.* Oregon has not identified studies or evidence to show how the reporting requirements of HB 4005 will directly advance its legislative goals, and the record it has created does nothing to advance such a connection.

Likewise, Oregon has failed to demonstrate that HB 4005 is narrowly tailored to advance its stated goals. For instance, the law is underinclusive—it requires only one type of entity in a complex supply chain to provide justifications for price increases. To be sure, pharmaceutical companies have leeway under the text of

the law to explain how other actors impact prices, but that leeway does not justify burdening the First Amendment rights of only PhRMA's members in service of acquiring information that may prove useful. Asking one actor among many to explain itself is underinclusive given Oregon's own framing of the issue HB 4005 is aimed at addressing: rising drug prices caused by a combination of factors. While Oregon may be correct that regulation can be piecemeal and preliminary without being unconstitutionally underinclusive, *see* Def.'s MSJ & Opp. to Pl.'s MSJ, ECF 29 at 24 ("[L]aws are not required to solve every part of every problem to be valid."), it still fails to explain why the underinclusive nature of HB 4005's reporting requirements is nonetheless narrowly tailored. Put differently, while there may be a justification for beginning its approach with this compulsion of this speech from these companies, Oregon does not elucidate that justification.

Because HB 4005's reporting requirements cannot, on this record, survive intermediate scrutiny, this Court is satisfied that they likewise would not survive if analyzed as regulating private speech rather than commercial speech. *See NIFLA*, 585 U.S. at 773; *Yim v. City of Seattle*, 63 F.4th 783, 793 (9th Cir. 2023), *cert. denied sub nom. Yim v. Seattle*, 144 S. Ct. 693 (2024). The private speech framework would compel this Court to apply at least intermediate scrutiny, if not strict. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348, 355 (1995); *Wooley v. Maynard*, 430 U.S. at 714. The preceding discussion addressing intermediate scrutiny would apply with full force.

## CONCLUSION

For these reasons, and the reasons discussed at oral argument, PhRMA is entitled to summary judgment on its Takings Clause and First Amendment claims. Neither party is entitled to summary judgment on PhRMA's Commerce Clause claim. Oregon is entitled to summary judgment on PhRMA's Supremacy Clause claim.

**IT IS SO ORDERED.**

DATED this 19th day of March, 2024.

/s/ Michael W. Mosman
Michael W. Mosman
United States District Judge

**APPENDIX C**

[FILED: FEBRUARY 16, 2024]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

| | |
|---|---|
| PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,<br>Plaintiff,<br>v.<br>ANDREW STOLFI, in his official capacity as Director of the Oregon Department of Consumer and Business Services,<br>Defendant. | Case No. 6:19-cv-01996-MO<br><br>DECLARATORY JUDGMENT |

**DECLARATORY JUDGMENT**

Pending before the Court are the Parties' Cross-Motions for Partial Summary Judgment on Plaintiff's challenge to Oregon's House Bill 4005, 2018 Or. L. Ch. 7. Plaintiff alleges that H.B. 4005 violates the Takings Clause of the Fifth Amendment of the United States Constitution; is preempted by the Defend Trade Secrets Act and the Supremacy Clause of the United States Constitution; violates the Commerce Clause of the United States Constitution; and violates the First Amendment of the United States Constitution.

The Court **GRANTS IN PART and DENIES IN PART** Plaintiff's Motion for Partial Summary Judgment, ECF No. 25, and **GRANTS IN PART and DENIES IN PART** Defendant's Motion for Partial Summary Judgment, ECF No. 29. Specifically, the Court **GRANTS** Plaintiff's Motion for Summary Judgment on its claim under the Takings Clause of the Fifth Amendment; **GRANTS** Defendant's Motion for Partial Summary Judgment on Plaintiff's preemption claim; **DENIES** the Parties' Cross-Motions for Summary Judgment on Plaintiff's Commerce Clause claim; and **GRANTS** Plaintiff's Motion for Summary Judgment on its First Amendment claim. ECF No. 71.

Per that ruling and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), the Court hereby:

(1) **DECLARES** that the publication of a manufacturer's trade secrets under the Public Interest Exception, House Bill No. 4005, 2018 Or. L. Ch. 7, § 2(10)(a), constitutes a taking of private property under the Fifth Amendment to the United States Constitution, and that any invocation of the Public Interest Exception by Defendant without simultaneously providing just compensation for that taking would accordingly violate the Fifth Amendment; and

(2) **DISMISSES WITH PREJUDICE** Plaintiff's claim that House Bill 4005, 2018 Or. L. Ch. 7, § 2(10)(a), is preempted by the Defend Trade Secrets Act and the Supremacy Clause; and

(3) **DECLARES** that H.B. 4005's reporting requirement, House Bill 4005, 2018 Or. L. Ch. 7, § 2(3), violates the First Amendment to the United States Constitution and is, therefore, unenforceable.

This judgment completely resolves Plaintiff's Fifth Amendment, preemption, and First Amendment claims. The Court hereby certifies that "there is no just reason for delay" of entry of final judgment on these claims. Fed. R. Civ. P. 54(b). The Court's entry of judgment at this stage will award Plaintiff with an enforceable declaratory judgment. The claims subject to this judgment involve no material facts intertwined with Plaintiff's remaining claim under the Commerce Clause, and allowing appellate review of this final judgment on fewer than all of Plaintiff's claims is likely to lead to the termination of this litigation. The Court therefore enters this judgment as its final judgment on the Second Claim (First Amendment), the Third Claim (Defend Trade Secrets Act and Supremacy Clause), and the Fourth Claim (Takings Clause of the Fifth Amendment) of Plaintiff's Complaint, ECF No. 1. Fed. R. Civ. P. 54(b). The Parties' Cross-Motions are **DENIED** in other respects consistent with the Court's oral ruling.

A full basis for these rulings, in addition to those stated on the record, will be set forth in a written opinion to follow.

DATED February 16, 2024.

/s/ Michael W. Mosman
Michael W. Mosman
United States District Court Judge

**APPENDIX D**

[FILED: OCTOBER 23, 2025]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>ANDREW R. STOLFI, in his official capacity as Director of the Oregon Department of Consumer and Business Services,<br>Defendant-Appellant. | No. 24-1570<br><br>D.C. No. 6:19-cv-01996-MO District of Oregon, Eugene<br><br>ORDER |

Before: BEA, KOH, and SUNG, Circuit Judges.

Judge Koh and Judge Sung voted to deny the petition for panel rehearing. Judge Bea voted to grant the petition for panel rehearing. Judge Koh and Judge Sung voted to deny the petition for rehearing en banc. Judge Bea recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the Court has requested a vote on the petition. Fed. R. App. P. 40. The petition for panel rehearing and rehearing en banc (Dkt. 61) is **DENIED**.

## APPENDIX E

The Prescription Drug Price Transparency Act of 2018, codified at Or. Rev. Stat. §§ 646A.680-692, provides, in relevant part:

> **§ 646A.689. Definitions; reporting requirements concerning drug manufacturing and pricing; penalty**
>
> (1) As used in ORS 646A.680 to 646A.697:
>
> (a) "Drug" has the meaning given that term in ORS 689.005.
>
> (b) "Health care facility" has the meaning given that term in ORS 442.015.
>
> (c) "Health care service contractor" has the meaning given that term in ORS 750.005.
>
> (d)(A) "Manufacture" means:
>
> > (i) The production, preparation, propagation, compounding, conversion or processing of a drug, either directly or indirectly by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and
> >
> > (ii) The packaging or repackaging of a drug or labeling or relabeling of a drug container.
>
> (B) "Manufacture" does not include the preparation or compounding of a drug by an individual for the individual's own use or the preparation, compounding, packaging or labeling of a drug:
>
> > (i) By a health care practitioner incidental to administering or dispensing a drug in the course of professional practice;

(ii) By a health care practitioner or at the practitioner's authorization and supervision for the purpose of or incidental to research, teaching or chemical analysis activities and not for sale;

(iii) By a health care service contractor for dispensing to a subscriber or delivery to a health care facility or outpatient clinic owned or operated by the health care service contractor or an affiliate of the health care service contractor;

(iv) By a centralized repackaging operation for distribution to subscribers of health care service contractors or to pharmacies, health care facilities or outpatient clinics operated by or affiliated with a health care service contractor; or

(v) By a health care facility for dispensing to a patient or other person.

(e) "Manufacturer" means a person that manufactures a prescription drug that is sold in this state.

(f) "New prescription drug" has the meaning prescribed by the Department of Consumer and Business Services by rule.

(g) "Patient assistance program" means a program that a manufacturer offers to the general public in which a consumer may reduce the consumer's out-of-pocket costs for prescription drugs by using coupons or discount cards, receiving copayment assistance or by other means.

(h) "Prescription drug" means a drug that must:

(A) Under federal law, be labeled "Caution: Federal law prohibits dispensing without prescription" prior to being dispensed or delivered; or

(B) Under any applicable federal or state law or regulation, be dispensed only by prescription or restricted to use only by health care practitioners.

(i) "Price" means the wholesale acquisition cost as defined in 42 U.S.C. 1395w-3a(c)(6)(B).

(2) No later than March 15 of each year, a manufacturer shall report the information described in subsection (3) of this section to the department regarding each prescription drug for which:

(a) The price was $100 or more for a one-month supply or for a course of treatment lasting less than one month; and

(b) There was a net increase of 10 percent or more in the price of the prescription drug described in paragraph (a) of this subsection over the course of the previous calendar year.

(3) For each prescription drug described in subsection (2) of this section, a manufacturer shall report to the department, in the form and manner prescribed by the department:

(a) The name and price of the prescription drug and the net increase, expressed as a percentage, in the price of the drug over the course of the previous calendar year;

(b) The length of time the prescription drug has been on the market;

(c) The factors that contributed to the price increase;

(d) The name of any generic version of the prescription drug available on the market;

(e) The research and development costs associated with the prescription drug that were paid using public funds;

(f) The direct costs incurred by the manufacturer:

(A) To manufacture the prescription drug;

(B) To market the prescription drug;

(C) To distribute the prescription drug; and

(D) For ongoing safety and effectiveness research associated with the prescription drug;

(g) The total sales revenue for the prescription drug during the previous calendar year;

(h) The manufacturer's profit attributable to the prescription drug during the previous calendar year;

(i) The introductory price of the prescription drug when it was approved for marketing by the United States Food and Drug Administration and the net yearly increase, by calendar year, in the price of the prescription drug during the previous five years;

(j) The 10 highest prices paid for the prescription drug during the previous calendar year in any country other than the United States;

(k) Any other information that the manufacturer deems relevant to the price increase described in subsection (2)(b) of this section; and

(L) The documentation necessary to support the information reported under this subsection.

(4) The department may use any prescription drug price information the department deems appropriate to verify that manufacturers have properly reported price increases as required by subsections (2) and (3) of this section.

(5) A manufacturer shall accompany the report provided under subsection (2) of this section with the

following information about each patient assistance program offered by the manufacturer to consumers residing in this state for the prescription drugs described in subsection (2) of this section:

(a) The number of consumers who participated in the program;

(b) The total value of the coupons, discounts, copayment assistance or other reduction in costs provided to consumers in this state who participated in the program;

(c) For each drug, the number of refills that qualify for the program, if applicable;

(d) If the program expires after a specified period of time, the period of time that the program is available to each consumer; and

(e) The eligibility criteria for the program and how eligibility is verified for accuracy.

(6) No later than 30 days after a manufacturer introduces a new prescription drug for sale in the United States at a price that exceeds the threshold established by the Centers for Medicare and Medicaid Services for specialty drugs in the Medicare Part D program, the manufacturer shall notify the department, in the form and manner prescribed by the department, of all the following information:

(a) A description of the marketing used in the introduction of the new prescription drug;

(b) The methodology used to establish the price of the new prescription drug;

(c) Whether the United States Food and Drug Administration granted the new prescription drug a breakthrough therapy designation or a priority review;

(d) If the new prescription drug was not developed by the manufacturer, the date of and the price paid for acquisition of the new prescription drug by the manufacturer;

(e) The manufacturer's estimate of the average number of patients who will be prescribed the new prescription drug each month; and

(f) The research and development costs associated with the new prescription drug that were paid using public funds.

(7)(a) After receiving the report or information described in subsection (2), (3), (5) or (6) of this section, the department may make a written request to the manufacturer for supporting documentation or additional information concerning the report. The department shall prescribe by rule the periods:

(A) Following the receipt of the report or information during which the department may request additional information; and

(B) Following a request by the department for additional information during which a manufacturer may respond to the request.

(b) The department may extend the period prescribed under paragraph (a)(B) of this subsection, as necessary, on a case-by-case basis.

(8) A manufacturer may be subject to a civil penalty, as provided in ORS 646A.692, for:

(a) Failing to submit timely reports or notices as required by this section;

(b) Failing to provide information required under this section;

(c) Failing to respond in a timely manner to a written request by the department for additional information under subsection (7) of this section; or

(d) Providing inaccurate or incomplete information under this section.

(9) Except as provided in subsection (10) of this section, the department shall post to its website all of the following information:

(a) A list of the prescription drugs reported under subsection (2) of this section and the manufacturers of those prescription drugs;

(b) Information reported to the department under subsections (3) and (5) to (7) of this section; and

(c) Written requests by the department for additional information under subsection (7) of this section.

(10)(a) The department may not post to its website any information described in subsection (9) of this section if:

(A) The information is conditionally exempt from disclosure under ORS 192.345 as a trade secret; and

(B) The public interest does not require disclosure of the information.

(b) If the department withholds any information from public disclosure pursuant to this subsection, the department shall post to its website a report describing the nature of the information and the department's basis for withholding the information from disclosure.

(c) A person may petition the Attorney General, as provided in ORS 192.411, to review a decision by the department to withhold information pursuant to paragraph (a) of this subsection.

(11) In accordance with ORS 646A.694, the department shall provide to the Prescription Drug Affordability Board established in ORS 646A.693:

(a) Each calendar year, a list of prescription drugs included in reports submitted under subsections (2) and (6) of this section; and

(b) Access to pricing information submitted to the department under subsections (3), (6) and (7) of this section.

(12) The department shall make available to consumers, online and by telephone, a process for consumers to notify the department about an increase in the price of a prescription drug. Any personally identifiable information about a consumer included in a notification provided to the department under this subsection, such as a consumer's name, address, telephone number or electronic mail address, is confidential and not subject to disclosure under ORS 192.311 to 192.478.

(13) The department may adopt rules as necessary for carrying out the provisions of this section.

(14) No later than December 15 of each year, the department shall compile and report the information collected by the department under this section to the interim committees of the Legislative Assembly related to health. The report shall include recommendations for legislative changes, if any, to contain the cost of prescription drugs and reduce the impact of price increases on consumers, the Department of Corrections, the Public Employees' Benefit Board, the Oregon Health Authority, the Department of Human Services, the Oregon Educators Benefit Board and health insurance premiums in the commercial market.

## APPENDIX F

The Prescription Drug Price Transparency Act of 2018, codified at Or. Rev. Stat. §§ 646A.680-692, provides, in relevant part:

**§ 646A.692. Penalties**

(1) A manufacturer that fails to report or provide information as required by ORS 646A.689 may be subject to a civil penalty as provided in this section.

(2) The Department of Consumer and Business Services shall adopt a schedule of penalties, not to exceed $10,000 per day of violation, based on the severity of each violation.

(3) The department shall impose civil penalties under this section as provided in ORS 183.745.

(4) The department may remit or mitigate civil penalties under this section upon terms and conditions the department considers proper and consistent with the public health and safety.

(5) Civil penalties collected under this section shall be paid over to the State Treasurer and deposited in the General Fund to be made available for general governmental expenses.

## APPENDIX G

Or. Admin. R. 836-200-0530(2)(h) (2019), provides, in relevant part:

**(2)** Prescription Drug Reporting - Price Increase. For drugs meeting the conditions specified in OAR 836-200-0515, the report furnished to the department must include the following information, along with any documentation necessary to support the information reported under this subsection:

* * *

**(h)** The factors that contributed to the price increase, including a narrative description and explanation of all major financial and nonfinancial factors that influenced the decision to increase the wholesale acquisition cost of the drug product and to decide on the amount of the increase;

* * *