Nos. 24-3654, 24-3655, 24-3700

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRESENIUS MEDICAL CARE ORANGE COUNTY, LLC, *et al.*,
Plaintiffs-Appellants,

and

JANE DOE, *et al.*,
Plaintiffs,

v.

ROB BONTA, in his Official Capacity as Attorney General of California, *et al.*,
Defendants-Appellees.

[CAPTIONS CONTINUED ON INSIDE COVER]

On Appeals from the United States District Court
for the Central District of California
Nos. 8:19-cv-02105 DOC (ADS) & 8:19-cv-02130 DOC (ADS) (Carter, J.)

RESPONSE AND REPLY BRIEF FOR PLAINTIFFS-APPELLANTS FRESENIUS MEDICAL CARE ORANGE COUNTY, LLC, FRESENIUS MEDICAL CARE HOLDINGS, INC. D/B/A FRESENIUS MEDICAL CARE NORTH AMERICA, DAVITA INC., AND U.S. RENAL CARE, INC.

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INTRODUCTION

The State that litigated this case before the district court would hardly recognize the State's brief on appeal. The State has wholly abandoned its core justification for AB290: protecting ESRD patients against being "steered" onto private insurance plans that, the State speculated, are not in their best interest. The State had to pivot away from its anti-steering rationale because, despite years of discovery, it adduced no evidence of steering, let alone patient harm resulting from such steering. That complete lack of evidence led the district court to correctly strike down the provision of AB290 that barred providers from steering patients toward, or even advising patients about, available insurance plans. The State did not appeal that decision.

The State now attempts to salvage what remains of AB290—chiefly the Reimbursement Penalty—by acting as though this case was never about the anti-steering rationale that it spent five years advancing. The State also abandons any claim that the law protects ESRD patients from harm, and indeed it does not dispute that the Reimbursement Penalty frustrates insurance access that is vital to many low-income, critically ill patients.

The State instead defends the Penalty on two new theories. First, the State claims that, by making it harder for ESRD patients to access commercial insurance, the Reimbursement Penalty will keep insurance premiums lower for

non-ESRD patients. Second, the State suggests that reducing ESRD patients' access to commercial insurance (even absent any evidence of steering or patient harm) will avoid "unjustly enriching" providers. The Legislature would not recognize these retooled interests, and the State cannot invent new rationales now.

Regardless, the State's new interests fail on their own terms. The State's own expert conceded that ESRD patients have not meaningfully impacted commercial insurance risk pools in California, and he could not show that AKF's financial assistance raises premiums for other non-ESRD patients. The State also identifies no evidence that the Reimbursement Penalty will lower premiums; indeed, even if AB290 did generate savings, nothing in the statute requires insurers to pass along any savings to insureds. The Reimbursement Penalty therefore does little more than harm ESRD patients and dialysis providers while increasing insurers' profits.

The State similarly fails to substantiate its unjust enrichment theory. Absent evidence of steering to the detriment of ESRD patients, there is nothing "unjust" about requiring private insurance companies to pay the rates they freely negotiated to pay dialysis providers. As a result, AB290 cannot survive any meaningful level of First Amendment scrutiny.

That leaves the State to assert that the First Amendment doesn't apply at all. The Supreme Court, however, rejected that position in *Americans for Prosperity*

Foundation v. Bonta, 594 U.S. 595 (2021), which held that restrictions on charitable contributions are subject to exacting scrutiny because they burden the right to *associate*—a right the State's brief all but ignores. The State's position also cannot be squared with the long line of precedent recognizing that contributions to mission-driven organizations are protected *expression*, both in their own right and because they facilitate their recipients' expression. The State's insistence that a "reasonable observer" would nonetheless view Providers' charitable donations as non-expressive is little more than an attempt to circumvent binding precedent holding that the existence of an economic benefit does not erase the First Amendment's protections.

Finally and perhaps most simply, the Reimbursement Penalty must fall because the Penalty cannot be severed from the Patient Disclosure Mandate, which the district court correctly held unconstitutionally compels AKF's speech. The State conceded below that the Reimbursement Penalty cannot function without the Disclosure Mandate, which the State described as "vital," "essential," and "necessary." Its attempts to walk back those concessions are improper and foreclosed by AB290's plain text.

ARGUMENT

I. THE REIMBURSEMENT PENALTY UNCONSTITUTIONALLY BURDENS FIRST AMENDMENT ASSOCIATION AND EXPRESSION

We start with the governing legal framework before turning (in §II) to its application to the facts. Nothing in the State's brief undermines Providers' showing that, at a minimum, "exacting scrutiny" applies here. As both long-established and recent authority make clear, Providers' contributions to AKF are exercises of their First Amendment rights to both association (*infra* §I.A.) and expression (§I.B). Because the Reimbursement Penalty burdens these rights, it is subject to at least exacting scrutiny.

A. Because It Burdens Associational Rights, The Reimbursement Penalty Triggers Exacting Scrutiny

1. As Providers' opening brief explains, *Americans for Prosperity Foundation v. Bonta* makes clear that deterring contributions to charitable organizations chills "an individual's ability to join with others to further shared goals" in violation of "freedom of association," and so triggers exacting scrutiny. 594 U.S. at 607, 618; *see* Providers' Br. 28-29, 38-39. The State's threshold error—like the district court's—is to ignore that the Reimbursement Penalty abridges Providers' freedom of association.

Bonta follows a long line of cases that "vigorously protect" the right to associate with expressive organizations, including to advance their "charitable …

activities." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622, 626-627 (1984). One way such protected associations are formed is by making financial contributions. *E.g.*, *Bonta*, 594 U.S. at 618; *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (a "contribution … 'serves to affiliate a person with'" the recipient (quoting *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976)); Providers' Br. 28-29.

On the undisputed facts here, these principles require heightened First Amendment scrutiny of the Reimbursement Penalty. The State concedes that AKF is an expressive organization with a genuine charitable mission, Providers' Br. 10-11, 29-30, meaning that burdens on associating with AKF trigger First Amendment protection, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). The State also concedes that Providers contribute to AKF in part to support its mission of advocacy, education, and charity. State Br. 27 (Providers "have a subjective intent to express support for AKF's mission through their contributions"); Providers' Br. 35-36. And the State does not deny that AB290's Reimbursement Penalty harshly penalizes these contributions: If Providers contribute to AKF, AB290 replaces the reimbursement rates that insurers freely contracted to pay with payment levels that (the State also concedes) are often at or below the cost of providing care. Providers' Br. 18.

That should resolve the matter. Under *Bonta* and its predecessors, these undisputed facts mean the Reimbursement Penalty is subject to exacting scrutiny.

2. Directly contravening this precedent, the State argues that the First Amendment does not apply *at all*. The State contends instead that charitable contributions are protected only if a "reasonable observer" would perceive a party's act of making a particular contribution to be "meaningfully expressive"—and even then, protected only by intermediate scrutiny. *See* State Br. 26-31. The State cites no case that so holds, and Providers are aware of none.

Indeed, the State's argument conflicts with *Bonta*. There, the Supreme Court applied exacting scrutiny to invalidate a California law that burdened charitable contributions without ever asking what a "reasonable observer" would think about any particular contribution—even though California defended the law in *Bonta* on the very similar ground that it would purportedly prevent "charitable fraud and self-dealing." *Bonta*, 594 U.S. at 597; *see* Brief for Respondent, *Bonta*, No. 19-251, at 53 (U.S. March 24, 2021) (defending the law as "helping to identify when a donor uses a charity to funnel contributions for the donor's own benefit"). (Perhaps this is why the words "reasonable observer" appear nowhere in the State's district court briefs in this case, and why the State does not mention *Bonta* until page 42 of its brief on appeal.) Instead, *Bonta* held the law "facially unconstitutional"—that is, invalid "in every case." 594 U.S. at 618. The Court could not have facially invalidated California's law if the First Amendment protected only the individual contributions that a "reasonable observer" would

understand to be expressive. Indeed, the State's position that charitable contributions lose First Amendment protection if a reasonable observer does not understand them to be expressive would render *Bonta* incomprehensible, given that the California law there compelled disclosure of *anonymous* contributors, who by definition were not engaging in public expression that a "reasonable observer" would be in a position to assess. *Id.* at 617.[1]

Bonta did not apply the State's "reasonable observer" test to contributions for good reason. The "reasonable observer" test is a tool courts use to decide whether conduct qualifies as protected expression because it "would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *see also United States v. O'Brien*, 391 U.S. 367, 369 (1968). But a charitable contribution to a bona fide expressive organization is an axiomatic act of association protected by the First Amendment. *See Bonta*, 594 U.S. at 618; *McCutcheon*, 572 U.S. at 203. And that quintessential associative act facilitates protected expression by the organization. *See Knox v. Service Emps. Int'l Union*, 567 U.S. 298, 309 (2012) ("[T]he ability of like-minded

[1] To reject the State's "reasonable observer" case-by-case test is not to say "that the First Amendment categorically protects charitable financial contributions." State Br. 30. To be protected by the First Amendment as expressive association, contributions must be made to organizations actually engaged in protected expression. The State does not deny that AKF is such an organization and that Providers' donations are intended in part to further AKF's mission.

individuals to associate for the purpose of expressing commonly held views may not be curtailed."); *Buckley*, 424 U.S. at 65 (association "is protected because it enhances '(e)ffective advocacy'" (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958))). Indeed, associational rights cases *require* that the association "engage in some form of expression." *Dale*, 530 U.S. at 648. Whether a reasonable observer thinks an individual's act of affiliating with the organization is itself expressive has no bearing on whether a law deterring that affiliation impairs *the organization's* expression and so impairs individuals' ability to "engage in association for the advancement of beliefs and ideas." *NAACP*, 357 U.S. at 460.

Nor can the First Amendment's protection of association turn on an outside observer's evaluation of whether the individual benefits from that association. The State's test would leave unprotected an individual's legitimate participation in a group's expressive efforts—donating to a political action committee, paying union dues, or attending a local rally because they support the candidate or the cause—simply because that individual's act of affiliation or expression entails a financial benefit. That sort of purity test is anathema to the First Amendment, which protects the right to associate even for *purely* "economic" as well as "political, social, … educational, religious, and cultural ends." *Jaycees*, 468 U.S. at 622.

Here, the State concedes that AKF is an expressive organization and that Providers contribute to AKF in part to advance its charitable mission. Because it is also undisputed that the Reimbursement Penalty deters Providers' contributions to AKF, Providers' associational rights are directly burdened and exacting scrutiny applies. *Cf. Dale*, 530 U.S. at 659 (holding that the *O'Brien* test, which applies to laws that burden conduct understood by observers to have a communicative element, was "inapplicable," because the law at issue "directly and immediately affect[ed] associational rights").

3. The State offers no sound basis to distinguish the *Bonta* line of associational rights cases. As to *Bonta* itself, the State contends only (1) that it involved "disclosure requirements" that (2) allegedly were intended to cause "chilling effect[s]." State Br. 42, 43.

First, it does not matter that the mechanism by which the State abridged contributors' associational rights here is a financial sanction while in *Bonta* it was a disclosure rule. "Government actions that may unconstitutionally infringe upon this freedom [of association] can take a number of forms," including "penalties" and "disclosure of the fact of membership." *Jaycees*, 468 U.S. at 622-623. What matters is that the object of the regulation—charitable giving, in both cases—is a protected exercise of associational rights. If anything, the Reimbursement Penalty more obviously infringes associational rights than the disclosure rule in *Bonta*, for

its deterrent effects are *certain* to materialize: AB290 directly reduces reimbursement rates due to providers' contributions. In contrast, the deterrent effect in *Bonta* stemmed from what contributors feared third parties *might* do if knowledge of their contributions leaked. *See* 594 U.S. at 604. The State's view—that *Bonta* would have come out differently had the State imposed financial penalties on donors rather than merely required confidential disclosure of their identities—defies credulity.

Second, the relevant question is not whether the State *intends* to chill First Amendment activity but whether there is a "risk of a chilling *effect*." *Bonta*, 594 U.S. at 618 (emphasis added); *see id.* at 607 (exacting scrutiny required where there is a "'deterrent effect on the exercise of First Amendment rights'" (quoting *Buckley*, 424 U.S. at 65)). In any event, Providers have shown that "the State is seeking" to chill protected conduct. State Br. 43. Indeed, it is undisputed that "the law's very purpose is to 'remove incentive[s]' for dialysis providers to contribute to AKF." Providers' Br. 40 (quoting legislative record).

Nor can the State distinguish *Bonta*'s predecessors. The State tries to differentiate cases like *Jaycees* and *Dale* because they "involved disputes regarding *membership* in charitable organizations, not financial contributions." State Br. 29. But *Bonta*—which relied on *Jaycees*—involved contributors, not members. *See* 594 U.S. at 618; *id.* at 609 (the First Amendment protects

"members *and supporters*" (emphasis added)). Moreover, the Supreme Court repeatedly has held that the First Amendment protects association specifically "by means of financial support," *McCutcheon*, 572 U.S. at 204, because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate," *Buckley*, 424 U.S. at 22.

Elsewhere, the State seeks to distinguish cases holding that financial contributions trigger exacting scrutiny in the political context. State Br. 29-30; *compare* Providers' Br. 28-29 (discussing cases). But "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups," *Dale*, 530 U.S. at 648; it extends to "a wide variety of political, social, economic, educational, religious, and cultural ends," *Jaycees*, 468 U.S. at 622. In *Bonta*, the contributions were to "charitable organizations," 594 U.S. at 600, not political ones. And *Bonta* relied on cases involving both political and non-political groups because "'it is immaterial' to the level of scrutiny 'whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.'" *Id.* at 608.

B. The Reimbursement Penalty Also Burdens Expression, Thereby Triggering Heightened Scrutiny

For the foregoing reasons, the burden on Providers' associational rights alone triggers exacting scrutiny. Heightened scrutiny also independently applies because Providers' contributions constitute protected expression. As the Supreme

Court has repeatedly held, contributions to mission-driven, expressive organizations are protected speech because they both express support for the recipient and facilitate the recipient's expression. *See* Providers' Br. 28-30. The State urges the Court to ignore these precedents in favor of what it labels the *Interpipe* "framework" (State Br. 24-25 & n.6)—three scenarios in which "[c]onduct-based laws may implicate speech rights," *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018). But *Interpipe* itself recognized that laws burdening "the right of an individual to express herself through the medium of finance" are subject to different and stronger First Amendment protection. *Id.*

In any event, even application of the *Interpipe* framework confirms that heightened First Amendment scrutiny applies here. Because Providers' contributions express support for AKF and its charitable mission, they "communicate[] a message." *Id.*; *infra* §I.B.1. Because the contributions facilitate AKF's own expression, they also "bear[] a tight nexus to a protected First Amendment activity." *Interpipe*, 898 F.3d at 895; *infra* §I.B.2. And a "reasonable observer" would understand what the State concedes to be true: Providers' contributions express support for AKF's mission in addition to being in Providers' financial interest. This "expressive element" triggers heightened scrutiny as well. *Interpipe*, 898 F.3d at 895; *infra* §I.B.3. Even under the State's preferred framework, therefore, AB290 is subject to heightened First Amendment scrutiny.

1. Providers' contributions to AKF are protected expression

As Providers explained (at 28-29, 39), "[t]he Supreme Court has acknowledged that contributions, in both charitable and political contexts, function as a general expression of support for the recipient and its views and, as such, are speech entitled to protection under the First Amendment." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002).[2] A corporation, for example, "engages in expressive conduct when it decides which charities to support." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254-1255 (11th Cir. 2021). That is because making a "contribution 'serves as a general expression of support'" for the recipient and its views. *McCutcheon*, 572 U.S. at 203 (quoting *Buckley*, 424 U.S. at 21).

The State agrees with this principle. State Br. 43 (conceding that heightened scrutiny applies to laws that burden "charitable contributions that are primarily expressive in nature"); *id.* at 29 ("in many circumstances, charitable financial contributions will qualify for First Amendment protection"). Indeed, *Interpipe* recognized that "the First Amendment protects the right of an individual to express herself through the medium of finance," 898 F.3d at 894, and emphasized that the

[2] The State is wrong that *Kamerling* "actually supports the State's position." State Br. 30-31. The Second Circuit held that the plaintiff's right to contribute was not actually infringed because she could do the expressive thing she wanted to do without penalty: send her Social Security earnings back to the government. Here, by contrast, Providers cannot contribute to AKF without facing a financial penalty.

wage law at issue there was permissible in part because it did not "prevent [anyone] from contributing" to the recipients, *id.* at 891.

In search of an exception to the general rule that charitable contributions are expressive, the State asserts that "having a financial relationship with an entity that" provides premium assistance "is a business activity" that "does not itself 'communicate[] a message.'" State Br. 25. But the so-called "financial relationship" at issue here is formed by contributing to a concededly expressive charitable organization. Providers' Br. 58. That is nothing like the "employer's payment of wages" at issue in *Interpipe*. *Contra* State Br. 25; *see* Providers' Br. 33-34. And the State's effort to erase the expressive character of Providers' contributions runs headlong into its concession that "many charitable contributions are properly viewed as expressive even though they may provide some financial benefit." State Br. 31.

Where conduct itself "communicates a message," *Interpipe*, 898 F.3d at 895, the less protective framework set forth in *O'Brien* does not apply. *See Green v. Miss United States of Am., LLC*, 52 F.4th 773, 790 (9th Cir. 2022) (a "statute's direct operation on … speech itself" is not "incidental," and so is not "analyz[ed] … under *O'Brien*"). *Buckley* illustrates the point. The government there argued that *O'Brien*'s intermediate scrutiny applied on the ground "that what the Act regulates is conduct." 424 U.S. at 15-16. *Buckley* rejected that argument, holding

that "contribution … limitations" are not "comparable" to "restrictions on conduct" that have only a "'communicative *element*'" under *O'Brien*. 424 U.S. at 16 (cleaned up) (emphasis added). Rather, contribution limits are subject to a more searching standard that requires the government to show "a sufficiently important interest and ... means closely drawn to avoid unnecessary abridgment" of First Amendment rights. *Id.* at 25.

2. Providers' contributions are protected by the First Amendment because they facilitate AKF's expressive activities

The First Amendment separately protects Providers' contributions to AKF because they facilitate AKF's expressive activities and thus "bear[] a tight nexus to a protected First Amendment activity." *Interpipe*, 898 F.3d at 895; *see also id.* at 892 (recognizing "a contributor's right to fund an entity's speech"). As Providers' opening brief explains (at 10-11, 30), and the State does not dispute, AKF depends on Providers' contributions to engage in protected expressive conduct, including political organizing, private and public education, and the HIPP program itself.

Buckley recognized that penalizing contributions to expressive organizations "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," and so triggers rigorous constitutional scrutiny. 424 U.S. at 19; *id.* at 65 n.76 (rejecting government's request for a more lenient standard of review because money is "a

necessary and integral part of … perhaps most[] forms of communication"). Just as restricting political contributions "plainly impairs freedom of expression" because it "limit[s]" the recipient's "expenditures" on speech, limiting charitable contributions "plainly impair[s]" a charitable organization's "expenditures" on its protected advocacy. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299 (1981). "'[M]ore speech, not less, is the governing rule' under the First Amendment," and "'[m]ore speech' often means 'more money.'" *Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684, 687 (9th Cir. 2010).

The State's only response is to deny that the Reimbursement Penalty "single[s] out" any expressive entities. State Br. 28-29. That is incorrect: AB290 expressly targets both AKF—which the State concedes is an expressive organization—and AKF's principal contributors. Providers' Br. 30, 41.

3. Providers' contributions are protected by the First Amendment because they have an "expressive element"

Providers' contributions to AKF are thus expressive twice over, regardless of the "reasonable observer" test. That is perhaps why the State can cite no decision applying that test to contributions of any kind. But if the reasonable observer test did apply, a reasonable observer would conclude that Providers' charitable contributions have an "expressive element," and are thus protected by, at minimum, intermediate scrutiny. *Interpipe*, 898 F.3d at 895.

As Providers' opening brief details (at 34-36)—and the State does not dispute—Providers contribute to AKF in part to express support for AKF's critical mission of aiding people who suffer from the unique burdens of kidney disease. A reasonable observer would recognize that AKF is a bona fide charitable organization, and that it is deeply committed to serving a uniquely vulnerable population. *See* Providers' Br. 10-12; *cf. Krishna Lunch of S. California, Inc. v. Gordon*, 797 F. App'x 311, 313 (9th Cir. 2020) ("[T]he organization's actions are also communicative because of the identity of the organization."). And a reasonable observer would understand why Providers—who are healthcare providers—would support AKF's mission to help the population of ESRD patients that Providers serve, regardless of any financial benefit. The State does not dispute that dialysis makes it difficult to maintain employment, that not every ESRD patient qualifies for public insurance, that Medicare does not fully cover patients' costs, and that access to private insurance is critical for many ESRD patients. *See* Providers' Br. 7-11; *cf. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1242 (11th Cir. 2018) (actions touching on "an issue of concern in the community" more likely to be understood as expressive).

A reasonable observer would also understand that the HIPP program is structured to put patients' interests first. In accordance with longstanding federal guidance, Providers never direct patients toward any insurance option or condition

their contributions on how AKF will disburse them. Providers' Br. 13, 37. AKF alone retains the independent discretion to determine how contributions are used. *Id.* at 37. And premium assistance "follow[s] a patient regardless of which provider the patient selects." *Id*. at 36-37. Consistent with the fact that the vast majority of ESRD patients are on government plans, most patients who receive AKF's assistance choose public over private insurance, and the overwhelming majority who elect private insurance use premium assistance to *maintain* their existing coverage. *Id.* at 8, 12, 49. This only confirms that contributions are not the "quid pro quo" that the State contends. State Br. 26.[3]

The State ignores all of this and insists that Providers' life-saving contributions to AKF are not expressive because they are, in part, "financially motivated." State Br. 28. Remarkably, the State's principal support for this argument, *see id.*, comes from *Edge v. City of Everett*, 929 F.3d 657, 669 (9th Cir. 2019), which involved "baristas[] wearing pasties and g-strings" while "solicit[ing] tips." That conduct bears no resemblance to AKF's life-saving premium

[3] There is nothing untoward about AKF asking Providers to contribute their "fair share." State Br. 27. After all, HIPP cannot serve patients if Providers stop contributing. But there is no dispute that AKF does not earmark contributions to specific HIPP recipients. 3-PER-450-452, 454; 1-SER-169, 182. The State's other record cites merely show that Providers also financially benefit from the contributions (*e.g.*, 1-SER-54-55, 122, 214) or restate the State's own flawed conclusions about the nature of the arrangement (*e.g.*, 1-SER-66, 1-PER-49).

assistance. And the State cites no evidence to support its assertion that a reasonable observer would ignore the full context of Providers' contributions, which makes plain that Providers' contributions, like many corporate charitable donations, are *both* expressive *and* economically beneficial. At the very least, Providers' evidence raises a dispute of fact as to the expressive element of their contributions that precludes granting the State summary judgment.

Ultimately, the State's "reasonable observer" argument boils down to a poorly disguised attempt to circumvent clear precedent holding that even a *purely* economic motive does not strip expression of its First-Amendment protection. After all, "a great deal of vital expression" "results from an economic motive." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). If the State is right, contributions to an expressive charity would receive less constitutional protection than merely "propos[ing] a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation omitted). That cannot be right.

II. THE REIMBURSEMENT PENALTY FAILS ANY FORM OF FIRST AMENDMENT SCRUTINY

The foregoing discussion makes clear that the First Amendment applies here and imposes exacting scrutiny. But the Reimbursement Penalty fails even intermediate scrutiny. Providers' opening brief showed that the Reimbursement Penalty cannot stand on the grounds that the State advanced below—namely,

preventing Providers from "steering" patients to commercial insurance to the supposed detriment of patients and the market, and to Providers' profit. Providers' Br. 43-50. And Providers explained why the district court's alternative justification—addressing a "market failure" related to Providers' purported oligopoly power—likewise failed. Providers' Br. 50-52.

On appeal, the State pivots to two new rationales: preventing insurance premiums from rising for non-ESRD patients when ESRD patients "shift" to private insurance, "regardless of whether those patients are 'steered'" toward that insurance against their interests; and preventing providers from "unjustly enriching" themselves in these circumstances. State Br. 22, 37-38 & n.9. But the Legislature's interest in lowering premiums and preventing unjust enrichment was entirely premised on claims about steering that the State no longer defends. And that is fatal; under even intermediate scrutiny, the State cannot invent new justifications on appeal. *Infra* §II.A.

The State's interests also fail on their own terms. The State's expert admitted he had no evidence that Providers' charitable contributions increased premiums in California and acknowledged that the State "successfully" maintained a "consistent" risk pool in its Affordable Care Act (ACA) exchange. 1-SER-242. And regardless, the State offered no evidence that the Reimbursement Penalty would decrease premiums, rather than provide a windfall to insurers. *See infra*

§II.B. As to "unjust enrichment," absent any harmful steering, there is nothing "unjust" about commercial insurers paying the rates that they freely negotiated and agreed to pay. *See infra* §II.C.

A. The State's New Rationales All Founder On The Conceded Lack of Steering

The State cannot salvage the Reimbursement Penalty with revisionist justifications at odds with the law's actual aims. "Government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (brackets and citation omitted). Courts applying even intermediate scrutiny therefore will not accept "stated interests" that "are not the actual interests served by the [challenged] restriction." *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982), which held that "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification"); *see also Cornelio v. Connecticut*, 32 F.4th 160, 172-173 & n.5 (2d Cir. 2022) (intermediate scrutiny requires assessing "actual purpose of the law"). The State's reliance on reinvented rationales is fatal to its defense.

Start with what AB290 was actually enacted to do: "address steering of patients into commercial insurance by financially interested providers," because

(the Legislature thought) such "steering injures patients" and "harms the public by distorting the insurance risk pool, causing health insurance premiums to rise." 3-PER-343, 353 (Defendants' summary judgment reply). AB290's text expressly characterizes the source of the harm it seeks to redress as "schemes" of "[e]ncouraging" and "steer[ing]" patients toward commercial insurance. AB290 §1(c), (d), (e), (i). True to that stated purpose, the State has until now defended the Penalty as preventing steering and the harm it supposedly causes. *See* 5-PER-930, 3-PER-343.

The problem for the State is that there never has been evidence of *any* steering, let alone *harmful* steering. The district court held as much in striking down the Advising Restriction—the provision that *directly* outlawed purported steering. Per the district court, the State could not "identify a single California patient steered into a private insurance plan by a dialysis provider or third-party payer." 1-PER-44 (citation omitted). And "the State ha[d] not met its burden of showing patient harm that has resulted from this supposed steering." 1-PER-42.

The State does not ask to reinstate the Advising Restriction, nor does it challenge the district court's findings concerning steering. *See* State Br. 58-59. Instead, the State attempts to pivot to two post hoc rationales untethered from steering and patient harm.

Increased Premiums to Non-ESRD Patients. The State now argues that, irrespective of steering, charitable premium assistance "causes all enrollees to 'pay higher health insurance premiums due to the distortion of the insurance risk pool.'" State Br. 34 (partially quoting AB290 §1(e)); *see id.* at 37 n.9. But the State omits the full statutory quote, which makes clear that the Legislature was concerned about distortion *from steering*: "Consumers also pay higher health insurance premiums due to the distortion of the insurance risk pool *caused when providers steer patients* into particular insurance plans." AB290 §1(e) (emphasis added); *see* Providers' Br. 48.

Absent steering, the State's newly asserted interest boils down to keeping low-income ESRD patients off commercial insurance to reduce premiums for non-ESRD patients. But the Legislature had no such interest. The State does not deny that commercial insurance is the only option for some patients and that it can provide better coverage, transplant access, and health outcomes. *See* Amicus Brief for Cal. Med. Ass'n 11; Amicus Brief for Cal. State Conf. of the NAACP 6-8; Providers' Br. 8-10. And AB290 has always been concerned with *preventing* harm to ESRD patients, *see, e.g.*, AB290 §1(d), (i)—not causing them harm in the hopes of saving money elsewhere in the insurance system.

California's longstanding support for measures that help sick, low-income patients afford the insurance of their choice underscores that the Legislature did

not enact AB290 to keep members of that vulnerable population off commercial insurance to reduce costs for healthier, wealthier patients, as the State's new defense would have it. For example, as the State's expert explained, the State's healthcare exchange, Covered California, has "devot[ed] a significant percentage of its annual budget to ensuring" awareness that "financial assistance is available to help make coverage more affordable." 1-SER-241. AB290 itself reinforces that "health care service plan[s]" may not "deny coverage to an enrollee whose premiums are paid by a third party." AB290 §3(m)(3); *see also* §5(m)(3). And the State has defended the Affordable Care Act precisely on the ground that it enables low-income patients with pre-existing conditions to obtain commercial insurance where it suits their needs. *See, e.g.*, Opening Brief for Petitioners, *California v. Texas*, No. 19-840, at 45-46 (U.S. May 6, 2020) (counting among the ACA's "profound benefits" the fact that, by 2017, "more than 100 million Americans with pre-existing health conditions" were benefitting from the provisions forbidding insurers from denying them coverage or charging them excessive premiums).

Unjust Enrichment. As to "unjust enrichment," the Legislature made clear that its concern with providers "unjustly driv[ing] up the cost of care" likewise presupposed that patients were being "harm[ed] … *by being steered* into coverage options that may not be in their best interests." AB290 §1(i) (emphasis added); *id.* §1(c); *see* 3-PER-578 (State arguing that "[t]his practice"—*i.e.*, steering—

"result[s] in an unjust enrichment" for Providers). Apart from steering and the associated harms, there is no basis for believing that Providers' freely negotiated rates with insurance companies are unjust. *See infra* §II.C.

Because these justifications were invented on appeal, they cannot save the Reimbursement Penalty.

B. The State's Argument That The Reimbursement Penalty Reduces Insurance Premiums Fails For Additional Reasons

In any event, the State's newly claimed interest in preventing ESRD patients from using financial assistance to obtain commercial insurance in the hopes of reducing premiums for non-ESRD patients does not survive even intermediate scrutiny. State Br. 37 n.9. The State's theory is that Providers' support for premium assistance has "facilitated a substantial shift of ESRD patients into commercial insurance plans." *Id.* at 34. And, the State theorizes, because ESRD patients are more expensive "than non-ESRD patients," this "shift[]" "causes all enrollees to 'pay higher health insurance premiums due to the distortion of the insurance risk pool.'" *Id.* (citation omitted). The State has not remotely substantiated that theory of harm, and the Reimbursement Penalty is not tailored to address it.

1. The State musters no evidence that Providers' contributions to AKF increased insurance premiums

The State has failed to support its new theory that Providers' contributions to AKF raise premiums because they "facilitate[] a substantial shift of ESRD patients into commercial insurance plans." State Br. 34; *id.* at 19 (positing that "an influx of ESRD patients … into commercial insurance plans would likely lead to an increase in premiums"). Breaking that theory down to its component parts, the State must show that (1) premium assistance shifts a substantial number of ESRD patients onto commercial insurance plans, (2) thereby distorting the insurance risk pool, and (3) ultimately raising premiums for non-ESRD patients.

The State has not substantiated any link in its hypothesized chain. First, its expert Mr. Bertko ultimately claimed to identify an increase of around 700 ESRD patients enrolled in Covered California between 2015 and 2016. 1-SER-279.[4] But Mr. Bertko only "assum[ed]" that any increase between 2015 and 2016 was caused by premium assistance and steering—as opposed to, for example, the recently effective prohibition on discriminating against pre-existing conditions, such as end-stage renal disease. 1-SER-281-282; *see* 3-PER-528. The State cannot carry its burden with unsupported assumptions. *See, e.g.*, *Junior Sports Mags. Inc. v.*

[4] That modest increase was less than one-quarter of what Mr. Bertko originally claimed in his report, before acknowledging he "misstate[d]" the numbers. 1-SER-271.

Bonta, 80 F.4th 1109, 1115, 1118 (9th Cir. 2023) (intermediate scrutiny requires "'evidentiary support,'" not "inferences" (citation omitted)). And Providers introduced expert testimony that Mr. Bertko's calculations ignored a 2015 change in diagnosis codes such that he had effectively compared three months of 2015 patient data with twelve months of 2016 patient data, rather than detecting an actual increase in enrollees. 3-PER-524-525. At minimum, summary judgment in the State's favor cannot rest on this contested data.

The State's failure of proof is even greater at the second step, the heart of the State's theory. Mr. Bertko himself confirmed that there has been no meaningful change to the risk pool. He opined that Covered California had "sought successfully … to keep the health 'risk mix' of enrolled consumers to a level that has been consistent" during years the ACA was in effect and AKF was providing premium assistance. 1-SER-242-243; *see also* 4-PER-646 (State agreeing with this characterization of Mr. Bertko's testimony). Simply put, the risk pool did not meaningfully change—so if there were any premium increases, they were not caused by AKF's premium assistance.

But even if the composition of the risk pool had changed, the State failed to show a resulting increase in premiums, much less an increase attributable to AKF's premium assistance (step three of the State's chain of reasoning). The State cites estimates that an influx of ESRD patients into the commercial risk pool *could* raise

premiums for others. State Br. 34-35. But the State's own evidence shows this hypothetical concern is unfounded: Mr. Bertko—the chief actuary for Covered California—testified that he *could not* attribute any premium increases to an increase in ESRD patients (and certainly not to those ESRD patients who receive premium assistance). *See* 1-SER-285-288.[5] That is hardly surprising, as the number of California ESRD patients with commercial insurance receiving premium assistance is small and, as the district court noted, Mr. Bertko testified that "small changes in the risk mix of the insurance pool would not necessarily lead to higher insurance premiums." 1-PER-44.

Out of evidence, the State resorts to so-called "common sense." State Br. 35. It reasons that some of Providers' AKF contributions fund premium assistance, which enables some ESRD patients to afford private insurance, resulting in "increased healthcare costs" for others in the system. *Id.* But that guesswork (again, undercut by the State's own expert) incorporates all manner of suppositions about price negotiations and pass-through in the complex insurance market. And more fundamentally, intuition is not enough under the First Amendment: "California cannot merely gesture to 'common sense' to meet its

[5] The AKF-commissioned report the State cites (at 35-36) underscores the point, estimating a negligible impact on individual insurance premiums in California even assuming *all* ESRD patients (whether or not they receive premium assistance) were forcibly removed from the insurance pool. *See* 2-SER-302-303.

burden of showing that the law will 'significantly' advance its goals." *Junior Sports*, 80 F.4th at 1119. Rather, the government's "inferences"—even if "reasonable" in the abstract—must be "based on substantial evidence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion); *Junior Sports*, 80 F.4th at 1119 ("In the end, California spins a web of speculation—not facts or evidence … . The First Amendment cannot be so easily trampled through inferences and innuendo.").[6]

Unable to marshal evidence to support its theory of premium increases, the State faults Providers for not introducing evidence disproving that premium assistance for some would raise premiums for others. State Br. 35-36. But it is the State that "must demonstrate that the recited harms are real, not merely conjectural." *Turner*, 512 U.S. at 664 (plurality opinion). The argument is also wrong: Providers submitted unrebutted expert analysis that there was no correlation between the prevalence of ESRD patients and individual insurance premiums in California. *See* 3-PER-535-539.

[6] "[A] state can invoke 'common sense' only if the connection between the law restricting speech and the government goal is so direct and obvious that offering evidence would seem almost gratuitous." *Junior Sports*, 80 F.4th at 1118. But the law has long recognized that "evidentiary complexities and uncertainties" preclude courts from simply assuming that price changes will be passed through to end purchasers. *See, e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-732, 741-743 (1977).

The evidence—both Providers' and the State's—shows no impact on premiums. This Court therefore should grant summary judgment to Providers. At a bare minimum, given Providers' expert evidence, *supra* 26-27 & n.4, there is a dispute of fact about whether Providers' contributions cause a meaningful impact to the risk pool, let alone to premiums—or whether any marginal impact, offset by any resulting harm to ESRD patients, is sufficient to justify the Reimbursement Penalty. Either way, the grant of summary judgment to the State cannot stand.

2. The Reimbursement Penalty is not tailored to reducing premiums

The Reimbursement Penalty fails for the separate reason that it is not tailored to serve the State's interest in reducing premiums supposedly inflated by premium assistance. That is true under both exacting and intermediate scrutiny. *See* Providers' Br. 53 (describing tailoring standards); State Br. 38, 44 (same).

Most importantly, AB290 does nothing to actually serve the State's purported interest in reducing premiums for patients. That is because the Reimbursement Penalty operates by cutting the rates *insurers* must pay *providers*. It does not require or even encourage insurance companies to pass along any savings to consumers. *See* AB290 §3(e). For that reason, as Providers' expert opined, expelling low-income patients that receive AKF's assistance from commercial insurance likely would not lower premiums. *See* 3-PER-533-539. And a law that merely transfers money from providers to insurers does not further

the State's purported interest in consumer welfare "in a direct and material way," as even intermediate scrutiny requires. *See United States v. National Treasury Emps. Union*, 513 U.S. 454, 475 (1995) (citation omitted); *see also Turner*, 512 U.S. at 664 (plurality opinion) (applying *O'Brien*).

AB290 is also fatally overinclusive. The Reimbursement Penalty is triggered by *any* contribution to a covered charity, even if the contribution is small, even if the contribution supports patients on public insurance, and even if the contribution does not go toward premium assistance *at all*. Providers' Br. 55-56. Here, it is undisputed that most patients receiving AKF's premium assistance use that assistance to pay *government* premiums rather than for private insurance, and that Providers' contributions also advance AKF's other charitable, political, and educational initiatives. *See* Providers' Br. 11-12, 30; 5-PER-878-879. Yet Providers are still punished for treating any premium-assisted patient. The State's decision to sweep in contributions to AKF (and other charities), regardless of whether those contributions are connected to the State's purported interest, is fatal under any applicable tailoring test. *See* Providers' Br. 54-55 (discussing less speech-restrictive alternatives).

The Reimbursement Penalty is underinclusive, too. *See, e.g.*, *Valle del Sol Inc. v. Whiting*, 709 F.3d 808, 827-828 (9th Cir. 2013) ("underinclusivity" is a relevant consideration in whether law sufficiently advances state interest). Though

any financial support that lets patients choose commercial insurance would "distort[] insurance markets" through "subsidizing," the State did not restrict other forms of aid that make commercial insurance affordable. State Br. 40. Its chosen means—targeting Providers' donations to AKF—make sense only in light of AB290's (unfounded and now-abandoned) concern about steering. The State's decision to exempt dialysis providers with less than 10% market share underscores the mismatch between the Reimbursement Penalty and the State's justification for the Reimbursement Penalty, *see* AB290 §3(h)(2)(C), for contributions from those providers likewise facilitate the very "problem" the State now claims to be addressing.

C. The State's Argument That The Reimbursement Penalty Prevents Unjust Enrichment Fails For Additional Reasons

The State's additional asserted "interest in preventing the unjust enrichment of dialysis providers," State Br. 63, likewise fails to justify the Reimbursement penalty under any degree of scrutiny.

As an initial matter, and as explained above (at 21-22), the Legislature was clear that its concern with unjust enrichment was premised on its concern with steering. The State has acknowledged this. *See* 3-PER-578. That is fatal to the State's new argument, which now has nothing to do with steering.

In any event, without steering—much less any *harm* from steering—there is nothing "unjust" about Providers receiving the reimbursement rates insurers freely

agreed to pay. Nor does the State even assert there is anything unjust about those rates in and of themselves. After all, it is common for commercial reimbursement rates to be higher than the rates negotiated by the federal government; ESRD treatment is hardly unique in this regard. And as the State does not dispute, Medicare rates for ESRD in particular can be *below* the cost of care, and so Providers need a minimum number of commercial payers to keep their doors open to all. Providers' Br. 10; *see* 4-PER-625-626. The State offers no evidence—and barely any argument—to the contrary.

Ultimately, insurance companies may consider it "unjust" that the Affordable Care Act requires them to provide coverage to patients with substantial medical needs whom they would rather exclude. But they freely negotiated reimbursement rates with Providers against that backdrop. And because the Reimbursement Penalty does not compel private insurers to pass along any savings to their insureds, all the Reimbursement Penalty accomplishes is a transfer of funds from medical providers to insurers—a powerful lobby whose bare economic interest cannot trump the First Amendment rights of charities and their contributors.

For similar reasons, this "unjust enrichment" rationale does not satisfy any form of tailoring. A law that enriches *commercial insurers* is not reasonably

tailored to the purported goal of avoiding the purportedly unjust enrichment of Providers.

D. The State's Passing References To Other State Interests Do Not Sustain The Reimbursement Penalty

Scattered throughout the State's brief are references to other potential state interests. Given the cursory nature of these assertions, it is unclear whether the State even believes them to be constitutionally sufficient. In any event, none is.

Regulating Health Care and Insurance. The State points to a broad interest in "regulating health care and health insurance," to justify regulating the "'reimbursement rates for healthcare providers.'" State Br. 33 (citation omitted). But it is not enough to invoke an interest at such a "high level of generality"—the "First Amendment demands a more precise analysis." *Green*, 52 F.4th at 791 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021)); *see Junior Sports*, 80 F.4th at 1117 ("simply having a substantial interest … does not validate" a speech prohibition). "California must provide evidence establishing that the harms it recites are real, and that its speech restriction will '*significantly*' alleviate those harms." *Junior Sports*, 80 F.4th at 1117 (internal quotation marks and citation omitted). The cases the State cites (at 33), about preemption and *Younger* abstention, are not to the contrary.

Market Failure Due To Oligopoly Power. The State occasionally suggests that it is defending the district court's decision to uphold AB290 as correcting "a

market failure that has allowed large dialysis organizations" to "use their oligopoly power" to drive up commercial reimbursement rates. 1-PER-51 (citation omitted); *see* State Br. 34. Providers' opening brief explained at length (at 50-52) why this justification fails. Among other reasons, the State did not raise this theory as a concern independent of steering; collected no evidence to support any market failure; provided no economic expert to opine on any market failure; and adduced no evidence that insurance rates are rising in California due to the contributions that AB290 targets. *Id.* It is telling that, while the district court appeared to invoke this theory below, the State does not engage with these deficiencies.

III. THE REIMBURSEMENT PENALTY IS UNCONSTITUTIONALLY OVERBROAD

As Providers' opening brief explains (at 56-61), the Reimbursement Penalty also is unconstitutionally overbroad: The Penalty captures charitable contributions of any size from nearly any healthcare provider (not just Providers) to any charity that offers premium assistance (not just AKF)—even those that lack any connection to the alleged harms that AB290 supposedly addresses. The Penalty thus plainly would penalize constitutionally protected contributions. This conclusion comes straight from a plain reading of AB290's capacious terms "financially interested provider," "financially interested entity," and "financial relationship." Providers' Br. 57-60.

The State does not challenge this reading of the statute. Indeed, the State says AB290 applies to "any healthcare provider" that "obtain[s] elevated reimbursement rates by subsidizing their patients' health insurance premiums." State Br. 46; *see also id.* (conceding AB290 "could theoretically apply to 'general physicians, psychiatrists, allergists, dentists,' and other physicians who donate to AKF"). That is just another way of saying the Reimbursement Penalty applies generally to any provider who treats a patient receiving premium assistance from a charity to which the provider contributes (other than dialysis providers with less than 10% market share, *see* AB290 §3(h)(C)). *See* Providers' Br. 57-58.[7] Yet there is no evidence—or even argument—that these providers harm patients or unjustly enrich themselves when they support premium-assistance charities.

The State's response rests on basic legal errors.

First, the State says, "[i]f the Court agrees that providers' contributions to AKF are not expressive in nature, then plaintiffs' overbreadth theory fails." State Br. 45 (citation omitted). But the very purpose of the overbreadth doctrine is to

[7] According to the State (Br. 45), Providers have "contradict[ed]" themselves by emphasizing both AB290's breadth and that the statute's legislative findings "single out" AKF and two Providers, Providers' Br. 41. As Providers' opening brief explains, there is no contradiction: "Although the Legislature targeted Providers' contributions to AKF in particular, it enacted a provision that deters all kinds of healthcare providers from making all kinds of donations to all kinds of premium-assistance charities." Providers' Br. 57 (citation omitted).

"permit[] the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 n.8 (1980); *accord Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (overbreadth asks whether a statute "may cause others not before the court to refrain from constitutionally protected speech"). Here, the State itself recognizes that charitable contributions of many donors ensnared by AB290 would be constitutionally protected. *See* State Br. 29 ("To be sure, in many circumstances, charitable financial contributions will qualify for First Amendment protection").

Next, the State dismisses the many unconstitutional applications of AB290 (described at Providers' Br. 58-60) as merely "theoretical." State Br. 46. But "the overbreadth doctrine requires courts to assume and evaluate *purely hypothetical* fact patterns." *Green*, 52 F.4th at 800; *see Broadrick*, 413 U.S. at 612 (overbreadth rests on "judicial prediction or assumption"); Providers' Br. 56-57 (citing cases). Plaintiffs need only "describe instances of arguable overbreadth," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008), because the "risk of … suppression" is the concern, whether or not it materializes, *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997). The State's demand for "evidence" of "actual instance[s]" of chilled contributions

misunderstands these principles. State Br. 46. Nor is the risk Providers identify merely theoretical: AKF receives donations from scores of doctors who would be penalized under the statute. *See* 4-PER-691, 623.

Next, the State suggests that there is no risk of a chilling effect because any provider worried that contributing to a charity could trigger the Reimbursement Penalty "can simply ask the charity" whether it is covered by AB290. State Br. 46-47. That is not so. A charity is penalized by AB290 if it receives the majority of its funding from "financially interested" providers. Many charities are unlikely to know which of their provider-contributors are financially interested. Whether a provider meets that definition will depend on (among other things) whether it treats premium-assisted patients, Providers' Br. 57-58—something many providers are unlikely to know. Moreover, being funded by a majority of financially interested providers is just one way a charity qualifies as "financially interested." *See* Providers' Br. 59.[8] In short, no one knows for sure that they are in the clear—including the State, which can only baldly assert, without citation, that AB290 doesn't reach "[m]ost charities." State Br. 46.

[8] The State is simply incorrect when it asserts that Plaintiffs "acknowledge[d] that the statute only applies" to charities satisfying the majority-funding test. State Br. 46.

Finally, the State claims that the "overbreadth theory [fails] because the overbreadth doctrine does not apply to commercial speech." State Br. 45 (cleaned up). But Providers have not sought to have "the reimbursement cap … be evaluated as a regulation of commercial speech." *Id.*; *compare* Providers' Br. 42. Indeed, neither has the State. State Br. 32 n.7, 43-44. If anything, the State's own stance makes the argument for overbreadth especially compelling. According to the State, whether a charitable contribution is constitutionally protected depends on how a reasonable observer would view the particular circumstances surrounding the contribution. *E.g.*, State Br. 29. The uncertainty that creates is precisely what the overbreadth doctrine exists to prevent: a situation where "the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk" the consequences. *Green*, 52 F.4th at 800-801 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965)).

IV. THE REIMBURSEMENT PENALTY CANNOT BE SEVERED FROM THE UNCONSTITUTIONAL PATIENT DISCLOSURE MANDATE

The Reimbursement Penalty must be permanently enjoined for the independent reason that it is not severable from the unconstitutional Patient Disclosure Mandate, AB290 §§3(c)(2), 5(c)(2).

1. The Patient Disclosure Mandate compels AKF to inform insurers—against AKF's wishes and to the detriment of patients—which patients receive premium assistance, so that insurers can reimburse providers at a lower rate.

Providers' Br. 18, 61. The district court correctly struck down the Mandate because it violates AKF's associational rights. 1-PER-54, 1-PER-10-11; *see* AKF Br. 46-47.[9] That dooms the Penalty because the State has repeatedly and unmistakably conceded that the Reimbursement Penalty cannot function without the Patient Disclosure Mandate.

First, the State affirmatively admitted below that the Reimbursement Penalty "would effectively be unenforceable" without the Patient Disclosure Mandate. 2-PER-95. This was no mere stray remark. *See* Providers' Br. 62-63. The State made this argument repeatedly, both in opposing a preliminary injunction, *see* 7-AKF-ER-1653-1654 (during preliminary-injunction hearing, defending AKF's duty to disclose patient identities to insurers as "an enforcement mechanism" because "[y]ou couldn't track that without the reporting mechanisms in the statute"), and in seeking reconsideration of the court's summary-judgment

[9] Contrary to the State's argument, State Br. 62-65, the Patient Disclosure Mandate is *not* subject to and does *not* survive the low standard set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). *Zauderer* permits, in the commercial context, the compelled disclosure of purely factual and uncontroversial information that is reasonably related to a substantial governmental interest and is not unjustified or unduly burdensome. But *Bonta* held that "compelled disclosure of affiliation with groups engaged in advocacy" is subject to "exacting scrutiny," which requires the State to show the law is "narrowly tailored to an important government interest." 594 U.S. at 606-607, 617. AB290 fails heightened scrutiny—and, indeed, also would fail *Zauderer* review—for the same reason the Reimbursement Penalty fails any level of constitutional scrutiny: There is simply no evidence of any problem that AB290 would solve.

order, *see* 2-PER-96. The State thus recognized that the Patient Disclosure Mandate and the Reimbursement Penalty rise or fall together.

Second, the State did not dispute inseverability during summary judgment proceedings, *see* Providers' Br. 62, and it does not deny on appeal that it forfeited the argument below—confirming that, until now, it has never doubted that the two provisions cannot survive apart from one another.

The State's efforts to paper over its concession do not withstand scrutiny. The State now claims that it admitted only that it would be "more difficult for insurers to monitor" compliance with the Reimbursement Penalty without the Patient Disclosure Mandate. State Br. 48; *see also id*. at 49 (arguing that it claimed the Mandate is "vital" only "for the insurers to be able to confirm that providers' billing complies with the reimbursement cap"). That is not remotely what the State said below. It argued unambiguously that the Patient Disclosure Mandate is "vital for AB 290's reimbursement cap to function properly—or even at all," and that the Mandate is "essential to," "critical to," and "necessary for" the "implementation" of the Reimbursement Penalty. 2-PER-91, 94-96. To point this out is not to "take[] the State's briefing out of context," State Br. 48, but to repeat what the State plainly stated and what is manifestly true: If insurers do not know which patients receive premium assistance, they cannot cap their reimbursement payments as AB290 instructs. The State cannot now argue the opposite of what it

said below. *See Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 811 (9th Cir. 2020) ("A party remains bound by a concession in the district court notwithstanding a contrary position on appeal.").

2. The State's new severability argument is wrong in any event. As Providers' opening brief explains, the Reimbursement Penalty is neither functionally nor volitionally severable from the Disclosure Mandate. Providers' Br. 62-66. The State argues that, even without the Patient Disclosure Mandate, the Reimbursement Penalty will remain effective because "providers will remain under an obligation not to accept reimbursement for [premium-assisted] patients in an amount that exceeds the cap"—an obligation, the State says, that the Attorney General can enforce. State Br. 48. The State never made this argument before because no such obligation exists.

AB290 regulates what *insurers* must *pay*, not what payments *providers* can *accept*. *See* State Br. 48 (acknowledging that §§ 3(e)(1), 5(e)(1)'s text refers to the "amount of reimbursement … that shall be paid" to providers). The State's severability argument would require the Court to rewrite the statute to restrict "the amount of reimbursement … that shall be ~~paid to~~ **accepted by**" providers. But "a court may not use severability as a fig leaf for judicial legislation." *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014); *see Abbott Lab'ys v. Franchise Tax Bd.*, 175 Cal. App. 4th 1346, 1360 (Cal. Ct. App. 2009) (declining to sever

invalid provision because "[t]his court has no power to rewrite the statute to make it conform to a presumed intention which its terms do not express"). And without an underlying legal obligation, there is nothing for the Attorney General to enforce.

Multiple other parts of AB290 confirm that the Legislature intended for charities and insurers, rather than providers, to implement the Reimbursement Penalty. *First*, nothing in the statute mandates that charities inform providers which patients receive assistance—information that providers would need to effectuate the rate cut. *Second*, the Legislature conditioned *other* provisions of AB290 on the charities disclosing this information to insurers. The amount of the penalty, for instance, goes up if charities do not inform insurers. AB290 §§4(i)(1), 5(i)(1). *Third*, the statute requires insurers—not providers—to send to the relevant agencies "information regarding premium payments by financially interested entities and reimbursement for services to providers." *Id.* §§3(j), 5(j). *Fourth*, numerous other provisions of AB290 show that, when the Legislature wanted providers to do something, it said so. *E.g.*, *id.* §§3(e)(1), 5(e)(1) ("Financially interested providers shall neither bill the insured nor seek reimbursement from the insured…."); *id.* §2(a) ("A chronic dialysis clinic shall not steer, direct, or advise a patient….").

The State had it right before: Without the Patient Disclosure Mandate, the Reimbursement Penalty cannot "function properly—or even at all." 2-PER-96. For this reason too, the Reimbursement Penalty must fall.

CONCLUSION

The judgment of the district court should be reversed insofar as it held the Reimbursement Penalty constitutional, and the Penalty should be permanently enjoined along with the other provisions of AB290 that the district court properly enjoined.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on this 19th day of February, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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I attest that all Plaintiffs-Appellants concur in the content of this filing.

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