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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JANE DOE, *et al.*

Plaintiffs,

v.

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

Defendants.

**Case No. 8:19-cv-02105 (ADSx)**

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF A PORTION OF THE COURT'S ORDER ON SUMMARY JUDGMENT [ECF NO. 209]**

Date: April 8, 2024
Time: 8:30 AM
Place: Courtroom 9D

## INTRODUCTION

Plaintiffs Jane Doe, Stephen Albright, the American Kidney Fund, Inc. ("AKF"), and Dialysis Patient Citizens respectfully oppose the State's Motion for Reconsideration of a Portion of the Court's Order on Summary Judgment (ECF No. 209) ("Motion" or Mot.").[1] As relevant to the State's motion, sections 3(c)(2) and 5(c)(2) of AB 290 prohibit AKF from carrying out a core part of its charitable mission—providing financial assistance to low-income ESRD patients to help them afford insurance needed to pay for life-sustaining dialysis services—unless AKF "[d]iscloses" to private insurers "prior to" providing financial assistance "the name" of any patient who participates in AKF's charitable assistance program. AB 290 §§ 3(c)(2), 5(c)(2) ("Patient Disclosure Mandate"). The Court correctly held that these provisions violate AKF's and its patients' First Amendment rights to freedom of association.

In seeking reconsideration, the State does not identify any error or manifest injustice resulting from the Court's ruling. The State instead asserts that its purported showings under the more lenient *Zauderer* standard—which applies to "purely factual and uncontroversial" compelled speech in a commercial context—were enough to satisfy the more rigorous "exacting scrutiny" the Court correctly held applies to compelled disclosures that burden associational rights. But the State made *no showing* under the proper framework in its summary judgment briefing, and it cannot do so for the first time now.

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[1] The Providers—Fresenius Medical Care Orange County, LLC, Fresenius Medical Care Holdings, Inc., doing business as Fresenius Medical Care North America, DaVita Inc., and U.S. Renal Care, Inc.—join in this opposition. The State argues that their interests are not implicated by the Patient Disclosure Mandate because it applies only to "financially interested entities like AKF." Mot. 4 n.2. That is wrong. The Providers challenged the same provisions of AB 290, suing on behalf of the interests of their ESRD patients. *See* Fresenius Compl. ¶¶ 91, 113–17. Moreover, if the Court were to grant reconsideration, it would need to address the Providers' claim that AB 290's penalty for non-compliance with the Patient Disclosure Mandate violates due process. *Id.* ¶¶ 157–62; ECF No. 176 at 22–23.

The State has not satisfied the demanding standards for reconsideration, and its motion should be denied.

## LEGAL STANDARD

Reconsideration is an "extraordinary remedy, to be used sparingly[.]" *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A motion for reconsideration "may not be used to raise arguments ... for the first time when they could reasonably have been raised earlier in the litigation." *Id.* Nor may it "in any manner repeat any oral or written argument made in support of, or in opposition to, the original motion." C.D. Cal. L.R. 7-18. Reconsideration is appropriate only when a court "commit[s] *clear error*" or its "initial decision [is] *manifestly unjust*." *School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (emphasis added); C.D. Cal. L.R. 7-18(c) (listing grounds for reconsideration). Mere disagreement with a ruling is not a proper basis for reconsideration. *See McCandless Grp., LLC v. Coy Collective*, No. LA CV 21-02069-DOC-KES, 2023 WL 8896885, at *2 (C.D. Cal. Nov. 6, 2023) (Carter, J.).

## ARGUMENT

The Court committed no "clear error" or "manifest" injustice in striking down AB 290's Patient Disclosure Mandate. *School Dist. No. 1J*, 5 F.3d at 1263. The Court correctly held that the mandate triggers exacting scrutiny under the First Amendment because it compels AKF to disclose the names of individual patients receiving charitable assistance to private insurance companies. *See* ECF No. 207 at 42–43. As the Court explained, the mandate invades AKF's and patients' rights to associate and is not tailored to advance a substantial state interest. *See id.* at 43.

In seeking reconsideration, the State faults the Court for not addressing an argument the State chose not to raise. The State's sole argument at summary judgment—both in briefing and at oral argument—was that the Patient Disclosure Mandate should be upheld under the test for *compelled commercial speech* set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S.

626, 651 (1985). *See* ECF No. 128-1 at 20–23; ECF No. 153 at 17–20; ECF No. 171 at 12–13; ECF No. 171 at 12–13; ECF No. 202 at 96–97; *see also Fresenius* Docket, No. 19-cv-02130, ECF No. 152-1 at 2, 16. The State contended that the disclosure of "purely factual and uncontroversial" information was "reasonably related" to California's "substantial governmental interest" in preventing patient "steering." ECF No. 153 at 17–20. The State addressed AKF's *associational* rights only once in its briefing—in a footnote arguing that the Patient Disclosure Mandate did not sufficiently chill associational rights to *trigger* exacting scrutiny. ECF No. 171 at 13 n.7. But the State nowhere made any attempt to explain how the Patient Disclosure Mandate *satisfied* exacting scrutiny, as the Court correctly recognized. *See* ECF No. 207 at 43.

The State now attempts to overcome this default by listing times it discussed the mandate's purpose in support of its arguments under the *Zauderer* standard. *See, e.g.*, Mot. 3 (bullets), *id.* at 6–7. But this sleight-of-hand should be rejected. The *Zauderer* test applies to compelled speech, not associational rights, and the test is less demanding than the test that applies to a disclosure regime that burdens associational rights. The *Zauderer* test is akin to rational basis review, requiring primarily that any compelled disclosure of purely factual and uncontroversial commercial speech be "reasonably related to a substantial government interest." *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019); *see also* ECF No. 207 at 43–45 (applying *Zauderer* to different provision of AB 290). By contrast, compelled disclosures that burden associational rights are "reviewed under exacting scrutiny," which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest" and "narrow[ ] tailor[ing] to the government's asserted interest." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). The State's arguments under *Zauderer* thus cannot substitute for the State's failure to defend the Patient Disclosure Mandate under exacting scrutiny. And reconsideration cannot be used to

present new arguments that could have been, but were not, raised at summary judgment. *See Kona Enters.*, 229 F.3d at 890.

The State also argues that it showed a "substantial state interest" because the Patient Disclosure Mandate is purportedly "necessary" to implement a different provision of AB 290, namely AB 290's "[R]eimbursement [C]ap." Mot. 6. But the Court addressed this argument, reasoning that "[e]ven if such a requirement would meaningfully assist the State," the Patient Disclosure Mandate was "not sufficiently tailored." ECF No. 207 at 43; *see also id.* ("[T]he prime objective of the First Amendment is not efficiency[.]" (quoting *Ams. for Prosperity Found.*, 141 S. Ct. at 2376)). The State is wrong to say that the Court "fail[ed] to consider" this point. Mot. 5.

In any event, the State's argument is meritless. Contrary to the State's position, it is not Plaintiffs' burden to identify alternative, constitutionally sound "mechanism[s]" to implement the Reimbursement Cap. Mot. 7. Moreover, the State ignores the different levels of scrutiny that the Court applied to the Reimbursement Cap and the Patient Disclosure Mandate. In upholding the Reimbursement Cap, the Court held that it does not regulate dialysis providers' speech or association and targets only "economic activity or nonexpressive conduct," and the Court therefore applied a less demanding level of scrutiny. ECF No. 207 at 38–40. Concluding that the Reimbursement Cap does not have an "expressive element," the Court concluded that a generalized "interest in neutralizing the reimbursement rates for commercial insurance" was sufficient. *Id.* at 39–40.

Plaintiffs respectfully disagree with this aspect of the Court's decision, but for purposes of the State's motion for reconsideration it is enough to observe that whatever level of constitutional scrutiny properly applies to the Reimbursement Cap, the relationship between AKF, an expressive non-profit charitable organization, and the patients to whom it provides charitable support implicates protected First Amendment associational rights and thus demands more rigorous scrutiny. The

Patient Disclosure Mandate compels AKF to engage in speech—communicating to private insurers the identities of patients with it whom it affiliates and for whom it provides charitable aid—over AKF's objections and with no consideration for the associational, privacy, health, or other dignitary interests of patients. *See* ECF No. 132 at 17; ECF No. 167 at 10–11. That interferes with "the vital relationship between freedom to associate and privacy in one's associations," and it therefore triggers exacting First Amendment scrutiny. *Ams. for Prosperity*, 141 S. Ct. at 2382.

The Court was thus correct to recognize that the State never met its burden to explain how the disclosure of patient names advances a substantial state interest. *See* ECF No. 207 at 43. Again, the only purported governmental interest the State identified was "shield[ing]" patients from "potential harm" caused by patient "steering." ECF No. 128-1 at 22; *see also* ECF No. 153 at 17–20; ECF No. 171 at 12–13. But as AKF and the Providers explained—and as this Court held—the State never adduced *any* evidence of patient harm or "steering." *See* ECF No. 128-1 at 12–14; ECF No. 156 at 8–10; ECF No. 167 at 8–9; ECF No. 207 at 30 ("On the record developed so far, the Court finds that the State has not identified any real patient or public harm from any purported steering to support its asserted interest."); *id.* at 31–33 (discussing lack of record evidence). Accordingly, even under the less-demanding standard that applies to commercial speech restrictions, the Court correctly concluded that the State "has not identified any real patient or public harm" and failed to present "sufficient evidence that any purported steering has distorted, or will distort, California's risk pools." ECF No. 207 at 30, 34. The same conclusion necessarily applies under the higher level of exacting constitutional scrutiny that governs the associational rights of AKF and its patients.

## CONCLUSION

For the reasons set forth above, the Court should deny the State's motion for reconsideration.

/ /

DATED: February 6, 2024

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**ATTORNEY ATTESTATION**

Pursuant to Civil L.R. 5-4.3.4(a)(2)(i), the filer attests that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

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