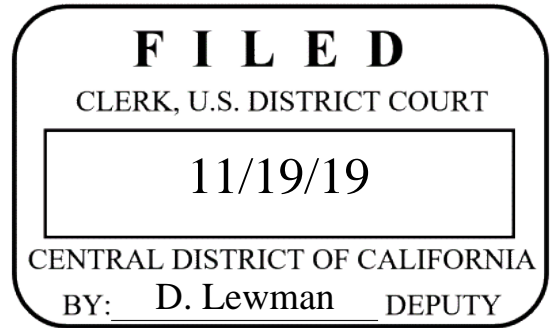


1 MORGAN, LEWIS & BOCKIUS LLP
2 David L. Schrader, Bar No. 149638
3 david.schrader@morganlewis.com
4 Jahmy S. Graham, Bar No. 300880
5 jahmy.graham@morganlewis.com
6 300 South Grand Avenue
7 Twenty-Second Floor
8 Los Angeles, CA 90071-3132
9 Tel: +1.213.612.2500
10 Fax: +1.213.612.2501



7 Attorneys for Non-Party As *Amicus Curiae*
8 CALIFORNIA STATE CONFERENCE OF
9 THE NATIONAL ASSOCIATION FOR THE
10 ADVANCEMENT OF COLORED PEOPLE

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION

15 JANE DOE, *et al.*,
16 Plaintiff,
17 vs.
18 XAVIER BECERRA, *et al.*,
19 Defendants.

Case No. 8:19-CV-02105 DOC (ADS)

**AMICUS BRIEF ON BEHALF OF
CALIFORNIA STATE
CONFERENCE NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: December 9, 2019
Time: 8:30 a.m.
Location: Courtroom 9D

Complaint Filed: November 5, 2019

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The California State Conference of the National Association for the Advancement of Colored People (“California NAACP”) urges this Court to grant the motion for preliminary injunction filed by Plaintiffs in this case, as well as the motion filed by Plaintiffs in the matter of *Fresenius Medical Care, et al. v. Becerra, et al.* (Case No. 8:19-cv-02130 DOC), and enjoin implementation of California Assembly Bill 290 (“AB 290”). AB 290 embodies terrible public policy that directly discriminates against the poorest dialysis patients in California. If implemented, AB 290 will cause irreparable harm to minority, low income, and vulnerable Californians who are suffering from life threatening diseases.

II. CALIFORNIA NAACP’S COMMITMENT TO RACIAL JUSTICE AND EQUALITY.

The National Association for the Advancement of Colored People (“NAACP”) is the nation’s largest and strongest civil rights organization. The NAACP’s principal objectives are to ensure the political, educational, social and economic equality of minority citizens of the United States and to eliminate race prejudice. The NAACP seeks to remove all barriers of racial discrimination through democratic processes. This mission is accomplished by seeking the enactment and enforcement of laws securing civil rights and by informing the public of the adverse effects of racial discrimination.

The California NAACP consists of 72 branches and youth units mobilized across the state to help ensure racial justice and equality in California. *See* <https://www.naacp.org/nations-premier-civil-rights-organization/> (last visited Nov. 14, 2019). The California NAACP is dedicated to stopping discriminatory policies that disproportionately impact communities of color and low-income Californians. AB 290 will disproportionately impact communities of color and low-income Californians.

1 **III. AB 290 DISCRIMINATES AGAINST MINORITY AND LOW**
2 **INCOME PATIENTS.**

3 Dialysis patients are among the most vulnerable in society. Dialysis patients
4 must get dialysis three times a week, for three to four hours at a time, to stay alive.
5 The process of dialysis, removing toxins and fluid build-up, is so critical that
6 missing just one treatment increases patient risk of death significantly.

7 Kidney disease disproportionately affects people of color. According to the
8 National Institute of Diabetes and Digestive and Kidney Disease, African
9 Americans are approximately four times more likely than Caucasians to develop
10 kidney failure. [www.niddk.nih.gov/health-information/kidney-disease/race-](http://www.niddk.nih.gov/health-information/kidney-disease/race-ethnicity)
11 [ethnicity](http://www.niddk.nih.gov/health-information/kidney-disease/race-ethnicity) (last visited Nov. 14, 2019); *see also* National Kidney Foundation,
12 www.kidney.org/news/newsroom/factsheets/African-Americans-and-CKD (last
13 visited Nov. 14, 2019) (“African Americans suffer from kidney failure at a
14 significantly higher rate than Caucasians - more than 3 times higher. African
15 Americans constitute more than 35% of all patients in the U.S. receiving dialysis
16 for kidney failure, but only represent 13.2% of the overall U.S. population.”).
17 Hispanics are also at a much higher risk of developing chronic kidney disease. *Id.*

18 The extraordinary challenges and burdens imposed (both physical and
19 financial) on those undergoing kidney dialysis treatment are beyond dispute and
20 described in the declarations that accompany Plaintiffs’ motion in this action, as
21 well as the declarations filed in the action by the providers, in support of their
22 motions for preliminary injunction.

23 Currently, nonprofit American Kidney Fund (“AKF”) offers charitable
24 premium grants to more than 3,700 low-income dialysis patients in California.
25 Most of those patients are minorities. One hundred percent (100%) are low income,
26 averaging less than \$30,000 a year in annual income.

27 If signed into law, the AKF has said it will be forced to leave California and
28 stop charitable grants to these patients. Ending AKF grants will be devastating for

1 low-income dialysis patients who depend on this safety net to pay for their
2 healthcare that keeps them alive.

3 AB 290 also discriminates against low-income dialysis patients by making it
4 nearly impossible for them to get kidney transplants -- the best option for dialysis
5 patients to live a longer life. To qualify for a kidney transplant and get on the list,
6 patients must be able to demonstrate they have comprehensive health care
7 coverage. See [https://khn.org/news/no-cash-no-heart-transplant-centers-require-](https://khn.org/news/no-cash-no-heart-transplant-centers-require-proof-of-payment/)
8 [proof-of-payment/](https://khn.org/news/no-cash-no-heart-transplant-centers-require-proof-of-payment/) (last visited Nov. 15, 2019). Even patients on Medicare are
9 usually required to show they can afford supplemental coverage to cover the 20%
10 of health care costs that Medicare does not. See *Id.* AKF pays for supplemental
11 plans for many of its grantees and is the only way they can afford the coverage.
12 Without it, patients will be dropped from the transplant list.

13 It does not end there. AB 290 would also force AKF to create a list of the
14 low-income, minority patients to whom it provides grants – and require AKF to
15 share this confidential list of patients with insurance companies. AB 290 empowers
16 insurance companies and creates new opportunities for them to discriminate against
17 those with pre-existing conditions.

18 Low-income, minority dialysis patients should not be further victimized by
19 being caught in the middle of a dispute between labor groups and dialysis
20 providers.

21 **IV. AB 290 WILL CAUSE IMMINENT AND IRREPARABLE HARM.**

22 AB 290, if implemented, will drive AKF from California. The consequences
23 to low-income dialysis patients, as described above, will be devastating. This is
24 exactly the type of irreparable harm that supports entry of a preliminary injunction.
25 The Ninth Circuit has several times held that beneficiaries of public assistance
26 “may demonstrate a risk of irreparable injury by showing that enforcement of a
27 proposed rule ‘may deny them needed medical care.’” See *M.R. v. Dreyfus*, 697
28 F.3d 706, 733 (9th Cir. 2012) (citations omitted). In *Dreyfus*, the court reversed

1 denial of a motion for preliminary injunction where the plaintiffs demonstrated that
2 the services they would lose as a result of the challenged regulation related
3 intimately to their mental and physical health, and the loss of those services would
4 exacerbate their “already severe mental and physical difficulties.” *Id.* That is the
5 definition of irreparable injury and what will happen to low-income dialysis
6 patients if AB 290 is implemented.

7 **V. THE PUBLIC INTEREST AND EQUITIES SUPPORT ENTRY OF**
8 **THE PRELIMINARY INJUNCTION.**

9 For these reasons, it is also plainly in the public interest to grant preliminary
10 injunction. In *Rodde v. Bonta*, 357 F.3d 988 (9th Cir. 2004), the court affirmed
11 entry of preliminary injunction, finding that the public interest supported it, where
12 closing of a hospital would lead “to increased delays in treatment and prolonged
13 suffering and illness among all those who rely upon it.” 357 F.3d at 999. As
14 discussed in the materials provided by the provider-plaintiffs in support of their
15 motion for preliminary injunction, if AB 290 is implemented, many clinics will be
16 forced to close.

17 **VI. AB 290 VIOLATES PATIENTS’ RIGHTS TO RECEIVE**
18 **INFORMATION ABOUT THEIR MEDICAL CARE OPTIONS.**

19 In addition to jeopardizing the health and financial welfare of kidney dialysis
20 patients, AB 290 also would deny them their First Amendment rights to receive
21 information about their medical care. AB 290 provides that a chronic dialysis clinic
22 cannot “advise a patient regarding any specific converge program option or health
23 care service plan contract.” [§ 2] This broad prohibition and associated penalties
24 could restrict (have a chilling effect on) dialysis providers in providing health care
25 information to patients who need information to make informed decisions. The
26 First Amendment protects not only the right to speak but also the right to receive
27 information. *Virginia State Board of Pharmacy, et al. v. Virginia Citizens*
28 *Consumer Counsel, Inc.*, 425 U.S. 748, 756 (“But where a speaker exists, as is the

1 case here, the protection afforded is to the communication, to its source and to its
2 recipients both.”).

3 **VII. CONCLUSION**

4 For the foregoing reasons, Plaintiffs urge this Court to enjoin California from
5 implementing AB 290 while this lawsuit is pending.

6 Dated: November 15, 2019

MORGAN, LEWIS & BOCKIUS LLP
David L. Schrader
Jahmy S. Graham

8

9

By */s/ David L. Schrader*

10

David L. Schrader
Attorneys for Non-Party As *Amicus Curiae*
CALIFORNIA STATE CONFERENCE
OF THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28