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IN THE UNITED STATES DISTRICT COURT

FOR THE 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-DOC-ADS

DEFENDANTS' RESPONSES TO PLAINTIFFS' OBJECTIONS TO EVIDENCE OFFERED IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: June 9, 2022
Time: 8:00 a.m.
Courtroom: 10A
Judge: The Honorable David O. Carter
Trial Date: July 12, 2022
Action Filed: November 1, 2019

Defendants Rob Bonta, Ricardo Lara, Shelly Rouillard, and Tomás J. Aragón (Defendants) respectfully submit the following Responses to Plaintiffs' Objections to Evidence Offered in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 167-2 in *Doe, et al. v. Bonta, et al*. and ECF No. 190-10 in *Fresenius, et al. v. Bonta, et al.*, Case No. 8:19-cv-02130-DOC-ADS.

DEFENDANTS' RESPONSES TO EVIDENTIARY OBJECTIONS

Defendants' Uncontroverted Fact/Evidence	Plaintiffs' Evidentiary Objection	Defendants' Response
Defendants' Uncontroverted Fact #75: While some studies have found a correlation between private insurance and better health outcomes, other factors related to socioeconomic status likely play a role in this association. **Supporting Evidence**: Declaration of S. Clinton Woods in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (Woods Decl.), Ex. 22 (Deposition of Amy Waterman (Waterman Dep.) 126:17-127:19; 131:21-132:2.	Objection to Exhibit 22 on the ground that it is outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994).	Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g., Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc.*

		v. FCC, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…").
Defendants' Uncontroverted Fact #76: While private insurance may be the preferred choice of some patients, public insurance can be more cost-effective. **Supporting Evidence**: *See, e.g.*, Pub. L. 114-255, § 17006 (allowing ESRD patients to enroll in Medicare Advantage plans, which limit out-of-pocket costs); Woods Decl., Ex 20 (Deposition of Rene Mollow (Mollow Dep.) 50:15-51:11 (testimony of René Mollow, Deputy Director of Health Care Benefits and Eligibility at the California Department of	Objection to Pub. L. 114-255, § 17006 and Exhibit 20 on the ground that they are outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g.*, *Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs'

Health Care Services, that patients in Medi-Cal's ESRD program "don't have a spend-down requirement")).		cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…"). Further, the Legislature of course may take into account the existence and substance of other relevant laws during the law-making process without inclusion of such laws in the legislative record. Indeed, legislators are presumed to know existing law (*see Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-697 (1979), such as, in this case, the 21st Century Cures Act, PL 114-255 (Dec. 13, 2016), 42 USC Section 17006 (Allowing End-Stage Renal Disease Beneficiaries to Choose a

		Medicare Advantage Plan).
Defendants' Uncontroverted Fact #77: Research has shown that ESRD patients at for-profit dialysis centers, like Plaintiffs' facilities, suffer from lower rates of kidney transplantation and inferior transplant education. **Supporting Evidence**: *Fresenius* ECF No. 152-4 at 110.	Objection to the expert report of Dr. Amy Waterman for the reasons set forth in Plaintiffs' motion to exclude, *see* Dkt. 146, including on the ground it will not help the trier of fact to understand the evidence or to determine a fact in issue under Federal Rule of Evidence 702 and is irrelevant under Federal Rule of Evidence 402. Dr. Waterman's opinion has no relevance to Plaintiffs' challenge to AB 290, and no provision of AB 290 addresses the purportedly lower rates of kidney transplantation and inferior transplant education at for-profit facilities. Objection to the expert report of Dr. Waterman on the ground that it violates Federal Rule of Civil Procedure 56(c)(4) because it is not sworn, nor accompanied by a sworn declaration. Rule 56(c)(4) requires an expert report to be "itself sworn" or "accompanied by a sworn declaration." *Am. Fed. of Musicians of U.S. and Canada v.*	Defendants address the substance of the objections to Dr. Waterman's report at length in their opposition to Plaintiffs' motion to exclude. ECF No. 161. Dr. Waterman's opinions that ESRD patients at clinics like those of provider Plaintiffs receive inferior transplant education and have a lower likelihood of obtaining a transplant are consistent with AB 290's legislative findings, and such facts informed the Legislature as it enacted AB 290 to address harms to patients caused by steering. *See, e.g.*, AB 290, Section 1 (d)("patients caught up in these schemes may have a more difficult time obtaining critical care such as kidney transplants"). Dr. Waterman's expert reports are authenticated. *See* Declaration of Dr. Amy Waterman, filed concurrently with Defendants' Reply in support of Motion for Summary Judgment (Waterman Decl.).

	Paramount Pictures Corp., 903 F.3d 968, 976–77 (9th Cir. 2018). Accordingly, Dr. Waterman's opinion should not be considered on summary judgment. Objection to *Doe* Dkt. 128-4 at 110 (Defendants' Exhibit 7 (*Waterman Expert Report*) on the ground that it is outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g.*, *Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the

		District Court to resolve any factual disputes remaining…").
Defendants' Uncontroverted Fact #79: Former DaVita insurance specialist Laura Fiallos corroborated the existence and purpose of the "Medicaid Opportunity" scheme at a legislative hearing on AB 290, testifying that she had "watched DaVita increasingly push to have more commercially insured patients in their clinics" through this program. **Supporting Evidence**: Woods Decl., Ex. 17 (Deposition of Laura Fiallos (Fiallos Dep.) 46:4-13, 64:5-67:1).	Objection to Exhibit 17 on the ground that Ms. Laura Fiallos lacks personal knowledge under Federal Rule of Evidence 602 to testify to this effect. Ms. Fiallos testified that she spent just two months working on the Medicaid Opportunity program and that she participated only in initial interest conversations; as such, she has no personal knowledge of whether DaVita allegedly pushed patients to obtain commercial insurance. Leland Decl. Exh. 73, at 125, 127–28 (Fiallos Depo. at 70:04–06, 72:11–73:15). Objection to Exhibit 17 on the ground that it is outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	Plaintiffs' objection is improper as it is based on Plaintiffs' misrepresentation of Fiallos's testimony and contentions about what inferences should be drawn from the testimony. The foundation for Fiallos's testimony is clear from her deposition testimony; as Plaintiffs concede, one of Ms. Fiallos's job functions as a DaVita insurance specialist was to promote the Medicaid Opportunity program. *See* Fiallos Dep. Plaintiffs' objections are not grounds for exclusion as they go to the weight of the evidence, not its admissibility. Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g., Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . .

		so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…"). Plaintiffs' objection is particularly inappropriate given that Fiallos testified to the Legislature on the same subjects at the July 3, 2019 AB 290 hearing (see Fiallos Dep. 46:4-13) and her testimony is thus part of the AB 290 legislative record. In addition, Plaintiffs noticed and took Fiallos's deposition at

		which she gave the testimony they seek to exclude on the ground it is not part of the relevant record.
Defendants' Uncontroverted Fact #80: Lower insurance premiums should flow naturally from a healthier risk mix given the close relationship between the risk of the pool and insurance premiums. **Supporting Evidence**: Woods Decl., Ex. 21 (Deposition of John Bertko (Bertko Dep.) 208:6-25); *see also Doe* RJN in support of Defs.' Opp'n (Opp'n RJN), Ex. 1 (DMHC premium rate review FAQ explaining that health plan premiums increase due to a variety of factors, including "when individuals use more health care services that expected or when they require expensive care"). Furthermore, the legislation requires insurers to file a schedule documenting the cost savings associated with the law and the impact on rates. *See* AB 290, § 4.	Objection to Mr. John Bertko's opinion on the ground it is unreliable and speculative. Mr. Bertko in fact testified in the cited deposition excerpt that small changes in the risk mix of the insurance pool would not necessarily lead to higher insurance premiums. *See* Defs.' Opp. MSJ, Ex. 21, Dkt. 153-1 at 39 (Bertko Depo. at 208:22–25). (testifying if "risk mix" "just changed [a] little bit" then that "would not necessarily have an impact on premiums" or would have "an impact maybe that wasn't very visible"); *see also* Leland Decl. Exh. 74, at 138 (Bertko Depo. at 209:01–23) (agreeing that a small change in the risk mix "would not necessarily show up in a one-to-one impact on premiums"). Objection to *Doe* Request for Judicial Notice, Exhibit 2 (which in fact is the document to which Defendants cite) on the	Plaintiffs' objection "to Mr. John Bertko's opinion" is incomprehensible as it fails to make clear what "opinion" is objected to and the basis for the objection. The court's role in assessing reliability is not to determine whether the expert's hypothesis is correct, or to evaluate whether it is corroborated by other evidence in the record. *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1023-1024 (9th Cir. 2022); *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d at 969-70 (the district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to the trier of fact); *In re Toyota Motor Corp.*, 978 F. Supp. 2d 1053, 1074 (C.D. Cal. 2013). Again, Plaintiffs' challenge to the factual basis of Mr. Bertko's opinion "rather than the

	ground it may not be judicially noticed under Federal Rule of Evidence 201. Judicial notice is appropriate only for facts that are not subject to reasonable dispute. Fed. R. Evid. 201(b). Thus, "a court cannot take judicial notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). Because the relationship between premiums and health risk mix is at dispute in this case and the subject of expert testimony by both sides, the Court may not take judicial notice of this website. Objection to Exhibit 21 and to *Doe* Request for Judicial Notice, Exhibit 2 on the ground they are outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	methodology upon which it is based, particularly when the facts are subject to reasonable dispute . . . go[es] to the weight of [Bertko's] opinion, not the admissibility." *SPS Technologies, LLC v. Briles Aerospace, Inc.*, No. CV 18-9536-MWF (ASx), 2021 WL 4913509, *7 (C.D. Cal. Sept. 8, 2021) (cleaned up). The DMHC premium rate review FAQ is properly subject to judicial notice for the reasons stated in Defendants' Request for Judicial Notice, as the FAQ is a public record posted on a government website. Fed. R. Evid. 201(b). Plaintiffs have not identified any dispute of fact between the parties with regard to any statement about premium rate review in the subject FAQ, and the FAQ statements are not reasonably subject to dispute. Plaintiffs also have not identified a dispute of fact between the parties with regard to the relationship between premiums and health risk mix. Thus, there is no dispute of fact that precludes judicial notice

		of the cited FAQ. Indeed, Plaintiffs' rebuttal expert acknowledged that adding high risk costly ESRD enrollees to Covered California plans could drive up the risk mix (Deposition of Greg Russo (Russo Dep.) 160:2-16) and that a decrease in the risk score of an insurance pool could contribute to a decrease in insurance premiums (Russo Dep. 162:4-14). Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g.*, *Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner*

		Broadcasting System, Inc. v. FCC, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…").
Defendants' Uncontroverted Fact #81: AB 290 serves unique and important purposes as part of a "larger fabric of regulatory changes occurring nationwide." **Supporting Evidence**: *Doe* ECF No. 128-4 (Ex. 8) at 162.	Objection to the supplemental expert report of Dr. Waterman for the reasons set forth in Plaintiffs' motion to exclude, *see* Dkt. 146, including on the ground it will not help the trier of fact to understand the evidence or to determine a fact in issue under Federal Rule of Evidence 702 and is irrelevant under Federal Rule of Evidence 401. Dr. Waterman fails to explain how AB 290 would foster the federal policy goals referred to, such as shortening transplant wait times, increasing transplant rates, or increasing home dialysis	Defendants address the substance of Plaintiffs' objections to Dr. Waterman's reports at length in their opposition to Plaintiffs' motion to exclude. ECF No. 161. As noted therein, Dr. Waterman's supplemental expert report contains numerous expert opinions that will help the trier of fact to understand the evidence and to determine a fact in issue under Federal Rule of Evidence 702 and fully explains how AB 290 is part of a larger fabric of regulatory changes. The court's role in assessing reliability is not

	rates. *See* Pls.' Mot. to Exclude, Dkt. 146 at 21; Defs.' MSJ, Ex. 8, Dkt. 128-4 at 160–61. Objection to the supplemental expert report of Dr. Waterman on the ground that it fails to comply with Federal Rule of Civil Procedure 56(c)(4) because it is not sworn, nor accompanied by sworn declarations. *See Am. Fed. of Musicians*, 903 F.3d at 976–77 (9th Cir. 2018). Further objection to Exhibit 8 on the ground that it is outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	to determine whether the expert's hypothesis is correct, or to evaluate whether it is corroborated by other evidence in the record. *Elosu*, 26 F.4th at 1023-1024; *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc*., 738 F.3d at 969-70 (the district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to the trier of fact); *In re Toyota Motor Corp*., 978 F. Supp. 2d 1053, 1074 (C.D. Cal. 2013). Plaintiffs' challenge to the factual basis of Dr. Waterman's opinion "rather than the methodology upon which it is based, particularly when the facts are subject to reasonable dispute . . . go[es] to the weight of [Waterman's] opinion, not the admissibility." *SPS Technologies, LLC v. Briles Aerospace, Inc*., No. CV 18-9536-MWF (ASx), 2021 WL 4913509, *7 (C.D. Cal. Sept. 8, 2021) (cleaned up). Defendants are not limited to evidence within the legislative record because it is well established that

		evidence showing a substantial governmental interest can take many forms. *See, e.g., Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…"). Dr. Waterman's expert

		reports are authenticated. *See* Waterman Decl.
Defendants' Uncontroverted Fact #83: California's Legislative Counsel determined that based on the reasoning in Advisory Opinion 97-1, AKF could comply with AB 290 without violating HIPAA. **Supporting Evidence**: *Doe* ECF No. 128-3 (Ex. 1a) at 8.	Objection to Exhibit 1a on the ground that it is inadmissible hearsay under Federal Rule of Evidence 801(c) to the extent Defendants seek to introduce the material for the truth of the matter asserted therein. None of the exceptions to hearsay are applicable here.	The referenced Legislative Counsel opinion is admissible under the public records exception. Fed. R. Evid. 803(6), (8)(A)(i).
Defendants' Uncontroverted Fact #84: Sections 3(b)(2) & 5(b)(2) of AB 290 address certain practices noted in the CMS record that are harmful to patients, such as the withdrawal of premium assistance when a patient receives a kidney transplant. **Supporting Evidence**: *See* AB 290, §§ 1(c) & (d); *Doe* ECF No. 128-3 (Ex. 1c) at 53 (CMS record shows that major non-profits "will not continue to provide financial assistance once a patient receives a successful transplant").	Objection to Exhibit 1c on the ground that it is inadmissible hearsay under Federal Rule of Evidence 801(c). The quoted statements are in fact hearsay-within-hearsay, as they are statements made by CMS in the Federal Register that recount documents in the comment record made by other individuals and groups. No hearsay exception applies to the documents in the record, or to CMS's statement recounting the documents' contents.	The CMS rulemaking record is a public record containing the factual findings of a public agency, and thus, is "clearly admissible under Rule 803(8)(A)(iii)." 2 Robert E. Jones et al., *Federal Civil Trials & Evidence (The Rutter Group Practice Guide)* ¶ 8:2837 (2021); *see, e.g.*, *Owens v. Republic of Sudan*, 864 F.3d 751, 792 (D.C. Cir. 2017) (State Department report, including its factual findings and conclusions, "fit squarely within the public records exception) (vacated in part on other grounds by *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020)). Plaintiffs' objections to the rulemaking record thus

		go to the weight, not the admissibility, of the evidence contained therein. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988).
Defendants' Uncontroverted Fact #86: In recent years, DaVita affirmatively advertised HIPP on website. **Supporting Evidence**: Woods Decl., Exs. 24, 25.	Objection to Exhibit 25 on the ground that it contains handwriting that lacks foundation and has not been authenticated in violation of Federal Rule of Evidence 901. Objection to Exhibits 24 and 25 on the ground that they are outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	Defendants do not cite the exhibit for the handwriting on the document. Plaintiffs offer no authority for the proposition that the existence of handwriting that may not be authenticated renders the rest of the authentic document inadmissible. Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g., Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres*, 475 U.S. at 50-

		52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…").
Defendants' Uncontroverted Fact #87: A HIPP recipient would only potentially learn that their provider is a donor after (1) picking a provider, (2) applying for a receiving HIPP, (3) obtaining dialysis, and (4) receiving a benefits statement. By then, the HIPP recipient would have already picked a provider without undue influence, as required by Advisory Opinion 97-1. **Supporting Evidence**: *Doe* ECF No. 128-4 (Ex. 6) at 95-97, ¶¶ 78-86.	Objection to Exhibit 6 on the ground that it is outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g., Fla. Bar*, 515 U.S. at 626-28 (relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965

		(quoting *Playtime Theatres*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…"
Defendants' Uncontroverted Fact #88: California's Legislative Counsel did not conduct a preemption analysis as it pertained to AB 290, but instead simply described the mechanics of the proposed legislation. **Supporting Evidence**: *Doe* ECF No. 128-3 (Ex. 1a) at 7-11.	Objection to Exhibit 1a on the ground that it is inadmissible hearsay under Federal Rule of Evidence 801(c) to the extent Defendants seek to introduce the material for the truth of the matter asserted therein. None of the exceptions to hearsay are applicable here.	The referenced Legislative Counsel opinion is admissible under the public records exception. Fed. R. Evid. 803(6), (8)(A)(i).
Defendants' Uncontroverted Fact #89: At her deposition, Dr. Waterman testified that DaVita and U.S.	Objection to the opinions of Dr. Waterman on the ground that they are not proper opinion testimony	Defendants address the substance of Plaintiffs' objections to Dr. Waterman's testimony and reports at length in their

Renal dialysis staff reported to her that ESRD patients were steered to commercial insurance. **Supporting Evidence**: Woods Decl., Ex. 22, Waterman Dep. 173:1-175:4, 175:7-18, 175:22-176:4.	under Federal Rule of Evidence 702. First, Dr. Waterman disclosed these purported conversations for the first time at her deposition. Allowing these opinions to be introduced would violate the rule that an expert report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or date considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B)(i), (ii); *see also Cousyn for Cousyn Grading & Demo, Inc. v. Ford Motor Co.*, 2019 WL 6434922, at *4 (C.D. Cal. Jul. 17, 2019); *Walker v. Life Ins. Co. of the Southwest*, 2018 WL 6133640, at *6 (C.D. Cal. Nov. 9, 2018) ("[U]nder Rule 26, an expert cannot supplement an expert report by providing new opinions in a deposition." (citing *Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635, 642 (7th Cir 2008)). Second, this opinion should be excluded because it is not reliable. Dr. Waterman made no	opposition to Plaintiffs' motion to exclude them. ECF No. 161. Dr. Waterman testified about her personal experience of hearing reports of steering from DaVita and U.S. Renal dialysis staff in response to questions from Plaintiffs' counsel at her deposition. The reports of steering were not explicitly within the scope of the subject matter on which she was asked to opine, and reflect Dr. Waterman's personal knowledge of steering. Waterman's testimony was offered in rebuttal to Plaintiffs' misrepresentations about her background and experience. To the extent Dr. Waterman's testimony about her personal experience is construed as expert opinion, she did not offer new opinions at her deposition, but rather provided supplemental reasons for her ultimate conclusions. Courts have held that supplemental expert disclosures are harmless if they simply provide additional details to support reports' initial conclusion. *Encompass*

	attempt to independently investigate the veracity of these anecdotal claims, and any opinions she could draw from them are unreliable and not based on any methodology. *See* Leland Decl. Exh. 67, at 27 (Waterman Depo. at 177:02–08) (testifying she did nothing to confirm the truth or falsity of the purported statements). Instead, she attempts to "parrot[] the opinions of others," without showing she "conducted an *independent evaluation* of that evidence." *See Linares v. Crown Equipment Corp.*, 2017 WL 10403454, at *12 (C.D. Cal. Sept. 13, 2017) (emphasis added). Dr. Waterman's impromptu conversations are not scientific evidence—e.g., peer reviewed, published literature—of a type reasonably relied upon by social psychologists. *Cooper v. Brown*, 510 F.3d 870, 942–43 (9th Cir. 2007) (citing peer review and general acceptance in the relevant scientific fields as relevant factors).	*Ins. Co. v. Berger*, 2014 WL 12597120 at *4 (C.D. Cal., Aug. 12, 2014). "The purpose of an expert report is not to replicate every word that the expert might say on the stand; it is instead to convey the substance of the expert's opinion, along with the other background information required by the rule, so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary." *Williams v. Univ. Med. Ctr. of Southern Nev.*, 2010 WL 2802214, *4 (D. Nev., July 14, 2010) (quotation marks omitted). To the extent Dr. Waterman elaborated on the foundation for her opinions, Plaintiffs had a full opportunity to explore this topic at her deposition. Plaintiffs' objections thus go to the weight, not the admissibility, of the evidence. The court's role in assessing reliability is not to determine whether the expert's hypothesis is correct, or to evaluate whether it is corroborated by other evidence in the

	Third, Dr. Waterman's testimony about her personal conversations with third parties and any opinions based on them should be excluded because Dr. Waterman herself said that she did not rely on her personal conversations in forming her opinions. Leland Decl. Exh. 67, at 28 (Waterman Dep. 178:10–17) ("Q. … are you relying on any of those conversations for the opinions that you've included in your report or your supplemental report? A. *No*." (emphasis added)). As such, her discussion of these opinions represents an attempted end-run around Federal Rule of Evidence 802. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) ("Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert *properly relies* to be admitted to explain the basis of the expert's opinion" but "the hearsay evidence is to be considered solely as a basis for the expert opinion *and not as*	record. *Elosu*, 26 F.4th at 1023-1024; *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d at 969-70 (the district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to the trier of fact); *In re Toyota Motor Corp.*, 978 F. Supp. 2d 1053, 1074 (C.D. Cal. 2013). Plaintiffs' challenge to the factual basis of Dr. Waterman's opinion "rather than the methodology upon which it is based, particularly when the facts are subject to reasonable dispute . . . go[es] to the weight of [Waterman's] opinion, not the admissibility." *SPS Technologies, LLC v. Briles Aerospace, Inc.*, No. CV 18-9536-MWF (ASx), 2021 WL 4913509, *7 (C.D. Cal. Sept. 8, 2021) (cleaned up). Defendants are not limited to evidence within the legislative record because it is well established that evidence showing a substantial governmental interest can take many forms. *See, e.g., Fla. Bar*, 515 U.S. at 626-28

	substantive evidence." (emphasis added) (internal quotation marks and citations omitted)). Fourth, Dr. Waterman was not designated as an expert on evidence that steering occurs. *See* Defs.' Response to Pls.' Statement of Uncontroverted Facts ¶ 84, ECF No. 153-5. As such, she may not testify on this issue. Finally, objection to Exhibit 22 on the ground that it is outside the legislative record and therefore irrelevant. *See Turner Broadcasting System, Inc.*, 512 U.S. at 666.	(relying on survey data, newspaper editorials, and anecdotes). Courts do not impose "'an unnecessarily rigid burden of proof . . . so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.'" *Jackson*, 746 F.3d at 965 (quoting *Playtime Theatres.*, 475 U.S. at 50-52). Moreover, Plaintiffs' cited authority, *Turner Broadcasting System, Inc. v. FCC*, does not stand for the proposition asserted, but rather contemplates that legislative interests may be found outside the legislative record. 512 U.S. at 666-69 (1994) (finding evidence cited in the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining…").

Dated: May 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***Jane Doe, et al v. Rob Bonta, et al.***

Case No. **8:19-cv-02105-DOC-ADS**

I hereby certify that on May 3, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. **DEFENDANTS' RESPONSES TO PLAINTIFFS' OBJECTIONS TO EVIDENCE OFFERED IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
2. **SUPPLEMENTAL DECLARATION OF LISA J. PLANK IN SUPPORT OF DEFENDANTS' RESPONSES TO PLAINTIFFS' OBJECTIONS TO EVIDENCE OFFERED IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [with EXHIBIT 35]**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on May 3, 2022, at San Francisco, California.

Vanessa Jordan	Vanessa Jordan
Declarant	Signature

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