1	ROB BONTA	
2	Attorney General of California MARK R. BECKINGTON, SBN 126009 R. MATTHEW WISE, SBN 238485	
3	R. MATTHEW WISE, SBN 238485 Supervising Deputy Attorneys General S. CLINTON WOODS, SBN 246054	
4	Lisa J. Plank, SBN 153737	
5	Deputy Attorneys General 455 Golden Gate Avenue, Suite 11000	
6	San Francisco, CA 94102-7004 Telephone: (415) 510-4445	
7	Fax: (415) 703-1234 E-mail: Lisa.Plank@doj.ca.gov	
8	Attorneys for Defendants Rob Bonta, et al	
9	IN THE UNITED STAT	TES DISTRICT COURT
10	FOR THE CENTRAL DIS	STRICT OF CALIFORNIA
11	SOUTHER	N DIVISION
12		1
13	JANE DOE, et al.,	Case No. 8:19-cv-02105-DOC-ADS
14	Plaintiffs,	DEFENDANTS' RESPONSES TO PLAINTIFFS' OBJECTIONS TO
15	*7	EVIDENCE OFFERED IN SUPPORT OF DEFENDANTS'
16	V.	OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
17	ROB BONTA, in his Official	JUDGMENT SOWWART
18	Capacity as Attorney General of California; et al.,	Date: June 9, 2022
19	Defendants.	Time: 8:00 a.m. Courtroom: 10A The Hamarahla David O
20		Judge: The Honorable David O. Carter
21		Trial Date: July 12, 2022 Action Filed: November 1, 2019
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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

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7 8	Defendants'	Plaintiffs' Evidentiary	Defendants' Response
9	Uncontroverted	Objection	•
	Fact/Evidence		
10			
11	Defendants'	Objection to Exhibit 22	Defendants are not limited
12	Uncontroverted Fact #75 : While some studies	on the ground that it is outside the legislative	to evidence within the legislative record because
13	have found a correlation	record and therefore	it is well established that
14	between private insurance	irrelevant. See Turner	evidence showing a
	and better health outcomes, other factors	Broadcasting System, Inc. v. FCC, 512 U.S. 622,	substantial governmental interest can take many
15	related to socioeconomic	666 (1994).	forms. See, e.g., Fla. Bar,
16	status likely play a role in		515 U.S. at 626-28
17	this association.		(relying on survey data,
18	Supporting Evidence :		newspaper editorials, and anecdotes). Courts do not
19	Declaration of S. Clinton Woods in Support of		impose "an unnecessarily
20	Defendants' Opposition		rigid burden of proof
	to Plaintiffs' Motion for		so long as whatever evidence the [government]
21	Summary Judgment		relies upon is reasonably
22	(Woods Decl.), Ex. 22 (Deposition of Amy		believed to be relevant to
23	Waterman (Waterman		the problem that the
24	Dep.) 126:17-127:19;		[government] addresses." Jackson, 746 F.3d at 965
25	131:21-132:2.		(quoting <i>Playtime</i>
			Theatres., 475 U.S. at 50-
26			52). Moreover, Plaintiffs'
27			cited authority, <i>Turner Broadcasting System, Inc.</i>
28			Dioducusting 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 grainents, public insurance can be more cost-effective. Supporting Evidence: See, e.g., Pub. L. 114-255, § 17006 (allowing ESRD patients to carroll 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 Rene Mollow Mollow Deputy Director of Health Care Benefits and Eligibility at the California Department of the legislative record. 512 U.S. at 50-52). Moreover, Plaintiffs' and Eligibility at the California Department of the problem that the legislative record. 512 U.S. at 50-52). Moreover, Plaintiffs' that legislative interests that legislative mecord. 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 the legislative record to be insufficient and remanding to district court to "permit the parties to develop a more thorough factual record, and the legislative record the legislative record, 12 U.S. at 626-28 (rewinding) Defendants				
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2	patients in Medi-Cal's	Broadcasting System, Inc.
2	ESRD program "don't	v. FCC, does not stand for
3	have a spend-down	the proposition asserted,
4	requirement")).	but rather contemplates
5		that legislative interests
J		may be found outside the
6		legislative record. 512
7		U.S. at 666-69 (1994) (finding evidence cited in
0		the legislative record to be
8		insufficient and remanding
9		to district court to "permit
10		the parties to develop a
		more thorough factual
11		record, and to allow the
12		District Court to resolve
13		any factual disputes
13		remaining").
14		
15		Further, the Legislature of
1.6		course may take into account the existence and
16		substance of other relevant
17		laws during the law-
18		making process without
		inclusion of such laws in
19		the legislative record.
20		Indeed, legislators are
21		presumed to know
		existing law (see Cannon
22		v. Univ. of Chi., 441 U.S. 677, 696-697 (1979), such
23		as, in this case, the 21st
24		Century Cures Act, PL
		114-255 (Dec. 13, 2016),
25		42 USC Section 17006
26		(Allowing End-Stage
27		Renal Disease
		Beneficiaries to Choose a
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Defendants' Uncontroverted Fact #77: Research has shown that ESRD patients at forprofit 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. Supporting Evidence: Fresenius ECF No. 152-4 for flat 110. Supporting Evidence: Fresenius ECF No. 152-4 for flat 110. Defendants address substance of the objections to Dr. Waterman's report a length in their oppose to Plaintiffs' motion to exclude, see length in their oppose to Plaintiffs' 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 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 transplant education at for-profit facilities. Objection to the expert report of Dr. Amy Waterman for the reasons substance of the objections to Dr. Waterman's report a length in their oppose to Plaintiffs' motion to exclude, see length in their oppose to Plaintiffs' notion to exclude. ECF No. 1 Dr. Waterman's opinion has no relevance to Plaintiffs' reducation and have a clinics like those of provider Plaintiffs reducation and nayous action and have a clinics like those of provider Plaintiffs reducation and provision of AB 290 addresses the purportedly lower rates of kidney transplant education and inferior transplant education and inferior transplant education and inferior transplant education and inferior transplant education and have a clinics like those of provider Plaintiffs' neclude. ECF No. 1 Dr. Waterman's opinion has no relevance to Plaintiffs' challenge to AB 290 addresses the purportedly lower rates of kidney transplantation and inferior transplant education and inferior transplant education and have a clinics like those of obtaining a transplant education and inferior transplant education and inferior transplant education and have a clinics like those	tion co 51.
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9 Supporting Evidence: Fresenius ECF No. 152-4 at 110. 11 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 transplant education and inferior transplant education and have a lower likelihood of obtaining a transplant consistent with AB 2 legislative findings, such facts informed Legislature as it enaw AB 290 to address he to patients caused by steering. See, e.g., A 290, Section 1 18 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 addresses the purportedly lower rates of kidney transplant education and have a lower likelihood of obtaining a transplant consistent with AB 2 legislative findings, such facts informed Legislature as it enaw AB 290 to address he to patients caused by steering. See, e.g., A 290, Section 1 18 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 re inferior transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant education and have a lower likelihood of obtaining a transplant	- *
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report of Dr. Waterman on the ground that it violates Federal Rule of such as kidney	ave a
on the ground that it violates Federal Rule of such as kidney	
violates Federal Rule of such as kidney	<u>,</u>
Civil Procedure 56(c)(4) transplants").	
because it is not sworn.	
nor accompanied by a Dr. Waterman's exp	
sworn declaration. Rule reports are authentic	
56(c)(4) requires an See Declaration of D	
expert report to be "itself Amy Waterman, file	ı
sworn" or "accompanied by a sworn declaration." concurrently with Defendants' Reply is	-
by a sworn declaration. Support of Motion for	
Am. Fed. of Musicians of Summary Judgment	
28 U.S. and Canada v. (Waterman Decl.).	

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

1			
1			District Court to resolve
2			any factual disputes
3	D.C. J. 4.2	Ol.'	remaining").
	Defendants'	Objection to Exhibit 17	Plaintiffs' objection is
4	Uncontroverted Fact #79 : Former DaVita	on the ground that Ms. Laura Fiallos lacks	improper as it is based on Plaintiffs'
5	insurance specialist Laura	personal knowledge	misrepresentation of
	Fiallos corroborated the	under Federal Rule of	Fiallos's testimony and
6	existence and purpose of	Evidence 602 to testify to	contentions about what
7	the "Medicaid	this effect. Ms. Fiallos	inferences should be
8	Opportunity" scheme at a	testified that she spent	drawn from the testimony.
	legislative hearing on AB	just two months working	The foundation for
9	290, testifying that she	on the Medicaid	Fiallos's testimony is clear
10	had "watched DaVita	Opportunity program and	from her deposition
11	increasingly push to have	that she participated only	testimony; as Plaintiffs
	more commercially	in initial interest	concede, one of Ms.
12	insured patients in their	conversations; as such,	Fiallos's job functions as a
13	clinics" through this	she has no personal knowledge of whether	DaVita insurance
14	program.	DaVita allegedly pushed	specialist was to promote the Medicaid Opportunity
14	Supporting Evidence:	patients to obtain	program. See Fiallos Dep.
15	Woods Decl., Ex. 17	commercial insurance.	Plaintiffs' objections are
16	(Deposition of Laura Fiallos (Fiallos Dep.)	Leland Decl. Exh. 73, at	not grounds for exclusion
	46:4-13, 64:5-67:1).	125, 127–28 (Fiallos	as they go to the weight of
17	40.4-13, 04.3-07.1).	Depo. at 70:04–06,	the evidence, not its
18		72:11–73:15).	admissibility.
19		Objection to Exhibit 17	
		on the ground that it is	Defendants are not limited
20		outside the legislative	to evidence within the
21		record and therefore	legislative record because it is well established that
22		irrelevant. See Turner	evidence showing a
		Broadcasting System,	substantial governmental
23		<i>Inc.</i> , 512 U.S. at 666.	interest can take many
24			forms. See, e.g., Fla. Bar,
			515 U.S. at 626-28
25			(relying on survey data,
26			newspaper editorials, and
27			anecdotes). Courts do not
			impose "an unnecessarily
28			rigid burden of proof

1	so long as whatever
	evidence the [government]
2	relies upon is reasonably
3	believed to be relevant to
4	the problem that the
	[government] addresses.""
5	Jackson, 746 F.3d at 965
6	(quoting <i>Playtime</i>
7	Theatres., 475 U.S. at 50-
	52). Moreover, Plaintiffs'
8	cited authority, <i>Turner Broadcasting System, Inc.</i>
9	v. FCC, does not stand for
10	the proposition asserted,
	but rather contemplates
11	that legislative interests
12	may be found outside the
13	legislative record. 512
	U.S. at 666-69 (1994)
14	(finding evidence cited in the legislative record to be
15	insufficient and remanding
16	to district court to "permit
	the parties to develop a
17	more thorough factual
18	record, and to allow the
19	District Court to resolve
	any factual disputes
20	remaining"). Plaintiffs'
21	objection is particularly inappropriate given that
22	Fiallos testified to the
	Legislature on the same
23	subjects at the July 3,
24	2019 AB 290 hearing (see
25	Fiallos Dep. 46:4-13) and
	her testimony is thus part
26	of the AB 290 legislative
27	record. In addition, Plaintiffs noticed and took
28	Fiallos's deposition at
20	1 lands 5 deposition at

1			which she gave the
2			testimony they seek to
3			exclude on the ground it is
			not part of the relevant
4	Defendants'	Objection to Mr. John	record. Plaintiffs' objection "to
5	Uncontroverted Fact	Bertko's opinion on the	Mr. John Bertko's
6	#80: Lower insurance	ground it is unreliable	opinion" is
	premiums should flow	and speculative. Mr.	incomprehensible as it
7	naturally from a healthier	Bertko in fact testified in	fails to make clear what
8	risk mix given the close	the cited deposition	"opinion" is objected to
9	relationship between the	excerpt that small	and the basis for the
	risk of the pool and insurance premiums.	changes in the risk mix of the insurance pool would	objection.
10		not necessarily lead to	The court's role in
11	Supporting Evidence : Woods Decl., Ex. 21	higher insurance	assessing reliability is not
12	(Deposition of John	premiums. See Defs.'	to determine whether the
13	Bertko (Bertko Dep.)	Opp. MSJ, Ex. 21, Dkt.	expert's hypothesis is
	208:6-25); see also Doe	153-1 at 39 (Bertko	correct, or to evaluate
14	RJN in support of Defs.'	Depo. at 208:22–25).	whether it is corroborated
15	Opp'n (Opp'n RJN), Ex.	(testifying if "risk mix" "just changed [a] little	by other evidence in the record. <i>Elosu v</i> .
16	1 (DMHC premium rate	bit" then that "would not	Middlefork Ranch Inc., 26
	review FAQ explaining that health plan premiums	necessarily have an	F.4th 1017, 1023-1024
17	increase due to a variety	impact on premiums" or	(9th Cir. 2022); <i>Alaska</i>
18	of factors, including	would have "an impact	Rent-A-Car, Inc. v. Avis
19	"when individuals use	maybe that wasn't very	Budget Grp., Inc., 738
	more health care services	visible"); see also Leland	F.3d at 969-70 (the district
20	that expected or when	Decl. Exh. 74, at 138 (Bertko Depo. at 209:01–	court is not tasked with deciding whether the
21	they require expensive	23) (agreeing that a small	expert is right or wrong,
22	care"). Furthermore, the legislation requires	change in the risk mix	just whether his testimony
23	insurers to file a schedule	"would not necessarily	has substance such that it
24	documenting the cost	show up in a one-to-one impact on premiums").	would be helpful to the trier of fact); <i>In re Toyota</i>
	savings associated with		Motor Corp., 978 F. Supp.
25	the law and the impact on rates. See AB 290, § 4.	Objection to <i>Doe</i> Request for Judicial Notice,	2d 1053, 1074 (C.D. Cal.
26	14105. Бес ПВ 270, у т.	Exhibit 2 (which in fact is	2013). Again, Plaintiffs'
27		the document to which	challenge to the factual
28		Defendants cite) on the	basis of Mr. Bertko's opinion "rather than the
20			opinion ramer man me

1	ground it may not be	methodology upon which
2	judicially noticed under	it is based, particularly
3	Federal Rule of Evidence 201. Judicial notice is	when the facts are subject
	appropriate only for facts	to reasonable dispute go[es] to the weight of
4	that are not subject to	[Bertko's] opinion, not the
5	reasonable dispute. Fed.	admissibility." SPS
6	R. Evid. 201(b). Thus, "a	Technologies, LLC v.
7	court cannot take judicial notice of disputed facts	<i>Briles Aerospace, Inc.</i> , No. CV 18-9536-MWF
8	contained in such public	(ASx), 2021 WL 4913509,
	records." Khoja v.	*7 (C.D. Cal. Sept. 8,
9	Orexigen Therapeutics,	2021) (cleaned up).
10	Inc., 899 F.3d 988, 999	TI DIALIC
11	(9th Cir. 2018). Because the relationship between	The DMHC premium rate review FAQ is properly
12	premiums and health risk	subject to judicial notice
	mix is at dispute in this	for the reasons stated in
13	case and the subject of	Defendants' Request for
14	expert testimony by both	Judicial Notice, as the
15	sides, the Court may not take judicial notice of this	FAQ is a public record posted on a government
16	website.	website. Fed. R. Evid.
17	Objection to Exhibit 21	201(b). Plaintiffs have not
	and to <i>Doe</i> Request for	identified any dispute of
18	Judicial Notice, Exhibit 2	fact between the parties with regard to any
19	on the ground they are	statement about premium
20	outside the legislative record and therefore	rate review in the subject
21	irrelevant. See Turner	FAQ, and the FAQ
	Broadcasting System,	statements are not reasonably subject to
22	<i>Inc.</i> , 512 U.S. at 666.	dispute. Plaintiffs also
23		have not identified a
24		dispute of fact between the
25		parties with regard to the
26		relationship between premiums and health risk
		mix. Thus, there is no
27		dispute of fact that
28		precludes judicial notice

Case 8	3:19-cv-02105-DOC-ADS	Document 185 #:6615	Filed 05/03/22	Page 11 of 24 Page ID
1 2				of the cited FAQ. Indeed, Plaintiffs' rebuttal expert acknowledged that adding
3				high risk costly ESRD enrollees to Covered
4				California plans could
5				drive up the risk mix (Deposition of Greg Russo
7				(Russo Dep.) 160:2-16)
8				and that a decrease in the risk score of an insurance
9				pool could contribute to a decrease in insurance
10				premiums (Russo Dep.
11				162:4-14).
12				Defendants are not limited
13				to evidence within the legislative record because
14				it is well established that
15				evidence showing a substantial governmental
16				interest can take many
17				forms. See, e.g., Fla. Bar, 515 U.S. at 626-28
18				(relying on survey data,
19				newspaper editorials, and anecdotes). Courts do not
20				impose "an unnecessarily
21				rigid burden of proof so long as whatever
22				evidence the [government]
23				relies upon is reasonably believed to be relevant to
24				the problem that the
25				[government] addresses." Jackson, 746 F.3d at 965
26				(quoting <i>Playtime</i>
27				<i>Theatres.</i> , 475 U.S. at 50-52). Moreover, Plaintiffs'
28				cited authority, <i>Turner</i>

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

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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

1	rates. See Pls.' Mot. to	to determine whether the
2	Exclude, Dkt. 146 at 21;	expert's hypothesis is
3	Defs.' MSJ, Ex. 8, Dkt. 128-4 at 160–61.	correct, or to evaluate whether it is corroborated
4	Objection to the	by other evidence in the
5	supplemental expert	record. <i>Elosu</i> , 26 F.4th at 1023-1024; <i>Alaska Rent</i> -
6	report of Dr. Waterman on the ground that it fails	A-Car, Inc. v. Avis Budget
7	to comply with Federal	Grp., Inc., 738 F.3d at 969-70 (the district court
8	Rule of Civil Procedure 56(c)(4) because it is not	is not tasked with deciding
9	sworn, nor accompanied by sworn declarations.	whether the expert is right or wrong, just whether his
10	See Am. Fed. of	testimony has substance such that it would be
11	Musicians, 903 F.3d at 976–77 (9th Cir. 2018).	helpful to the trier of fact);
12	Further objection to	In re Toyota Motor Corp.,
13	Exhibit 8 on the ground	978 F. Supp. 2d 1053, 1074 (C.D. Cal. 2013).
14	that it is outside the legislative record and	Plaintiffs' challenge to the
15	therefore irrelevant. See	factual basis of Dr. Waterman's opinion
16	Turner Broadcasting	"rather than the
17	<i>System, Inc.</i> , 512 U.S. at 666.	methodology upon which it is based, particularly
18		when the facts are subject
19		to reasonable dispute go[es] to the weight of
20		[Waterman's] opinion, not
21		the admissibility." SPS Technologies, LLC v.
22		Briles Aerospace, Inc.,
23		No. CV 18-9536-MWF
24		(ASx), 2021 WL 4913509, *7 (C.D. Cal. Sept. 8,
25		2021) (cleaned up).
26		Defendants are not limited
27		to evidence within the
28		legislative record because it is well established that

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

1 2			reports are authenticated. <i>See</i> Waterman Decl.
	Defendants'	Objection to Exhibit 1a	The referenced Legislative
3	Uncontroverted Fact	on the ground that it is	Counsel opinion is
4	#83: California's	inadmissible hearsay	admissible under the
5	Legislative Counsel	under Federal Rule of	public records exception.
	determined that based on the reasoning in Advisory	Evidence 801(c) to the extent Defendants seek to	Fed. R. Evid. 803(6), (8)(A)(i).
6	Opinion 97-1, AKF could	introduce the material for	(0)(A)(1).
7	comply with AB 290	the truth of the matter	
8	without violating HIPAA.	asserted therein. None of	
9	Supporting Evidence : <i>Doe</i> ECF No. 128-3 (Ex.	the exceptions to hearsay are applicable here.	
10	1a) at 8.		
11	Defendants'	Objection to Exhibit 1c	The CMS rulemaking
12	Uncontroverted Fact	on the ground that it is	record is a public record
13	#84: Sections 3(b)(2) & 5(b)(2) of AP 200	inadmissible hearsay under Federal Rule of	containing the factual
	5(b)(2) of AB 290 address certain practices	Evidence 801(c). The	findings of a public agency, and thus, is
14	noted in the CMS record	quoted statements are in	"clearly admissible under
15	that are harmful to	fact hearsay-within-	Rule 803(8)(A)(iii)." 2
16	patients, such as the	hearsay, as they are	Robert E. Jones et al.,
17	withdrawal of premium	statements made by CMS	Federal Civil Trials &
	assistance when a patient receives a kidney	in the Federal Register that recount documents in	Evidence (The Rutter
18	transplant.	the comment record made	Group Practice Guide) ¶ 8:2837 (2021); see, e.g.,
19	-	by other individuals and	Owens v. Republic of
20	Supporting Evidence: See AB 290, §§ 1(c) &	groups. No hearsay	Sudan, 864 F.3d 751, 792
	(d); <i>Doe</i> ECF No. 128-3	exception applies to the	(D.C. Cir. 2017) (State
21	(Ex. 1c) at 53 (CMS	documents in the record,	Department report,
22	record shows that major	or to CMS's statement recounting the	including its factual findings and conclusions,
23	non-profits "will not continue to provide	documents' contents.	"fit squarely within the
24	financial assistance once		public records exception)
25	a patient receives a		(vacated in part on other
	successful transplant").		grounds by <i>Opati v</i> . <i>Republic of Sudan</i> , 140 S.
26			Ct. 1601 (2020)).
27			Plaintiffs' objections to
28			the rulemaking record thus

Case 8:19-cv-02105-DOC-ADS Document 185 Filed 05/03/22 Page 16 of 24 Page ID

1			
1			52). Moreover, Plaintiffs'
2			cited authority, <i>Turner</i>
3			Broadcasting System, Inc. v. FCC, does not stand for
			the proposition asserted,
4			but rather contemplates
5			that legislative interests
6			may be found outside the
7			legislative record. 512
/			U.S. at 666-69 (1994)
8			(finding evidence cited in
9			the legislative record to be
			insufficient and remanding to district court to "permit
10			the parties to develop a
11			more thorough factual
12			record, and to allow the
13			District Court to resolve
			any factual disputes
14	Defendants'	Objection to Exhibit 6 on	remaining").
15	Uncontroverted Fact	Objection to Exhibit 6 on the ground that it is	Defendants are not limited to evidence within the
16	#87: A HIPP recipient	outside the legislative	legislative record because
	would only potentially	record and therefore	it is well established that
17	learn that their provider is	irrelevant. See Turner	evidence showing a
18	a donor after (1) picking a	Broadcasting System,	substantial governmental
19	provider, (2) applying for	<i>Inc.</i> , 512 U.S. at 666.	interest can take many
	a receiving HIPP, (3)		forms. See, e.g., Fla. Bar,
20	obtaining dialysis, and (4) receiving a benefits		515 U.S. at 626-28 (relying on survey data,
21	statement. By then, the		newspaper editorials, and
22	HIPP recipient would		anecdotes). Courts do not
23	have already picked a		impose "an unnecessarily
23	provider without undue		rigid burden of proof
24	influence, as required by		so long as whatever
25	Advisory Opinion 97-1.		evidence the [government]
26	Supporting Evidence :		relies upon is reasonably believed to be relevant to
	Doe ECF No. 128-4 (Ex.		the problem that the
27	6) at 95-97, ¶¶ 78-86.		[government] addresses."
28			Jackson, 746 F.3d at 965

1			(quoting <i>Playtime</i>
2			Theatres, 475 U.S. at 50-
3			52). Moreover, Plaintiffs'
			cited authority, <i>Turner Broadcasting System, Inc.</i>
4			v. FCC, does not stand for
5			the proposition asserted,
6			but rather contemplates
7			that legislative interests
8			may be found outside the legislative record. 512
			U.S. at 666-69 (1994)
9			(finding evidence cited in
10			the legislative record to be
11			insufficient and remanding to district court to "permit"
12			the parties to develop a
13			more thorough factual record, and to allow the
14			District Court to resolve
			any factual disputes
15			remaining"
16	Defendants' Uncontroverted Fact	Objection to Exhibit 1a on the ground that it is	The referenced Legislative Counsel opinion is
17	#88: California's	inadmissible hearsay	admissible under the
18	Legislative Counsel did	under Federal Rule of	public records exception.
19	not conduct a preemption analysis as it pertained to	Evidence 801(c) to the extent Defendants seek to	Fed. R. Evid. 803(6), (8)(A)(i).
20	AB 290, but instead	introduce the material for	(0)(11)(1).
21	simply described the	the truth of the matter	
	mechanics of the	asserted therein. None of	
22	proposed legislation.	the exceptions to hearsay are applicable here.	
23	Supporting Evidence : <i>Doe</i> ECF No. 128-3 (Ex.	ше пррисцої пете.	
24	1a) at 7-11.		
25	Defendants'	Objection to the opinions	Defendants address the
26	Uncontroverted Fact	of Dr. Waterman on the	substance of Plaintiffs'
27	#89: At her deposition,	ground that they are not	objections to Dr.
	Dr. Waterman testified that DaVita and U.S.	proper opinion testimony	Waterman's testimony and reports at length in their
28	mai Da vita anu U.S.		reports at length in then

1 under Federal Rule of Renal dialysis staff opposition to Plaintiffs' reported to her that ESRD motion to exclude them. Evidence 702. 2 patients were steered to ECF No. 161. Dr. First, Dr. Waterman 3 commercial insurance. Waterman testified about disclosed these purported her personal experience of 4 **Supporting Evidence**: conversations for the first hearing reports of steering Woods Decl., Ex. 22, time at her deposition. 5 from DaVita and U.S. Waterman Dep. 173:1-Allowing these opinions Renal dialysis staff in 6 175:4, 175:7-18, 175:22to be introduced would response to questions from 176:4. violate the rule that an 7 Plaintiffs' counsel at her expert report must deposition. The reports of 8 contain "a complete steering were not statement of all opinions 9 explicitly within the scope the witness will express of the subject matter on 10 and the basis and reasons which she was asked to for them" and "the facts 11 opine, and reflect Dr. or date considered by the Waterman's personal 12 witness in forming them." knowledge of steering. Fed. R. Civ. P. 13 Waterman's testimony 26(a)(2)(B)(i), (ii); see was offered in rebuttal to 14 also Cousyn for Cousyn Plaintiffs' Grading & Demo, Inc. v. 15 misrepresentations about Ford Motor Co., 2019 her background and 16 WL 6434922, at *4 (C.D. experience. Cal. Jul. 17, 2019); 17 Walker v. Life Ins. Co. of To the extent Dr. 18 the Southwest, 2018 WL Waterman's testimony 6133640, at *6 (C.D. Cal. 19 about her personal Nov. 9, 2018) ("[U]nder experience is construed as 20 Rule 26, an expert cannot expert opinion, she did not supplement an expert 21 offer new opinions at her report by providing new deposition, but rather 22 opinions in a deposition." provided supplemental (citing Ciomber v. 23 reasons for her ultimate Cooperative Plus, Inc., conclusions. Courts have 24 527 F.3d 635, 642 (7th held that supplemental Cir 2008)). 25 expert disclosures are Second, this opinion harmless if they simply 26 should be excluded provide additional details 27 because it is not reliable. to support reports' initial Dr. Waterman made no 28 conclusion. Encompass

1	attempt to independently	Ins. Co. v. Berger, 2014
2	investigate the veracity of	WL 12597120 at *4 (C.D.
3	these anecdotal claims,	Cal., Aug. 12, 2014).
	and any opinions she could draw from them are	"The purpose of an expert report is not to replicate
4	unreliable and not based	every word that the expert
5	on any methodology. See	might say on the stand; it
6	Leland Decl. Exh. 67, at	is instead to convey the
	27 (Waterman Depo. at	substance of the expert's
7	177:02–08) (testifying	opinion, along with the
8	she did nothing to	other background
9	confirm the truth or	information required by the rule, so that the
10	falsity of the purported	opponent will be ready to
	statements). Instead, she attempts to "parrot[] the	rebut, to cross-examine,
11	opinions of others,"	and to offer a competing
12	without showing she	expert if necessary."
13	"conducted an	Williams v. Univ. Med. Ctr. of Southern Nev.,
14	independent evaluation of	2010 WL 2802214, *4 (D.
	that evidence." <i>See Linares v. Crown</i>	Nev., July 14, 2010)
15	Equipment Corp., 2017	(quotation marks omitted).
16	WL 10403454, at *12	To the extent Dr.
17	(C.D. Cal. Sept. 13, 2017)	Waterman elaborated on the foundation for her
18	(emphasis added). Dr.	opinions, Plaintiffs had a
	Waterman's impromptu conversations are not	full opportunity to explore
19	scientific evidence—e.g.,	this topic at her
20	peer reviewed, published	deposition. Plaintiffs'
21	literature—of a type	objections thus go to the weight, not the
22	reasonably relied upon by social psychologists.	admissibility, of the
23	Cooper v. Brown, 510	evidence.
24	F.3d 870, 942–43 (9th	The court's role in
	Cir. 2007) (citing peer	assessing reliability is not
25	review and general acceptance in the relevant	to determine whether the
26	scientific fields as	expert's hypothesis is
27	relevant factors).	correct, or to evaluate whether it is corroborated
28		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

1	substantive evidence." (relying on survey data,	
2	(emphasis added) newspaper editorials, and (internal quotation marks anecdotes). Courts do not	
3	and citations omitted)). impose "an unnecessarily	11
4	Fourth, Dr. Waterman so long as whatever	
5	was not designated as an expert on evidence that evidence the [government]	
6	steering occurs. See relies upon is reasonably	
7	Defs.' Response to Pls.' Statement of believed to be relevant to the problem that the	
8	Uncontroverted Facts ¶ [government] addresses."	
9	84, ECF No. 153-5. As such she may not testify Jackson, 746 F.3d at 965 (quoting <i>Playtime</i>)	
10	on this issue. Theatres., 475 U.S. at 50-	
11	Finally, objection to 52). Moreover, Plaintiffs' cited authority, <i>Turner</i>	
12	Exhibit 22 on the ground Broadcasting System, Inc.	
13	legislative record and v. FCC, does not stand for the proposition asserted,	
14	therefore irrelevant. See but rather contemplates	
15	Turner Broadcasting System, Inc., 512 U.S. at may be found outside the	
16	legislative record. 512	
17	U.S. at 666-69 (1994) (finding evidence cited in	
18	the legislative record to be	
19	insufficient and remanding	,
20	to district court to "permit the parties to develop a	
21	more thorough factual	
22	record, and to allow the District Court to resolve	
23	any factual disputes	
24	remaining").	_
25		
26		
27		
28		

Case	8:19-cv-02105-DOC-ADS	Document 185 #:6627	Filed 05/03/22 Page 23 of 24 Page ID
1	Dated: May 3, 2022		Respectfully submitted,
2			ROB BONTA
3			Attorney General of California MARK R. BECKINGTON R. MATTHEW WISE
4			Supervising Deputy Attorneys General S. CLINTON WOODS
5			Deputy Attorney General
6			/s/ Lisa J. Plank
7			Lisa J. Plank
8 9			Deputy Attorney General Attorneys for Defendants Rob Bonta,
10			et al.
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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 Qordan
Declarant	Signature

SA2019106023 43206255.docx