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IN THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

**JANE DOE; STEPHEN ALBRIGHT;
 AMERICAN KIDNEY FUND, INC.;**
**and DIALYSIS PATIENT
 CITIZENS, INC.,**

Plaintiffs,

v.

**ROB BONTA, in his Official
 Capacity as Attorney General of
 California; RICARDO LARA in his
 Official Capacity as California
 Insurance Commissioner; SHELLY
 ROUILLARD in her official Capacity
 as Director of the California
 Department of Managed Health
 Care; and TOMAS ARAGON, in his
 Official Capacity as Director of the
 California Department of Public
 Health,**

Defendants.

8:19-cv-02105-DOC (ADSx)

**SUPPLEMENTAL BRIEF
 SUPPORTING DEFENDANTS'
 MOTION FOR SUMMARY
 JUDGMENT**

Courtroom: 9D
 Judge: The Honorable David O.
 Carter

Action Filed: November 1, 2019

1 **FRESENIUS MEDICAL CARE**
2 **ORANGE COUNTY, LLC; DAVITA**
3 **INC., FRESENIUS MEDICAL**
4 **CARE HOLDINGS, INC., d/b/a**
5 **Fresenius Medical Care North**
6 **America; U.S. RENAL CARE, INC.,**

7 Plaintiffs,

8 v.

9 **ROB BONTA, in his Official**
10 **Capacity as Attorney General of**
11 **California; RICARDO LARA in his**
12 **Official Capacity as California**
13 **Insurance Commissioner; SHELLY**
14 **ROUILLARD in her official Capacity**
15 **as Director of the California**
16 **Department of Managed Health**
17 **Care; and TOMAS ARAGON, in her**
18 **official capacity as Director of the**
19 **California Department of Public**
20 **Health,**

21 Defendants.

22 **INTRODUCTION**

23 On June 21, 2022, the Supreme Court issued an opinion in *Marietta Memorial*
24 *Hospital Employee Health Benefit Plan v. DaVita Inc.*, 142 S. Ct. 1968 (2022)
25 (*Marietta*), and in doing so foreclosed the *Doe* Plaintiffs’ preemption claim based
26 on the Medicare Secondary Payer Act (MSPA). Nor does the *Marietta* decision
27 support the *Fresenius* Plaintiffs’ preemption claim. Neither claim should survive
28 summary judgment.

BACKGROUND

I. THE *DOE* PLAINTIFFS’ MSPA PREEMPTION CLAIM

In their second claim for relief, the *Doe* Plaintiffs allege that AB 290 is in
direct conflict with section 1395y(b) of the MSPA, which contains both the so-
called “take into account” and “non-differentiation” provisions. ECF No. 1 (*Doe*
Complaint), ¶ 92. The “take into account” provision prohibits group health plans

1 from “tak[ing] into account that an individual [with ESRD] is entitled to or eligible
2 for [Medicare] benefits” for the first thirty months of eligibility. 42 U.S.C.
3 § 1395y(b)(1)(C)(i). The “nondifferentiation” requirement provides that group
4 health plans “may not differentiate in the benefits [they] provide[] between
5 individuals having end stage renal disease and other individuals covered by such
6 plan on the basis of the existence of end stage renal disease, the need for renal
7 dialysis, or in any other manner” during the first thirty months of Medicare
8 eligibility. *Id.* at § 1395y(b)(1)(C)(ii). Prohibited “differentiation” includes
9 “[i]mposing on persons who have ESRD, but not on others enrolled in the plan,
10 benefit limitations” and “[p]aying providers and suppliers less for services
11 furnished to individuals who have ESRD than for the same services furnished to
12 those who do not have ESRD” 42 C.F.R. §§ 411.161(b)(ii), (iv).

13 The *Doe* Plaintiffs also allege obstacle preemption, asserting that AB 290 both
14 “interferes with the MSPA’s “objective of creating a public-private partnership to
15 cover and pay for the costs associated with treatment for ESRD patients” and
16 allows insurers to treat insureds differently on the basis of their ESRD diagnosis.
17 *Doe* Complaint, ¶¶ 93-94. Yet in briefing on this claim, the *Doe* Plaintiffs alleged
18 only that AB 290 creates obstacle preemption based on the “non-differentiation”
19 provision. *See, e.g., Doe* ECF No. 156 at 24-25 (“...AB 290 draws a sharp and
20 impermissible distinction between ESRD patients and those suffering” from other
21 kidney ailments); *Doe* ECF No. 167 at 15-16.

22 **II. THE *FRESENIUS* PLAINTIFFS’ PREEMPTION CLAIM**

23 The *Fresenius* Plaintiffs’ preemption claim alleges that AB 290 frustrates
24 various congressional goals expressed in a grab bag of federal statutes and
25 regulations. *Fresenius* ECF No. 1 (*Fresenius* Complaint), ¶¶ 126-136. In
26 particular, the *Fresenius* Plaintiffs allege that AB 290 runs contrary to Congress’s
27 aims as stated in the MSPA by “forcing ESRD patients from commercial coverage
28

1 to Medicare or Medi-Cal...” *Id.* at ¶ 132. The *Fresenius* Plaintiffs did not move for
 2 summary judgment on their preemption claim. *See Fresenius* ECF No. 153-1.

3 **III. THE *MARIETTA* DECISION**

4 In a 7-2 decision authored by Justice Kavanaugh, the Supreme Court
 5 considered and squarely rejected arguments nearly identical to the ones put forth by
 6 the *Doe* Plaintiffs here. *Marietta*, 142 S. Ct. at 1973-75. There, DaVita alleged
 7 that an insurance plan which offered the same benefits to all members but limited
 8 reimbursement rates for outpatient dialysis ran afoul of both the “take into account”
 9 and “non-differentiation” provisions of the MSPA. *Id.* at 1972. DaVita argued that
 10 the MSPA is violated “even when a plan limits benefits in a uniform way if the
 11 limitation on benefits has a disparate impact on individuals with end-stage renal
 12 disease.” *Id.* at 1973.

13 First, the Court held that plans that treat all patients the same but may have
 14 disparate impacts on ESRD patients do not run afoul of the “non-differentiation”
 15 provisions of the MSPA. *Id.* at 1973-74 (“The text of the [MSPA] cannot be read
 16 to encompass a disparate-impact theory.”) The Court further observed that
 17 DaVita’s disparate impact theory “is not only atextual but would be all but
 18 impossible to fairly implement.” *Id.*

19 The Court then rejected DaVita’s “take into account” argument for similar
 20 reasons. *Id.* at 1974-75. It held that because the plan provided the same outpatient
 21 dialysis benefits to all plan participants, regardless of whether they were eligible for
 22 Medicare coverage, the plan did not violate the “take into account” provision. *Id.*

23 **ARGUMENT**

24 **I. *MARIETTA* FORECLOSES THE *DOE* PLAINTIFFS’ MSPA PREEMPTION 25 CLAIM**

26 Both of the *Doe* Plaintiffs’ core arguments about AB 290’s supposed conflict
 27 with the MSPA are foreclosed by *Marietta*. The *Doe* Plaintiffs argue on summary
 28 judgment that AB 290 is preempted by the MSPA because it differentiates with

1 regard to reimbursement rates between ESRD patients who are receiving HIPP and
2 those who are not. *See Doe* ECF No. 132 at 24 (“AB 290 thus draws a sharp and
3 impermissible distinction in payments for HIPP and non-HIPP ESRD patients.”)
4 But *Marietta* holds that a distinction of this kind does not violate the MSPA, since
5 it does not result in different benefits for ESRD patients based on their ESRD
6 status. The Supreme Court cited with approval, 142 S. Ct. at 1973, a recent Ninth
7 Circuit decision holding that the “pertinent inquiry” is “whether the plan’s
8 provisions ‘result’ in *different benefits for persons with ESRD*, not whether the
9 plan’s provisions disproportionately affect persons with ESRD or otherwise
10 ‘discriminate’ against persons with ESRD.” *DaVita Inc. v. Amy’s Kitchen, Inc.*,
11 981 F.3d 664, 674-75 (9th Cir. 2020).

12 Similarly, *Marietta* makes clear that a regulation that affects ESRD patients
13 differently than it affects other patients does not violate the “take into account”
14 provision unless it differentiates between patients based on their eligibility for
15 Medicare. *Marietta*, 142 S. Ct. at 1974-75. AB 290’s challenged provisions are
16 not alleged to, and obviously do not, differentiate between patients based on their
17 eligibility for Medicare.

18 The *Doe* Plaintiffs’ obstacle preemption claim, *see Doe* Complaint ¶ 94, fails
19 for the same reasons. Their theory that AB 290 somehow disrupts the public-
20 private partnership to cover the costs of ESRD patients has never been developed
21 and Plaintiffs all but abandon it in their summary judgment briefing.

22 **II. *MARIETTA* DOES NOT SUPPORT THE *FRESENIUS* PLAINTIFFS’** 23 **PREEMPTION CLAIM**

24 The *Fresenius* Plaintiffs argue that AB 290 conflicts with the general goals of
25 the MSPA because AB 290 may prompt patients to shift from private to public
26 insurance coverage. *Fresenius* Complaint, ¶ 132. For the reasons stated above,
27 *ante* Argument I, *Marietta* does not suggest that such a shift in coverage would
28 support a determination that AB 290 conflicts with the MSPA, and thus *Marietta*

1 does not bolster the *Fresenius* Plaintiffs’ preemption claim. To be clear,
2 “[i]nvolving some brooding federal interest or appealing to a judicial policy
3 preference should never be enough to win preemption of a state law; a litigant must
4 point specifically to ‘a constitutional text or a federal statute’ that does the
5 displacing or conflicts with state law,” or that authorizes an agency to do so. *Va.*
6 *Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (lead opinion of Gorsuch,
7 J.) (cleaned up). The *Fresenius* Plaintiffs have failed to identify any such
8 conflicting federal statute, and there is none. Their preemption claim should be
9 rejected.

10 **CONCLUSION**

11 Defendants are entitled to summary judgment on all preemption claims.

12 Dated: November 17, 2022

13 ROB BONTA
14 Attorney General of California
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CERTIFICATE OF SERVICE

Case Name: *Jane Doe, et al v. Xavier
Becerra, et al.*

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

I hereby certify that on November 17, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SUPPLEMENTAL BRIEF SUPPORTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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 and that this declaration was executed on November 17, 2022, at San Francisco, California.

K. Figueroa-Lee
Declarant


Signature