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

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

18 Plaintiffs,

19 v.

20 **ROB BONTA, in his Official
 21 Capacity as Attorney General of
 22 California; RICARDO LARA in his
 23 Official Capacity as California
 24 Insurance Commissioner; MARY
 25 WATANABE¹ in her official Capacity
 26 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)

**NOTICE OF MOTION AND
 MOTION FOR
 RECONSIDERATION OF A
 PORTION OF THE COURT'S
 ORDER ON SUMMARY
 JUDGMENT**

Date: April 8, 2024
 Time: 8:30 a.m.
 Courtroom: 9D
 Judge: The Honorable David O.
 Carter

Action Filed: November 1, 2019

27 ¹ Defendant Mary Watanbe, the current Director of the Department of
 28 Managed Health, is automatically substituted for Shelly Rouillard as defendant.
 Fed. R. Civ. P. 25(d).

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TO THE HONORABLE COURT AND COUNSEL FOR ALL PARTIES:

PLEASE TAKE NOTICE on April 8, 2024, at 8:30 a.m., at the United States District Court, Central District of California, Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Santa Ana, California 92701, Courtroom 10A, Defendants Attorney General Rob Bonta, Ricardo Lara in his official capacity as California Insurance Commissioner; Mary Watanabe, in her official capacity as Director of the California Department of Managed Health Care; and Tomás Aragón, in his official capacity as Director of the California Department of Public Health, will and hereby do move for reconsideration of a portion of the Court’s Order Granting Motions to Exclude, Denying Motion to Exclude, Granting in Part Defendants’ Motion for Summary Judgment, and Granting in Part Plaintiffs’ Motions for Summary Judgment. ECF No. 207 (Order).

The State Defendants’ motion is made on the ground that the portion of the Court’s Order addressing the constitutionality of sections 3(c) and 5(c) of AB 290 mistakenly suggested that the State Defendants did not respond to Plaintiffs’ arguments regarding those sections. Because State Defendants clearly did respond to Plaintiffs’ arguments, and because allowing this clear error to stand would work manifest injustice in rendering AB 290’s reimbursement cap effectively inoperable, the court should reconsider this portion of its Order. *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

This Motion is based on this Notice of Motion and Motion to Reconsider; the accompanying Memorandum of Points and Authorities; all pleadings and papers on file in this action; and such additional matters that may be presented to and accepted by Court at the time of the hearing. This motion is also made following the conference of counsel pursuant to Local Rule 7-3, which took place on January 16, 2024.

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Dated: January 23, 2024

ROB BONTA
Attorney General of California
R. MATTHEW WISE
Supervising Deputy Attorney General
LISA J. PLANK
Deputy Attorney General

/s/ S. Clinton Woods
S. CLINTON WOODS
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General Rob Bonta, 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 (ADSx)

I hereby certify that on January 23, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF A PORTION OF THE COURT'S ORDER ON SUMMARY JUDGMENT**
- **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF A PORTION OF THE COURT'S ORDER ON SUMMARY JUDGMENT**
- **[PROPOSED] ORDER GRANTING MOTION FOR RECONSIDERATION OF A PORTION OF THE COURT'S ORDER ON 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 January 23, 2024, at San Francisco, California.

K. Figueroa-Lee
Declarant


Signature

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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14 **JANE DOE; STEPHEN ALBRIGHT;**
15 **AMERICAN KIDNEY FUND, INC.;**
16 **and DIALYSIS PATIENT**
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17 Plaintiffs,

18 v.

19 **ROB BONTA, in his Official**
20 **Capacity as Attorney General of**
21 **California; RICARDO LARA in his**
22 **Official Capacity as California**
23 **Insurance Commissioner; MARY**
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25 **as Director of the California**
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Care; and TOMAS ARAGON, in his
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Health,

26 Defendants.
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8:19-cv-02105-DOC (ADSx)

DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR
RECONSIDERATION OF A
PORTION OF THE COURT'S
ORDER ON SUMMARY
JUDGMENT

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

Action Filed: November 1, 2019

INTRODUCTION

On January 9, 2024, the Court entered an order resolving the parties’ pending cross motions for summary judgment. ECF No. 207 (Order). The Court upheld AB 290’s reimbursement cap, but also struck down statutory provisions that are essential to the reimbursement cap’s implementation. Namely, the Court found unconstitutional the part of the law that requires a financially interested entity making a third party premium payment like the American Kidney Fund (AKF), to “[d]isclose[] to the health care service plan, prior to making the initial payment, the name of the enrollee for each health care service plan contract on whose behalf a third-party premium payment . . . will be made.” Order at 42-43; *see* AB 290, §§ 3(c)(2), 5(c)(2).¹ In making this determination, the Court found that Defendants “d[id] not respond to [Plaintiffs’] argument in opposition” or explain how these provisions “advance[] a substantial state interest.” Order at 43.

But these findings are inconsistent with the record before the Court. Defendants’ briefing repeatedly rebutted Plaintiffs’ allegations that these provisions restrain AKF’s freedom of association and explained that they are critical to the implementation of AB 290’s reimbursement cap, as shown in the following ECF filings, among others:

- ECF No. 128-1 at 6 & n.4 (describing purpose of section 3(c))
- *Id.* at 20-21 (referencing section 3(c) in argument that AB 290’s disclosure provisions do not implicate First Amendment concerns)
- *Id.* at 22 (explaining that the disclosure provisions ensure “that health plans and insurers receive the information necessary for the law to be properly implemented”)

¹ Sections 3(c) and 5(c) mirror each other. The only difference between the two provisions is that section 3(c) relates to plans administered by the Department of Managed Health Care, while section 5(c) relates to plans administered by the Department of Insurance. *See* AB 290, §§ 3(c), 5(c). The legal analysis for both provisions is identical.

- 1 • *Id.* at 22 n.13 (further explaining that “[t]he requirement for AKF to
- 2 identify each patient for which it provides premium assistance ensures that
- 3 health plans and insurers know” when the reimbursement cap applies)
- 4 • *Id.* at 23 (arguing that section 3(c) meets the *Zauderer* standard)
- 5 • ECF No. 153 at 17 & n.13 (showing that section 3(c)(2)’s burden on AKF
- 6 is minimal because AKF already discloses the identity of some patients to
- 7 insurers)
- 8 • *Id.* at 19-20 (again arguing that section 3(c) meets the *Zauderer* standard)
- 9 • ECF No. 171 at 12 (arguing that section 3(c)’s constitutionality should be
- 10 determined under the *Zauderer* standard)
- 11 • *Id.* at 13 (arguing that section 3(c) meets the *Zauderer* standard because it
- 12 requires truthful disclosures and serves California’s substantial interest in
- 13 ensuring that AB 290 is “effectively implemented”)
- 14 • *Id.* at 13 n.7 (rebutting Plaintiffs’ argument that *Americans for Prosperity*
- 15 controls the analysis)

16 Defendants’ counsel also addressed these disclosure provisions at oral argument,
17 arguing that they “are reasonably related to California’s substantial interest in
18 protecting patients from harm by ... *ensuring that health plans and insurers receive*
19 *the information necessary to enforce the law.*” H’g Tr. 97:3-7 (emphasis added).

20 Because Defendants specifically addressed the disputed provisions in their
21 briefing and demonstrated that the provisions advance California’s substantial
22 interest in the reimbursement cap’s enforcement, Defendants move for
23 reconsideration under Federal Rule of Civil Procedure 60(b)(1) and (b)(6), and
24 Local Rule 7-18, and request that the Court uphold sections 3(c)(2) and 5(c)(2)
25 against Plaintiffs’ First Amendment claim.

1 **PROCEDURAL HISTORY**

2 On February 25, 2022, the parties filed cross motions for summary judgment.
3 See ECF Nos. 128, 132.² On March 25, 2022, the parties filed oppositions to the
4 motions for summary judgment. See ECF Nos. 153, 156. On April 18, 2022, the
5 parties filed their reply briefs in support of summary judgment. See ECF Nos. 167,
6 171.

7 Briefing on these motions was voluminous. Both sets of parties filed lengthy
8 declarations with hundreds of pages of exhibits, as well as competing sets of
9 undisputed and disputed facts, objections to evidence, and requests for judicial
10 notice. See, e.g., ECF Nos. 128-2–128-6, 132-1–132-21, 153-1, 153-2, 153-6, 156-
11 1–156-24, 167-1–167-13, 171-1–171-5. Both sets of parties also filed motions to
12 exclude certain expert opinions. ECF Nos. 142, 144.

13 All of these matters were heard on October 27, 2022. ECF No. 192. The
14 Court initially continued the hearing to allow for supplemental briefing and
15 argument on December 16, 2022. *Id.* The Court then took the continued hearing
16 off calendar, deeming that further argument was not necessary to resolve the
17 pending matters. ECF No. 204. The Order was issued on January 9, 2024. ECF
18 No. 207.

19 **LEGAL STANDARD**

20 Reconsideration is appropriate where the district court “committed clear error
21 or the initial decision was manifestly unjust.” *School Dist. No. 1J, Multnomah*
22 *County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A court may revise an
23 order upon a motion and showing of mistake, inadvertence, or any other reason that
24 justifies relief. Fed. R. Civ. Proc. 60(b)(1), (6). Local Rule 7-18 specifies three
25 grounds on which a motion for reconsideration may be presented to the district

26 ² The parties in the *Fresenius* case also filed cross motions for summary
27 judgment on the same date. See *Fresenius* docket, Case No. 8:19-cv-2130, ECF
28 Nos. 152, 153. Because the disclosure provisions at issue apply only to financially
interested entities like AKF, they were not a subject of that briefing. All ECF
references are to the *Jane Doe* docket.

1 court, including “a manifest showing of a failure to consider material facts
2 presented to the Court before the Order was entered.” C.D. Cal. L.R. 7-18(c).

3 ARGUMENT

4 In considering the constitutionality of sections 3(c) and 5(c) of AB 290, the
5 Court mistakenly suggested that Defendants had not provided a rationale for
6 upholding these provisions. Order at 43. Striking down these provisions without
7 the benefit of both parties’ arguments would be a manifestly unjust failure to
8 consider material facts. *See* Fed. R. Civ. Proc. 60(b)(1), (6); C.D. Cal. L.R. 7-18(c).
9 Due to the volume and complexity of the briefing and the parties’ differing views
10 concerning the disputed provisions, the arguments regarding these sections may not
11 have stood out.³ But while neither party briefed this issue at length,⁴ Defendants’
12 briefing and argument demonstrated that sections 3(c)(2) and 5(c)(2) are
13 constitutionally sound—and indeed, are essential to the implementation of AB
14 290’s reimbursement cap.

15 The stated basis for the Order’s holding that sections 3(c)(2) and 5(c)(2)
16 unconstitutionally infringe on Plaintiffs’ right to free association is that “[t]he State
17 here does not explain how the disclosure of patient names to their respective
18 insurers advances a substantial state interest.” Order at 43. The Order also states
19 that even if California had a substantial state interest, the provisions are not
20 sufficiently tailored to achieve that interest. *Id.* In addition, the Order concludes
21 that the State did not respond to Plaintiffs’ argument that these disclosure
22 provisions “burden AKF’s relationship with patients, forcing AKF to disclose

23 ³ The error may be attributable in part to the parties’ different constitutional
24 theories, and correspondingly, their discussion of the provisions in different parts of
25 their respective briefs. Plaintiffs analyzed sections 3(c) and 5(c) under a freedom of
26 association analysis. *See* ECF No. 153 at 18-19; ECF No. 156 at 14. Defendants,
27 on the other hand, analyzed the disputed provisions under *Zauderer v. Office of*
28 *Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), because they
simply require disclosure of “factual and uncontroversial information” regarding a
commercial product, *id.* at 651, like AB 290’s other disclosure provisions, which
were upheld by this Court. *See* Order at 44-45.

⁴ *See, e.g.*, ECF No. 156 (Plaintiffs’ Opposition) at 14 (devoting one
paragraph to these provisions).

1 patient details in a manner it would not agree to, and exposing information that
2 patients may not want revealed to their insurers.” Order at 42-43 (cleaned up). As
3 shown in Defendants’ summary judgment briefing, all three conclusions are
4 erroneous.

5 First, sections 3(c)(2) and 5(c)(2) advance a substantial state interest because
6 disclosure of AKF Health Insurance Premium Program (HIPP) recipient names to
7 insurance carriers is necessary to implement the reimbursement cap. *See* ECF No.
8 128-1 at 22 n.13 (“The requirement for AKF to identify each patient for which it
9 provides premium assistance ensures that health plans and insurers know when a
10 Medicare-linked reimbursement rate applies.”); *see also* ECF No. 153 at 17-20;
11 ECF No. 171 at 12-13. Without such disclosures, health plans and insurers would
12 have no mechanism to identify the patients for whom the reimbursement cap should
13 apply, and thus, the reimbursement cap provisions would effectively be
14 unenforceable. *See id.*

15 In the portion of its Order upholding the reimbursement cap, the Court
16 correctly determined that functionally identical substantial interests satisfied
17 constitutional scrutiny. Order at 39. The Court recognized that the State has a
18 substantial interest in “regulating its health and insurance markets,” “eliminating
19 preferentially high insurance rates for privately insured dialysis patients,” and
20 “provid[ing] needed protections for patients.” *Id.* The Court also found that the
21 State had demonstrated that the reimbursement cap “directly advances the State’s
22 interest in neutralizing the reimbursement rates for commercial insurance, and does
23 so without restricting the dialogue between patients and providers.” *Id.* at 40. The
24 Court’s reasoning applies with equal force to sections 3(c)(2) and 5(c)(2), which are
25 necessary for health plans and insurers to implement the reimbursement cap.

26 Second, sections 3(c)(2) and 5(c)(2) are sufficiently tailored to achieve
27 California’s substantial interest in ensuring that the reimbursement cap is
28 enforceable. AB 290 contains no other mechanism for health plans and insurers to

1 identify which patients should receive HIPP. Nor have Plaintiffs asserted that such
2 a mechanism is available, either in AB 290 or elsewhere. *See* ECF Nos. 132, 156,
3 167. Because health plans and insurance carriers have no other means to determine
4 when the reimbursement cap should apply, sections 3(c)(2) and 5(c)(2) are
5 sufficiently tailored to ensure that the reimbursement cap is enforceable.

6 Third, Defendants' briefing directly addressed Plaintiffs' arguments that AKF
7 and its patients would be burdened by the disputed provisions. Defendants
8 specifically rebutted AKF's argument that it would be burdened by having to
9 disclose the identities of HIPP recipients by citing AKF's practice of providing
10 grant payments (and thereby patient identities) directly to health plans and insurers.
11 *See, e.g.*, ECF No. 153 at 6 n.13; ECF No. 153-2 at 5 (SAMF 85). Similarly,
12 Defendants repeatedly argued that because AKF provided some HIPP recipients
13 with debit cards to pay their premiums, health plans and insurers would already be
14 aware that certain patients are HIPP recipients because of this practice. ECF Nos.
15 128-1 at 6 n.3; ECF No. 128-5 at 8 (SUF 21); ECF No. 153 at 6 n.3.

16 In short, sections 3(c)(2) and 5(c)(2) are vital for AB 290's reimbursement cap
17 to function properly—or even at all. Because these material facts were plainly
18 addressed in briefing and otherwise in the record, and such facts show that sections
19 3(c)(2) and 5(c)(2) are constitutionally sound, Defendants respectfully submit that
20 the Court should reconsider this portion of the Order and uphold these disclosure
21 provisions. *See ACandS, Inc.*, 5 F.3d at 1263 (reconsideration appropriate when
22 court commits clear error or the decision was manifestly unjust); *City of Los*
23 *Angeles Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001)
24 (district court may exercise its inherent power to rescind, reconsider, or otherwise
25 modify its own orders if sufficient cause is shown).

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CONCLUSION

The Court should reconsider and reverse its Order granting summary judgment in favor of Plaintiffs as to sections 3(c)(2) and 5(c)(2) of AB 290, and enter summary judgment in favor of Defendants as to these provisions.

Dated: January 23, 2024

ROB BONTA
Attorney General of California
R. MATTHEW WISE
Supervising Deputy Attorney General
LISA J. PLANK
Deputy Attorney General

/s/ S. Clinton Woods
S. CLINTON WOODS
Deputy Attorney General
*Attorneys for Defendants Attorney
General Rob Bonta, et al.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
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**JANE DOE; STEPHEN ALBRIGHT;
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**and DIALYSIS PATIENT
CITIZENS, INC.,**

Plaintiffs,

v.

**ROB BONTA, in his Official
Capacity as Attorney General of
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WATANABE in her official Capacity
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Department of Managed Health
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8:19-cv-02105-DOC (ADSx)

**[PROPOSED] ORDER GRANTING
MOTION FOR
RECONSIDERATION OF A
PORTION OF THE COURT'S
ORDER ON SUMMARY
JUDGMENT**

Date: April 8, 2024
Time: 8:30 a.m.
Courtroom: 9D
Judge: The Honorable David O.
Carter

Action Filed: November 1, 2019

1 Defendants' Motion for Reconsideration of a Portion of the Court's Order
2 Granting Motions to Exclude, Denying Motion to Exclude, Granting in Part
3 Defendants' Motion for Summary Judgment, and Granting in Part Plaintiffs'
4 Motions for Summary Judgment (ECF No. 207) (Order), came for hearing on
5 April 8, 2024. The State Defendants' motion was made pursuant to Federal Rule
6 of Civil Procedure 60 and Local Rule 7-18, on the grounds that the portion of the
7 Court's Order addressing the constitutionality of sections 3(c) and 5(c) of AB 290
8 mistakenly suggested that the State Defendants did not respond to Plaintiffs'
9 arguments regarding those sections. *See* Order at 43.

10 The Court, after reviewing Defendants' motion, and Plaintiffs' opposition,
11 and having considered the related pleadings and argument from counsel, and good
12 cause therefor appearing, GRANTS Defendants' limited motion for
13 reconsideration. Because State Defendants clearly did respond to Plaintiffs'
14 arguments, and because allowing this clear error to stand would work manifest
15 injustice in rendering AB 290's reimbursement cap effectively inoperable, the
16 Court hereby reconsiders this portion of its Order. *See School Dist. No. IJ,*
17 *Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).
18 Furthermore, the Court finds that Defendants have shown that these provisions are
19 sufficiently tailored to achieve California's substantial interest in ensuring that the
20 reimbursement cap is enforceable.

21 Accordingly, the Court hereby DENIES summary judgment in favor of
22 Plaintiffs as to sections 3(c)(2) and 5(c)(2) of AB 290, and instead GRANTS
23 summary judgment in favor of Defendants as to these provisions. All other
24 portions of the Order remain unchanged.

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IT IS SO ORDERED.

Dated: _____, 2024

DAVID O. CARTER
United States District Judge