

1 ROB BONTA
 Attorney General of California
 2 R. MATTHEW WISE
 Supervising Deputy Attorney General
 3 LISA J. PLANK
 S. CLINTON WOODS
 4 Deputy Attorneys General
 State Bar No. 246054
 5 455 Golden Gate Ave
 Suite 11000
 6 San Francisco, CA 94102-7004
 Telephone: (415) 510-3807
 7 Fax: (415) 703-5480
 E-mail: Clint.Woods@doj.ca.gov
 8 *Attorneys for Defendants Rob Bonta, et al.*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 SOUTHERN DIVISION

13
 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
 Capacity as Attorney General of
 California; RICARDO LARA in his
 Official Capacity as California
 21 Insurance Commissioner; MARY
 WATANABE¹ in her official Capacity
 22 as Director of the California
 Department of Managed Health
 23 Care; and TOMAS ARAGON, in his
 Official Capacity as Director of the
 24 California Department of Public
 Health,**

25 Defendants.
 26

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

**DEFENDANTS' REPLY IN
 SUPPORT OF 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 Watanabe, the current Director of the Department of
 28 Managed Health, is automatically substituted for Shelly Rouillard as defendant.
 Fed. R. Civ. P. 25(d).

1 AB 290 requires a financially interested entity making a third-party premium
2 payment to disclose to a health plan or insurer, “prior to making the initial payment,
3 the name of the enrollee . . . on whose behalf a third-party premium payment . . .
4 will be made.” AB 290, §§ 3(c)(2), 5(c)(2). These provisions are critical to AB
5 290’s reimbursement cap’s implementation because without them, health plans and
6 insurers lack a mechanism to identify patients for whom the reimbursement cap
7 should apply. *See* ECF No. 209-1 at 6.

8 Although the Court, in concluding that these provisions are unconstitutional,
9 found that Defendants did not respond to Plaintiffs’ First Amendment argument,
10 Plaintiffs concede that Defendants did in fact address these provisions in their First
11 Amendment briefing. *See* ECF No. 210 at 1. Plaintiffs’ opposition acknowledges
12 that Defendants treated these provisions—which Plaintiffs call the “Patient
13 Disclosure Mandate”—as requiring truthful disclosures under *Zauderer v. Office of*
14 *Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). *See* ECF
15 No. 210 at 1. While Plaintiffs assert that sections 3(c)(2) and 5(c)(2) violate the
16 associational rights of the American Kidney Fund (AKF) and its patients,
17 Defendants’ summary judgment briefing establishes that under the proper
18 framework for evaluating these disclosure provisions—the *Zauderer* standard—
19 Plaintiffs have failed to show a First Amendment violation. *See* ECF No. 209-1 at
20 2-3.²

21 Nevertheless, if Plaintiffs were correct that the constitutionality of these
22 disclosure provisions must be assessed as a question of associational rights, the
23 disclosures should be upheld for the same reasons the Court upheld AB 290’s
24 reimbursement cap. *Id.* at 6-7. The State’s overarching interests in “regulating its

25
26 ² And as Defendants observed in directly rebutting Plaintiffs’ associational
27 rights argument, Plaintiffs have not demonstrated that sections 3(c)(2) and 5(c)(2)
28 would have the sort of “chilling effect” at issue in *Americans for Prosperity*
Foundation v. Bonta, 141 S. Ct. 2373, 2389 (2021), given that AKF has already
effectively disclosed the personal information of the patients for whom it conveyed
grant payments to insurers. *See* ECF No. 171 at 13 n.7.

1 health and insurance markets,” “eliminating preferentially high insurance rates for
2 private insured dialysis patients,” and “provid[ing] needed protections for patients,”
3 Order at 39, apply not only to the reimbursement cap, but to the disclosure
4 provisions that are essential to enforce it. *See* ECF No. 209-1 at 6. While Plaintiffs
5 mistakenly suggest that the State’s only asserted interest in AB 290’s various
6 disclosure provisions is to shield patients from harm caused by steering, *see* Opp’n
7 at 5, Defendants repeatedly identified the specific governmental interest in the
8 disclosure provisions at issue here—ensuring “that health plans and insurers receive
9 the information necessary for the law to be properly implemented.” ECF No. 128-1
10 at 22; *see also* ECF No. 171 at 13. And because there is no dispute that health
11 plans and insurers lack another means to determine when the reimbursement cap
12 should apply, section 3(c)(2) and 5(c)(2) are appropriately tailored to achieve this
13 interest. *Id.* at 6-7. The Court should therefore reconsider and reverse its Order
14 granting summary judgment in favor of Plaintiffs as to these disclosure provisions
15 and enter summary judgment in favor of Defendants.³

16
17
18
19
20
21
22
23
24
25 ³ The Provider Plaintiffs join in the opposition on the rationale that they pled
26 a challenge “on behalf of the interests of their ESRD patients” to the penalty linked
27 to the disputed provisions. Opp’n 1 n.1. Yet, as Defendants previously observed,
28 the Provider Plaintiffs lack standing to represent the interests of dialysis patients, as
their interests are not aligned with their patients. *See Fresenius* ECF No. 152-1 at
23 n.10 (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). In any event, the
Provider Plaintiffs’ due process claim would fail on the merits. *See id.* at 24, n.11.

1 Dated: February 13, 2024

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

2

3

4

5

6

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

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

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 February 13, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' REPLY IN SUPPORT OF 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 February 13, 2024, at San Francisco, California.

K. Figueroa-Lee
Declarant



Signature