No. 24-3654
***consolidated with* No. 24-3655, No. 24-3700**

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRESENIUS MEDICAL CARE ORANGE COUNTY, LLC, *et al.*,
Plaintiffs-Appellants,
and
JANE DOE, *et al.*,
Plaintiffs,
v.
ROB BONTA,
in his Official Capacity as Attorney General of California, *et al.*,
Defendants-Appellees.

(Captions continued on inside cover)

On Appeal from the United States District Court for the Central District of California, Nos. 8:19-cv-02105-DOC-ADS, 8:19-cv-02130-DOC-ADS, Hon. David O. Carter, District Judge

OPENING BRIEF FOR APPELLANTS-CROSS-APPELLEES JANE DOE, STEPHEN ALBRIGHT, AMERICAN KIDNEY FUND, INC., AND DIALYSIS PATIENT CITIZENS, INC.

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September 23, 2024

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellant-Cross-Appellee American Kidney Fund, Inc. ("AKF") and Dialysis Patient Citizens, Inc. submit the following:

AKF is a District of Columbia not-for-profit corporation headquartered in Rockville, MD.

Dialysis Patient Citizens, Inc. is a privately held Delaware corporation headquartered in Washington, D.C.

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INTRODUCTION

This case concerns California's imposition of unconstitutional restrictions on the free speech, association, and petition rights of a charitable organization and its patients and charitable supporters. The restrictions do not serve any legitimate government interest and are not narrowly tailored. Instead, they were adopted at the behest of insurance companies seeking to reduce their coverage obligations by interfering with the organization's patient-focused expressive activities and undermining the federal regulatory authority under which it has operated for decades. As described below, the California statute that imposes these restrictions—Assembly Bill 290 ("AB 290")—violates the First Amendment and is preempted by federal law.

For more than five decades, the American Kidney Fund ("AKF") has helped patients suffering from end-stage renal disease ("ESRD")—the final, and often fatal, stage of chronic kidney disease—by supporting them with charitable education, advocacy, personal support, and financial assistance programs. As one of the nation's leading nonprofit organizations, AKF fights for more than 37 million Americans living with kidney disease, taking a comprehensive approach that seeks to ensure

that every kidney patient has access to health care, and every person at risk for kidney disease is empowered to prevent it. One of AKF's many programs is its Health Insurance Premium Program ("HIPP"), which provides financial assistance to tens of thousands of low-income patients nationwide, including plaintiffs Jane Doe and Stephen Albright, by helping them pay their health insurance premiums. End-stage renal disease patients—who are often unable to work and thus unable to afford insurance coverage without financial assistance—require three to four dialysis treatments every week to stay alive. AKF's services are essential to ensuring that these patients receive the treatments they need.

AB 290 targets AKF's expressive activities and jeopardizes HIPP in California, threatening the availability of life-saving dialysis treatment for patients. The statute has three sets of interrelated provisions. *First*, AB 290 prohibits AKF from "advising" patients regarding available health insurance policies, a provision that directly restricts AKF's speech, while also compelling AKF to engage in speech about patients' health insurance options that AKF seeks to avoid in order to remain in compliance with federal law. *Second*, AB 290 requires AKF to disclose the names of HIPP patients—not to any government regulator, but to

private insurance companies that have historically discriminated against ESRD patients because of the cost of their treatments—a burdensome speech mandate that intrudes on the associational rights of AKF and its patients (while also subjecting patients to potential harm). *Third*, AB 290 substantially reduces the reimbursement rates that dialysis providers receive for treating HIPP patients if they donate to AKF, a penalty designed to deter association with AKF and to chill AKF's expressive activities.

These provisions impose a significant burden on AKF's First Amendment rights and are properly subject to strict constitutional scrutiny. Yet the State has not come close to justifying AB 290 under any level of scrutiny. California purportedly designed AB 290 to prevent the improper "steering" of dialysis patients against their interests away from federal health insurance programs and onto private commercial insurance plans. But after years of litigation, the State has adduced no meaningful evidence that patient "steering" occurs, let alone that patients have suffered any harm. Nor has the State provided any other valid basis for restricting the First Amendment rights of AKF and its patients or otherwise interfering with AKF's expressive activities.

AB 290 is also preempted by federal law. The statute's content-based restrictions and compelled-speech mandates force AKF to risk violating the requirements of the federal Beneficiary Inducement Statute by requiring the organization to operate HIPP outside the statutory safe harbor provided by Advisory Opinion 97-1, issued almost 30 years ago by the federal Department of Health and Human Services ("HHS") Office of Inspector General ("OIG"). In addition, AB 290 undermines the goals of the federal Medicare Secondary Payer Act ("MSPA").

The district court—recognizing AB 290's many constitutional infirmities and the State's utter lack of evidence concerning patient "steering"—issued a preliminary injunction. At the summary judgment stage, the district court then correctly struck down as unconstitutional many of the statute's provisions, including AB 290's prohibition on "advising" patients and its requirement compelling AKF to disclose the names of HIPP patients to private insurers.

The district court nonetheless erred in failing to invalidate AB 290 in its entirety, finding that certain of AB 290's provisions could be severed from the rest of the statute. In a seemingly Solomonic compromise, the district court upheld AB 290's provisions compelling

AKF to inform HIPP patients about their health insurance options on the mistaken grounds that because such information is "purely factual and uncontroversial," AKF can be forced to engage in speech at odds with its charitable mission about services it does not provide. Applying only intermediate scrutiny and finding that dialysis providers' contributions to AKF merited no First Amendment protection, the district court also upheld the statutory provisions penalizing providers for making donations in support of AKF's charitable mission and expressive advocacy activities. In addition, the district court rejected the argument that AB 290 is preempted by federal law.

This Court should uphold the district court in part and reverse in part. Because AB 290 violates the First Amendment and is preempted by federal law, it should be struck down in its entirety.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction because the district court entered final judgement on May 9, 2024, and because AKF, its patients, and Dialysis Patient

Citizens filed a timely notice of appeal on June 7, 2024. *See* 8-ER-1778–1779; *see also* 28 U.S.C. § 1291; Fed. R. App. P. 4(a)(1)(B).[1]

STATEMENT OF THE ISSUES

The district court correctly held that AB 290 violates the First Amendment because it (a) restricts speech by requiring AKF "not to steer, direct, or advise" patients into or away from health insurance coverage, (b) compels speech by requiring AKF to disclose the names of HIPP patients to private insurers, and (c) interferes with rights of association by prohibiting AKF from conditioning financial assistance on eligibility for, or receipt of, any "surgery, transplant, procedure, drug, or device." The issues presented in this cross-appeal are:

1. Did the district court err in upholding provisions of AB 290 that (a) force AKF to engage in compelled speech by requiring it to disclose "all available health coverage options" to HIPP patients; and (b) penalize dialysis providers for donating to AKF in support of its charitable mission and expressive activities?

[1] Unless otherwise indicated, references to the record refer to district court case no. 8:19-cv-02105-DOC-ADS.

2. Did the district court err in holding that these provisions restricting and compelling speech are severable from the remainder of the statute?

3. Did the district court err in holding that AB 290 is not preempted by the federal Beneficiary Inducement Statute or the Medicare Secondary Payer Act, and that the provisions of AB 290 that seek to force AKF to request a new advisory opinion from the federal government do not violate its First Amendment petition rights?

STATEMENT OF THE CASE

A. Factual Background

1. End-stage renal disease

ESRD is the final stage of chronic kidney disease. It occurs when a patient's kidneys are no longer able to filter waste from the blood. 4-ER-743 ¶ 2. As of 2019, nearly 810,000 people in the United States, and more than 100,000 people in California, suffered from ESRD. 4-ER-743 ¶ 4. ESRD disproportionately affects racial minorities. 4-ER-744 ¶ 6.

ESRD is fatal without treatment. 4-ER-743, 744 ¶¶ 1,7. To survive, ESRD patients must either receive a kidney transplant or undergo renal dialysis. 4-ER-744 ¶ 8. Because there is a shortage of transplantable kidneys, ESRD patients must often wait years for a

transplant. 4-ER-744 ¶ 9. For many of those patients, dialysis is the only option. *See* 4-ER-744 ¶¶ 8–9.

Dialysis is physically draining, time-consuming, and costly. 4-ER-744 ¶ 11. The typical dialysis patient requires three dialysis treatments every week, each lasting four to five hours. 4-ER-744 ¶ 12. As a result, few ESRD patients are able to work—more than 80% are unemployed. 4-ER-744 ¶ 13. The vast majority of ESRD patients cannot afford dialysis without healthcare coverage. 4-ER-745 ¶ 15.

2. The American Kidney Fund and its patients

The individual plaintiffs in this case, Jane Doe and Stephen Albright, are ESRD patients who are currently undergoing dialysis and rely on the charitable services that AKF provides. *See* 8-ER-1733 ¶¶ 16–17. They are joined by plaintiff Dialysis Patient Citizens, Inc., a non-profit organization that works to improve the quality of life of individuals suffering from ESRD, with more than 4,500 members in California. 8-ER-1733 ¶ 19. The organization effectuates its mission through public education and advocacy efforts and works closely with AKF to ensure that its members have the support they need to live longer, healthier lives. 8-ER-1740–1741 ¶ 38.

Founded in 1971, AKF is the nation's leading 501(c)(3) nonprofit charity focused on kidney disease patients and their families. 4-ER-745 ¶ 18. AKF's mission takes a "360-degree approach" to combatting kidney disease through awareness, advocacy, prevention, public education, professional engagement, clinical research, and financial assistance. 8-ER-1740 ¶ 37. AKF is recognized as one of the best run and most effective charities in America. Over 80,000 donors who care about kidney disease contribute annually to support AKF, and AKF provides advocacy and support to ESRD patients in all 50 states. 4-ER-746, 752–753 ¶¶ 19, 66–68. The organization is financially transparent and ensures that 97 cents of every dollar donated to AKF goes to supporting patients and patient-assistance programs. 8-ER-1740 ¶ 37.

Among its other work and advocacy, AKF is a critical source of information for ESRD patients, and it operates financial assistance programs designed to help them. For example, AKF offers safety net grants for expenses that insurance does not cover, such as transportation to and from dialysis treatment; provides summer camp scholarships for children with kidney disease (a service it has provided for years); and supplies disaster relief grants for patients living in communities affected

by natural disaster (such as patients needing assistance due to California's wildfires). 6-ER-1344–1345 ¶ 15. During the Covid-19 pandemic, AKF disseminated educational materials to patients and set up a fund to help them with emergency expenses, such as delivering renal-friendly groceries and providing safe private transportation to dialysis. 6-ER-1346 ¶ 20.

One of AKF's programs is HIPP, which provides financial grant assistance to low-income, predominantly minority ESRD patients to help them pay their insurance premiums. 4-ER-752–753 ¶ 66. In 2021, HIPP assisted 70,731 ESRD patients nationwide, including 3,174 patients in California. 4-ER-754 ¶ 76.

HIPP assistance is limited to patients who are on dialysis or who have received a kidney transplant within the last year. 4-ER-754 ¶ 72. The assistance is provided based solely on a patient's financial need on a first-come, first-served basis. 4-ER-753, 754 ¶¶ 68, 75. To qualify, a patient's monthly household income in 2021 was not permitted to exceed reasonable monthly expenses by more than $600 (the amount has since changed to a percent of the federal poverty limit). 4-ER-753 ¶ 69. HIPP applicants also must prove that they already have insurance coverage.

4-ER-754 ¶ 73. In 2021, ESRD patients who received HIPP assistance had an average annual household income of approximately $25,000. 4-ER-753 ¶ 70. For California HIPP patients, the average was $32,000. 4-ER-754 ¶ 71.

HIPP applicants select their health insurance with no input from AKF. 4-ER-754 ¶ 74. AKF has a strict policy of neutrality among insurance providers, and HIPP grants fund a wide range of insurance policies, although the majority are for individuals on government Medicare or Medicaid plans. 6-ER-1347–1348 ¶ 26. AKF does not help HIPP recipients find insurance and does not tell patients to keep or switch insurance. 4-ER-755 ¶ 78. AKF continues providing HIPP assistance when patients change their insurance coverage or dialysis provider. 4-ER-755 ¶ 79.

3. The federal Beneficiary Inducement Statute

AKF has carefully structured HIPP to comply with federal law, including in particular the federal Beneficiary Inducement Statute. *See* 42 U.S.C. § 1320a-7a. The statute imposes civil penalties on any entity that "offers to or transfers remuneration to any individual eligible for benefits under [a federal or state healthcare program] . . . that such

person knows or should know is likely to influence" that person's choice of a healthcare provider. 42 U.S.C. § 1320a-7a(a)(5). To ensure that the statute is properly applied, the statute empowers HHS OIG to opine on whether "any activity or proposed activity" violates federal law. 42 U.S.C. § 1320a-7d(b); 4-ER-756 ¶ 86. Any resulting advisory opinion is binding on both the party that requested the opinion and the government. 42 U.S.C. § 1320a-7d(b)(4)(A).

In 1997, AKF and six dialysis provider donors sought an advisory opinion from the federal government to ensure that HIPP complied with the Beneficiary Inducement Statute. 4-ER-756 ¶ 88. The OIG issued Advisory Opinion 97-1 setting forth the terms on which HIPP would be deemed to comply with federal law. 4-ER-757 ¶¶ 89–90. The OIG concluded that donations to AKF are not impermissible "remuneration" because "the interposition of AKF, a bona fide, independent, charitable organization, and its administration of HIPP provides sufficient insulation so that the premium payments should not be attributed to the [dialysis providers]." 4-ER-757 ¶ 91. The OIG explained that because HIPP applicants will likely have "already selected a dialysis provider" before applying, HIPP assistance is "not likely to influence patients to

order or receive services from particular providers." 8-ER-1713; 4-ER-757 ¶ 92. OIG thus concluded that "AKF's payment of premiums will expand, rather than limit, beneficiaries' freedom of choice." 4-ER-757 ¶ 92.

Advisory Opinion 97-1 provides a safe harbor for HIPP under federal law, but only if "[HIPP] in practice comports with the information provided" to the OIG. 4-ER-758 ¶ 96. The OIG thus emphasized that "AKF staff involved in awarding patient grants" would not "take the identity of the referring facility or the amount of any provider's donation into consideration" when awarding HIPP grants. 8-ER-1712; 6-ER-1349–1350 ¶¶ 33–34. HIPP assistance is "available to all eligible patients on an equal basis." 8-ER-1711. The OIG also noted that dialysis providers would not "disclose directly or indirectly to individual patients they refer that such members have contributed to AKF to fund the grants." 8-ER-1712. If HIPP were to materially deviate from these practices, AKF would lose its safe-harbor protection. 4-ER-758 ¶ 97.

4. Healthcare coverage options for patients

One of AKF's major goals is to help ensure that patients are able to obtain the support, education, and treatment they need to live healthier

lives. Its charitable efforts are especially important because of how difficult it can be for ESRD patients to obtain and maintain adequate and appropriate insurance coverage.

In 1972, Congress extended Medicare coverage to ESRD patients regardless of their age or disability. 4-ER-748 ¶ 42. ESRD patients are entitled to Medicare Part A coverage. 4-ER-748 ¶ 43. ESRD patients are also eligible for Medicare Part B coverage if they have sufficient qualifying work time, receive Social Security benefits, or are a child or spouse of someone meeting either prerequisite. 4-ER-748 ¶ 43. Congress did not require ESRD patients to enroll in Medicare; ESRD patients can retain their private health insurance if they choose. 4-ER-749 ¶ 44.

Before 1980, a private insurer could decline to pay healthcare expenses covered by Medicare until Medicare paid first. *See DaVita Inc. v. Va. Mason Mem'l Hosp.*, 981 F.3d 679, 685 (9th Cir. 2020) (summarizing legislative history of MSPA). In 1981, in an effort to protect the public fisc, Congress made Medicare the secondary payer—and private insurers the primary payer—for ESRD patients during a set "coordination period." 4-ER-749 ¶¶ 45–46. Since then, Congress has gradually extended the coordination period from 12 months to 30 months.

4-ER-749 ¶ 47. Congress has also prohibited large group health plans from "tak[ing] into account" ESRD patients' Medicare eligibility during the coordination period and "differentiat[ing]" between the benefits large group health plans provide to ESRD patients. 4-ER-749–750 ¶¶ 48–49.

Although Medicare is available, it often does not provide adequate coverage for all of an ESRD patient's healthcare needs. *See* 4-ER-750–751 ¶¶ 51–57. For many ESRD patients, private commercial insurance is more affordable and provides better options, 4-ER-751 ¶ 56, and for some patients, commercial insurance may lead to better health outcomes. *See* 4-ER-751 ¶¶ 56–57. Moreover, some ESRD patients are not eligible for Medicare due to their immigration status or lack of work credentials—for these patients, commercial health insurance is the only option. 4-ER-751 ¶ 55.

Medicare is also expensive. Medicare recipients have cost-sharing obligations (including a 20% coinsurance requirement) and no limit on out-of-pocket expenditures. 4-ER-750–751 ¶ 54. Some ESRD patients must therefore turn to private supplemental insurance, such as Medigap or Medi-Cal, to afford their deductibles and co-insurance payments. 4-ER-751 ¶ 58. But California insurers do not offer Medigap policies to

ESRD patients under 65, 4-ER-751 ¶¶ 59–60, and Medi-Cal is available only to ESRD patients who spend all but $600 of their monthly income on medical costs, 4-ER-752 ¶ 61.

5. California Assembly Bill 290

In 2019, California enacted AB 290 to address the purported problem of "steering" dialysis patients to commercial insurance plans and away from federal healthcare programs. 4-ER-758–759 ¶ 100. To "remove the incentive[s]" for "steering," AB 290 imposes requirements on AKF and dialysis providers (which the statute refers to as "financially interested entities"). AB 290 §§ 3(h)(2), 5(h)(1). These requirements target AKF's expressive charitable activities and, by seeking to compel AKF to disclose information and operate HIPP in a way that conflicts with the OIG's opinion under federal law, threatens the ability of California patients (such as plaintiffs Jane Doe and Stephen Albright) to obtain the dialysis treatments they need to survive.

AB 290's provisions include numerous content-based restrictions on speech and compelled speech mandates. They require that AKF:

- Agree "not to steer, direct, or advise the patient into or away from a specific coverage program option or health care service plan contract." AB 290 §§ 3(b)(4), 5(b)(4) (the "Advising Restriction").

- Inform HIPP applicants about "all available health coverage options." *Id.* §§ 3(b)(3), 5(b)(3) (the "Coverage Disclosure Mandate").
- Provide financial assistance for the full plan year and notify its patients before an open enrollment period if that assistance is to be discontinued. *Id.* §§ 3(b)(1), 5(b)(1).
- Not condition financial assistance on the use of, eligibility for, or receipt of any "surgery, transplant, procedure, drug, or device." *Id.* §§ 3(b)(2), 5(b)(2) (the "Financial Assistance Restriction").
- Provide an annual statement to health care service plans certifying that it complies with sections 3(b) and 5(b) of AB 290. *Id.* §§ 3(c)(1), 5(c)(1) (the "Certification Requirement").
- Disclose the names of enrollees for each health care service plan contract on whose behalf a third-party premium payment is made. *Id.* §§ 3(c)(2), 5(c)(2) (the "Patient Disclosure Mandate").

In addition, AB 290 punishes dialysis providers that donate to support AKF's advocacy mission, reducing the reimbursements they receive for treating HIPP patients to the (much lower) Medicare reimbursement rate. *Id.* §§ 3(e)(1), 5(e)(1) (the "Reimbursement Penalty"). In addition, underscoring that the state law interferes with the federal regulation of AKF's activities, AB 290 provides that it shall become effective "unless" a party to Advisory Opinion 97-1 requests an "updated" advisory opinion from OIG. *Id.* § 7.

Despite years of litigation, the State has identified *no evidence* that the "steering" of ESRD patients occurs. The California Department of

Managed Health Care, the California Department of Healthcare Services, and the California Department of Insurance are not aware of any California patients who have been "steered." 4-ER-760–763 ¶¶ 107, 109–110, 112, 114, 116–119, 120–21. None of these agencies have received any complaints about "steering" ESRD patients. 4-ER-760–763 ¶¶ 108, 113, 120. And the State is unaware of any patient harmed by purported "steering." 4-ER-764 ¶¶ 126–27.

The State has also effectively conceded that AB 290 interferes with the existing federal regulation of AKF's charitable activities. California's Legislative Counsel Bureau has stated that "[t]he changes [to HIPP] required by AB 290 would remove the legal protection afforded by [Advisory] Opinion 97-1." 4-ER-759 ¶ 102. That is because AB 290's changes may make it "possible . . . for a patient to infer that the patient's provider had donated" to HIPP, 8-ER-1725, which breaks with Advisory Opinion 97-1's requirement that "premium payments should not be attributed to [dialysis providers]," 8-ER-1714.

Because AB 290 could compromise Advisory Opinion 97-1's safe harbor, AKF ceased providing new ESRD patients in California with HIPP assistance until the district court entered a preliminary injunction.

4-ER-765 ¶ 133. In turn, because of the importance of remaining within Advisory Opinion 97-1's safe harbor, AKF would have no choice but to withdraw its operations from California if all of AB 290's provisions were to take effect. 4-ER-765 ¶¶ 132, 134. If that were to occur, California ESRD patients could lose their health insurance without HIPP assistance. 4-ER-766 ¶ 135. AB 290 would also deter California donors from associating with and contributing to AKF's charitable mission, which would leave the organization with fewer resources to pursue its charitable mission of assisting patients in California and across the country.

B. Procedural History

On November 1, 2019, AKF and its patients, joined by Dialysis Patient Citizens, filed this lawsuit, asserting that AB 290 violates their First Amendment rights and is preempted by federal law. *See* 8-ER-1727–1762. The district court entered a preliminary injunction on December 30, 2019, holding that AB 290 likely abridged the First Amendment rights of AKF and its patients and that they would likely face irreparable harm if AB 290 took effect. 1-ER-84–85. The State did not appeal the district court's holding or seek a stay. As a result, the

statute has never taken effect. In the Spring of 2022, AKF and the State filed competing motions for summary judgment. *See* ECF Nos. 128, 132.

On January 9, 2024, the district court granted in part AKF's motion for summary judgment. Most significantly, the court found that the State's justification for AB 290 could not be supported. As the court explained, the State failed to identify "any real patient or public harm" stemming from any patient "steering," rejecting the State's evidence as irrelevant and based on "mere speculation and conjecture." 1-ER-41–43. The court also found that the State failed to provide any evidence of "distortions" in the insurance market caused by alleged patient "steering." 1-ER-44–45.

The district court addressed each of AB 290's contested provisions and ruled in favor of AKF and its patients on the following issues:

- ***The Advising Restriction.*** The court held the statutory provision prohibiting AKF from advising patients about coverage options regulated commercial speech and did not survive intermediate scrutiny. 1-ER-38–46. The court found the State failed to show this restriction of speech was properly tailored. 1-ER-45–46.

- ***Financial Assistance Restriction.*** The court held that the statutory provision prohibiting AKF from conditioning financial assistance on the use of, eligibility for, or receipt of any "surgery, transplant, procedure, drug, or device" amounted to an "unjustified government interference with AKF's choice" to

maintain relationships with ESRD patients pursuant to its organizational mission. 1-ER-51–53.

- ***Patient Disclosure Mandate.*** The court held that the statutory provision compelling AKF to disclose patient details to private insurance providers—which could expose those patients to the risk of discriminatory treatment—was not sufficiently tailored, as the State failed to explain how it advanced any substantial state interest. 1-ER-54.

The district court ruled in favor of the State on the following issues, concluding that certain provisions were not unconstitutional and could be severed from the statute's other provisions. 1-ER-63–66.

- ***The Reimbursement Penalty.*** The court held that penalizing donors for supporting AKF's charitable mission is a "restriction on economic activity," not expressive conduct. 1-ER-49–51. In reaching this conclusion, the court found that the contributions made by dialysis providers to support AKF's charitable mission did not "contain an expressive element" and credited the State's purported interest in "regulating its health and insurance markets." 1-ER-50–51.

- ***Coverage Disclosure Mandate.*** The court found that the statute's compelled speech requirement—forcing AKF to inform HIPP applicants about "all available health coverage options"—"reasonably related" to the State's proffered interests because the statute compels only the disclosure of "purely factual and uncontroversial" information. 1-ER-54–56.

- ***Updated Advisory Opinion.*** The court held AB 290 did not "mandate" AKF seek a new federal advisory opinion and thus did not abridge AKF's petition rights. 1-ER-56–57.

- ***Preemption Claim.*** The court held that neither the Beneficiary Inducement Statute nor the MSPA preempt AB 290. 1-ER-31–34, 36–37. The court brushed aside the concern that AB 290

> would force AKF to petition the federal government, and it rejected as "speculative" the concern that AB 290 would result in HIPP patients discovering whether their dialysis providers donate to AKF. 1-ER-34.

The court failed to address whether AB 290's provision compelling AKF to certify its compliance with other AB 290 requirements violates the First Amendment.

On January 23, 2024, the State moved for reconsideration on whether AB 290's provision requiring AKF to disclose its patients to insurance companies was sufficiently tailored to survive intermediate scrutiny. ECF No. 209-1. Contradicting the district court's conclusion that the statute's provisions could be severed, the State argued that the mandate was "essential" and "necessary" to implement the penalties that AB 290 imposes on providers that choose to support AKF's charitable mission and expressive activities through financial donations. ECF No. 209-1, at 2, 6. The district court denied the State's motion on April 4, 2024, holding that the State failed to show how compelling AKF to disclose its patients advanced a substantial state interest. 1-ER-8–11.

The district court entered a stipulated final judgment, permanent injunction, and stay pending appeal on May 9, 2024. 1-ER-3–7. Plaintiffs

timely filed their notices of appeal on June 7, 2024; the State filed its notice of appeal on June 12, 2024. *See* 8-ER-1767–1782, 1763–1766.

SUMMARY OF ARGUMENT

1. AB 290 violates the First Amendment because it targets and directly interferes with the expressive activities of AKF and its patients, and it cannot survive any level of scrutiny.

First, AB 290 unconstitutionally restricts AKF's speech and compels AKF to speak when it otherwise would not. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988). In particular, the statute impermissibly and at times contradictorily (1) restricts AKF's speech by prohibiting it from "advis[ing]" HIPP patients about their health insurance coverage options, (2) compels speech by forcing AKF to expend resources to inform HIPP patients about "all available health coverage options" provided by insurers, and (3) mandates that AKF certify its compliance with these unconstitutional requirements. Each of these speech restrictions is a content-based regulation subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Because the State has *no evidence* of patient "steering" or distortions to the insurance market—the purported evils

AB 290 is supposed to remedy—these speech restrictions are unconstitutional under any level of scrutiny.

Second, AB 290 violates AKF's associational rights. The statute impermissibly prohibits AKF from conditioning HIPP assistance on eligibility for or receipt of any "transplant" or "procedure." It compels AKF to disclose the names of HIPP patients to private health insurers—undermining AKF's mission and potentially exposing patients to the risk of discriminatory treatment—absent any reasonable state interest in requiring these private disclosures. And it impermissibly interferes with AKF's organizational mission by penalizing dialysis providers that choose to make charitable contributions to support AKF's expressive activities. These restrictions are justified by nothing more than the State's speculation about patient "steering," so they also fail to withstand any level of constitutional scrutiny.

2. The district court correctly recognized that many of AB 290's provisions are unconstitutional, but its decision to uphold several provisions is infected with error. In particular, the court erred in upholding the provisions that force AKF to inform HIPP patients about "all available health coverage options" and the provisions that penalize

providers that donate to support AKF's expressive activities. In reaching its decision, the court purported to apply intermediate (not strict) scrutiny and wrongly credited the State's speculative evidence regarding the purported "financial motive" of dialysis providers to support AKF's charitable mission.

The district court also erred by holding that the unconstitutional provisions of AB 290 are severable from the rest of the statute. Because the statute's provisions are designed to work together as a whole, the statute should be struck down in its entirety.

3. AB 290 should also be invalidated because it is preempted by federal law and conflicts with the federal regulatory scheme established by the federal Beneficiary Inducement Statute. In particular, AB 290's provisions ensure that HIPP patients are able to discover whether their dialysis providers donate to AKF—when HIPP patients look at the explanation of benefits they receive from their insurers, they will see that their dialysis provider is subject to a uniquely low reimbursement rate. That undermines a key predicate of Advisory Opinion 97-1, which the OIG issued on the express understanding that neither AKF nor dialysis providers would "directly or indirectly" disclose that a patient's provider

donates to AKF. Confirming that AB 290 is designed to interfere with the federal government's interpretation and enforcement of federal law, the statute (§ 7) delays its effective date if AKF changes HIPP and requests a new advisory opinion. That provision infringes on AKF's right to petition the government at the time and in the manner of its choosing.

AB 290 also presents a significant obstacle to Congress's policy goals in the MSPA. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000). Congress enacted the MSPA to protect the public fisc by ensuring private insurers pay their fair share for treating ESRD patients. AB 290 thwarts that goal by encouraging ESRD patients to prematurely leave private insurance coverage and enroll in Medicare.

STANDARD OF REVIEW

Summary judgment decisions are reviewed *de novo*. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1216 (9th Cir. 2022). This Court "employ[s] the same standard used by the trial court under Federal Rule of Civil Procedure 56(c)." *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 988 (9th Cir. 2016) (per curiam). The Court must "view the evidence in the light most favorable to the nonmoving party, determine whether there are any genuine issues of

material fact, and decide whether the district court correctly applied the relevant substantive law." *Id.* at 989.

ARGUMENT

I. AB 290 Impermissibly Regulates Speech and Impinges on Rights of Free Association.

AB 290 restricts speech, compels speech, and interferes with rights of association. But the State has come forward with *no evidence* to support the statute's only purported justification—that its provisions are purportedly needed to prevent patient "steering" and avoid harm to patients. The State has failed to support AB 290 under any level of constitutional scrutiny.

A. AB 290 Regulates the Content of Speech.

"[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley*, 487 U.S. at 796–97 (emphasis omitted); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (noting that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"). It is axiomatic that state governments "ha[ve] no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

Speech restrictions are "based on content" if they apply to speech because of the topic or message expressed. *Id.* at 96. Moreover, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and thus also constitutes a "content-based regulation." *Riley*, 487 U.S. at 795. Content-based regulations are subject to strict scrutiny. They are presumptively invalid unless they are narrowly drawn and justified by a compelling governmental interest. *See Reed*, 576 U.S. at 163–64.

AB 290 infringes on AKF's First Amendment rights in both ways—it compels AKF to speak when AKF otherwise would not, and it requires AKF to stay silent when AKF otherwise would prefer to speak:

- The Advising Restriction prohibits AKF from "steer[ing], direct[ing], or advis[ing]" any patient with regard to any "specific coverage program option or health care service plan contract."
- The Coverage Disclosure Mandate compels speech that is inconsistent with AKF's policies and mission because it forces AKF to inform patients of "all available health coverage options" provided by insurers.
- The Patient Disclosure Mandate requires AKF to disclose the names of HIPP patients to private health insurers.

AB 290 §§ 3(b)(4), 5(b)(4); *id.* §§ 3(b)(3), 5(b)(3); *id.* §§ 3(c)(2), 5(c)(2).

Each of these provisions is a content-based regulation subject to strict scrutiny. *Reed*, 576 U.S. at 163–64; *Mosley*, 408 U.S. at 95–96. The

Advising Restriction, on its face, restricts speech with particular content—"steer[ing], direct[ing], or advis[ing]" HIPP patients regarding any "coverage program option or health care service plan contract." AB 290 §§ 3(b)(4), 5(b)(4). Moreover, the provision is directed at particular *speakers*—AKF and certain of its charitable supporters—rendering the provision particularly problematic. *See id.*; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564–66 (2011) (holding statute prohibiting sale of physician prescription information to pharmaceutical marketers, but not to other parties, qualified as a content-based restriction).

AB 290 also compels AKF's speech, demanding it "speak a particular message." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 766, 769 (2018). The Coverage Disclosure Mandate requires AKF to "inform" HIPP patients of "all available health coverage options," which is contrary to AKF's longstanding practice and "strict policy" of maintaining neutrality among insurance providers by not offering HIPP patients AKF's own input on their health insurance options (consistent with the Beneficiary Inducement Statute). AB 290 §§ 3(b)(3), 5(b)(3); 4-ER-754, 755 ¶¶ 74, 78; *see also* 6-ER-1347–1348 ¶ 26. The Patient Disclosure Mandate likewise compels AKF's speech by

requiring it to disclose the names of HIPP beneficiaries to private health insurers, thereby forcing AKF to risk violating the requirements of the federal Beneficiary Inducement Statute. AB 290 §§ 3(c)(2), 5(c)(2). Moreover, these compelled speech requirements are exacerbated by AB 290's provision requiring AKF to certify in writing its compliance with unconstitutional provisions that AKF does not agree with. AB 290 §§ 3(c)(1), 5(c)(1). Because each of these requirements necessarily "alters the content" of AKF's speech, they are all content-based regulations subject to strict scrutiny. *NIFLA*, 585 U.S. at 766 (quoting *Riley*, 487 U.S. at 795).

B. AB 290 Interferes with Rights of Association.

In addition to regulating the content of AKF's speech, AB 290 intrudes on the associational rights of AKF and its patients. As noted above, AKF engages in a wide range of educational and advocacy activities on behalf of patients, and AB 290 is designed to interfere with those expressive activities for the benefit of private insurers.

The First Amendment protects the right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622

(1984). These protections guard against "compelled disclosure" because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *NAACP v.* Alabama, 357 U.S. 449, 460 (1958)). Statutes that compel disclosure of affiliation are thus assessed under "exacting scrutiny," which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) & *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010)).

A statute is "presumptively inconsistent with the First Amendment" if it "imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). As the Supreme Court has emphasized, this proposition is "so engrained in our First Amendment jurisprudence" and "so 'obvious'" that it does "not require explanation." *Id.* at 115–16 (quoting *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (striking

down content-based magazine tax); *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 962 (9th Cir. 2021) (collecting cases). Because of the First Amendment interests at stake, financial burdens on association are always subject to strict scrutiny. *See Simon & Schuster*, 502 U.S. at 115–23; *Ark. Writers' Project*, 481 U.S. at 231–34.

AKF is an "expressive association" protected by the First Amendment. To qualify as an "expressive association," an organization "must engage in some form of expression, whether it be public or private." *Boy Scouts v. Dale*, 530 U.S. 640, 648 (2000). AKF readily satisfies this standard. AKF is a nationwide 501(c)(3) nonprofit charity that has operated for more than 50 years and has advocated on behalf of more than 37 million ESRD patients. 4-ER-745–746 ¶ 18. As noted above, AKF engages in a wide range of expressive activities, helping patients by providing educational, advocacy, personal, and financial assistance programs. Over 80,000 donors contribute to AKF annually, and AKF provides financial assistance to ESRD patients in all 50 states. 4-ER-746, 752–753 ¶¶ 19, 66–68. AKF's singular mission of advocating and supporting ESRD patients amounts to a "form of expression" protected by the First Amendment. *Dale*, 530 U.S. at 648.

AB 290 violates AKF's associational rights in three ways:

- The Financial Assistance Restriction requires AKF not to "condition financial assistance on eligibility for, or receipt of, any surgery, transplant, procedure, drug, or device."
- The Patient Disclosure Mandate requires AKF to disclose the names of HIPP patients to private health insurers.
- The Reimbursement Penalty provision penalizes providers that support AKF's charitable mission and expressive activities by lowering the insurance reimbursements they receive for HIPP patients to the Medicare reimbursement rate.

AB 290 §§ 3(b)(2), 3(c)(2), 3(e)(1), 5(b)(2), 5(c)(2), 5(e)(1).

Each of these provisions burdens AKF's associational rights and is therefore subject to strict or exacting scrutiny. The Financial Assistance Restriction—which prohibits AKF from "condition[ing] financial assistance on eligibility for, or receipt of, any . . . transplant [or] procedure"—interferes with AKF's mission by prohibiting AKF from providing HIPP assistance only to ESRD patients who are undergoing *dialysis* or who have received a kidney *transplant* within the last year. AB 290 §§ 3(b)(2), 5(b)(2). AKF is entitled to choose which patients to support, and AB 290 directly interferes with that right. Similarly, the Patient Disclosure Mandate requires AKF to disclose the names of its affiliates—*i.e.*, vulnerable HIPP patients—to private insurance companies. AB 290 §§ 3(c)(2), 5(c)(2); *Ams. for Prosperity*, 594 U.S. at 606

("compelled disclosure of affiliation . . . may constitute as effective a restraint on freedom of association as [other] forms of governmental action"). Similarly, the Reimbursement Penalty, by reducing the reimbursement that dialysis providers receive for treating HIPP patients if they make charitable donations to AKF "operate[s] as [a] disincentive[ ]" to associate with AKF. *Simon & Schuster*, 502 U.S. at 117; *see also* AB 290 §§ 3(e)(1), 5(e)(1).

C. The State Has Not Justified AB 290's Speech Mandates and Restrictions.

Although all AB 290's First Amendment restrictions are properly subject to strict or exacting scrutiny, the statute does not survive any level of constitutional review. There is *no evidence* of patient "steering"—the purported problem AB 290 is supposed to remedy—and the statute's overreaching restrictions are not sufficiently tailored.

1. AB 290 is not a regulation of commercial speech.

The State has argued that AB 290 should be subject to less demanding scrutiny because, even though the statute directly interferes with AKF's charitable mission and expressive activities, it purportedly regulates only "commercial speech." That is incorrect. Whether speech is "commercial" turns on three factors: (1) whether "the speech is an

advertisement," (2) whether "the speech refers to a particular product," and (3) whether "the speaker has an economic motivation." *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)).

AB 290 satisfies none of these factors. The speech that AB 290 regulates does not involve "an advertisement," *Hunt*, 638 F.3d at 715, and the State has never contended otherwise. Moreover, none of AB 290's provisions regulate speech that references a "particular product." *Id.* AKF is a charitable organization, and AB 290 is regulating AKF's relationship with patients and its supporters, not the sale of any product. The statute specifically prohibits AKF from "advis[ing]" patients about their health coverage options, while at the same time (and paradoxically) requiring AKF to inform patients about "all available health coverage options." AB 290 §§ 3(b)(3)–(4), 5(b)(3)–(4). That directly interferes with AKF's relationships with patients, as it is undisputed that AKF provides no input to HIPP applicants about their insurance choices, and that HIPP applicants must already have insurance coverage when they apply. 4-ER-754, 755 ¶¶ 73–74, 78; 6-ER-1346–1348 ¶¶ 23, 26.

AKF also does not have an "economic motiv[e]" for its speech. *Hunt*, 638 F.3d at 715. As a 501(c)(3) nonprofit charity, AKF by definition lacks a profit motive. *See* 4-ER-745–746 ¶ 18. Although AKF solicits donations from multiple individuals and organizations, those solicitations do not qualify as "commercial speech" under well settled law. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (holding that charitable solicitation "has not been dealt with in our cases as a variety of purely commercial speech").

Contrary to the district court's suggestions, it does not matter that donations to support AKF's charitable mission are provided not only by individual donors but also by commercial entities. *See* 1-ER-39 (discussing "economic motive" of "maximiz[ing] profits for . . . dialysis centers" and "[dialysis] providers' bottom line"). In choosing to regulate AKF's speech—and not only the speech of others—the State must meet the higher level of scrutiny that applies. *See Gaudiya Vaishnava Soc'y v. City & Cnty. of San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1990) (noting that when speech "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it [is not treated as] a

variety of purely commercial speech" (quoting *Schaumburg*, 444 U.S. at 632)).

In any event, and contrary to the district court's approach, this Court has held that "economic motive" alone "is insufficient to characterize [speech] as commercial." *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012); *see also Bolger*, 463 U.S. at 67 (explaining "economic motivation for [speech] [is] clearly . . . insufficient by itself to turn the [speech] into commercial speech"). As courts have long recognized, the Supreme Court has "placed charitable solicitations by organizations in a category of speech close to the heart of the First Amendment, and distinguished it from 'purely commercial speech.'" *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851, 854 (8th Cir. 2001) ("The Supreme Court has repeatedly held that charity fund-raising involves speech that is fully protected by the First Amendment."). Charitable solicitations are fully protected because they are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the

flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632.

2. AB 290 does not satisfy any level of constitutional scrutiny.

None of AB 290's provisions pass constitutional muster. To satisfy strict scrutiny, AB 290's restrictions must be narrowly tailored and justified by a compelling governmental interest. *Reed*, 576 U.S. at 163. Provisions subject to exacting scrutiny must satisfy a slightly less stringent showing—there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Reed*, 561 U.S. at 196. Even under intermediate scrutiny, which applies to commercial speech, First Amendment restrictions must "directly advance[ ] a substantial government[ ] interest" and be "drawn to achieve that interest." *Sorrell*, 564 U.S. at 571–72. Moreover, to justify content-based restrictions on speech, the State must identify "an actual problem"—"anecdote and supposition" do not suffice. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (explaining "the recited harms [must be] real, not merely conjectural" under intermediate scrutiny).

Because the State has adduced no evidence of patient "steering," identified no evidence of "distortions" to the insurance market, and did not properly tailor the provisions in question, AB 290's restrictions fail to satisfy any level of constitutional scrutiny.

No evidence of patient "steering." Despite years of litigation, the State has identified no meaningful evidence of patient "steering" or that any patients have been harmed by such "steering." Before the district court, the State relied on the following "evidence":

- Public comments submitted in response to an enjoined Center for Medicare and Medicaid Services ("CMS") rule.
- Newspaper articles about a small number of social workers who raised general concerns about patient "steering."
- The Washington Office of the Insurance Commissioner's investigation into the conduct of a single employee of a dialysis provider.
- An out-of-context excerpt from the 2015 version of AKF's HIPP manual.
- Unproven allegations in securities complaints filed in other cases.

ECF No. 132, at 12–13; ECF No. 156, at 8–10; ECF No. 167, at 7.

None of the State's proffered materials establish that AKF "steered" California HIPP patients to private insurance coverage or that California HIPP patients were harmed as a result. The State's reliance on the CMS

rulemaking record fails because CMS "failed to assemble a complete record" and a federal court enjoined the rule on that basis, meaning that the record is neither reliable nor a reasonable basis for regulation. 1-ER-42–43 (citing *Dialysis Patients Citizens v. Burwell*, No. 17-cv-16, 2017 WL 365271, at *5–6 (E.D. Tex. Jan. 25, 2017)). Newspaper articles recounting social workers' generalized concerns, the Washington OIC's investigation into the conduct of a single employee, and a passing remark in the 2015 version of AKF's HIPP manual are not sufficient to establish patient "steering" or any ensuing harm. *See Playboy*, 529 U.S. at 821–22 (explaining a "handful of complaints" is insufficient to justify speech restrictions). More fundamentally, none of these materials concern conduct occurring *in California*. And mere allegations in two unrelated securities cases certainly cannot be used as "evidence at the summary-judgment stage." *VBS Distrib., Inc. v. Nutrivita Labs., Inc.*, 811 F. App'x 1005, 1010–11 & n.1 (9th Cir. 2020) (Bybee, J., concurring).

The State's evidence of "steering" fails for additional reasons: The undisputed record shows that the State has not identified a single California dialysis patient who was "steered" to a commercial insurance plan—and the State has never attempted to identify such patients. 4-

ER-760–763 ¶¶ 107, 109, 116, 123. The State also has no evidence that AKF or a dialysis provider ever influenced a patient's insurance coverage decisions. 4-ER-761–762 ¶¶ 110, 112, 117–18. The State has not received even a single *complaint* about patient steering. 4-ER-760–763 ¶¶ 108, 113, 120. In short, without evidence of "an actual problem," AB 290's speech restrictions cannot survive constitutional scrutiny. *Playboy*, 529 U.S. at 822.

No evidence of impact on health insurance costs. The State has also failed to adduce any meaningful evidence of "distortions" to California's "insurance risk pool." AB 290 § 1(e). Before the district court, the State relied on expert testimony suggesting that "3,000 additional ESRD patients" joined covered California healthcare plans between 2015 and 2016 and that "individual-market plans in California" would thus experience a "premium increase" of 5.3 percent. 1-ER-44 (summarizing testimony). But those numbers are highly misleading. As the State's expert admitted, he examined *all* ESRD patients who happened to choose private insurance and failed to isolate the effect of ESRD patients who were allegedly "steered" to private coverage (likely because no "steering" occurred). 3-ER-376–378 ¶ 44 (collecting

testimony); 1-ER-44. The State's expert also conceded that "small changes" to California's insurance pool "would not necessarily lead to higher insurance premiums" and that California's risk mix "has been consistent." 1-ER-44–45 (collecting testimony). There is thus no record evidence that "distortions" to California's insurance risk pool is "an actual problem." *Playboy*, 529 U.S. at 822.

AB 290 is not narrowly tailored. None of AB 290's provisions are sufficiently tailored to withstand constitutional scrutiny. Under the proper standard, "[i]f a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813. Even under intermediate scrutiny, any restriction must be "not more extensive than is necessary" to serve the government's interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

Here, the State had multiple alternatives to restricting the speech or associational rights of AKF and its patients. For instance, the State could have prohibited only false or misleading statements by dialysis providers to patients about insurance options, required providers to disclose any financial interest in patients' insurance choices, or taken

steps itself to educate ESRD patients about their insurance options. *See Riley*, 487 U.S. at 795 (explaining enforcement of antifraud laws is a less restrictive alternative); *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626, 651 (1985) (explaining "disclosure requirements trench much more narrowly . . . than do flat prohibitions on speech"); *NIFLA*, 585 U.S. at 775 ("California could inform low-income women about its services 'without burdening a speaker with unwanted speech.'"). The State has never explained why any of these alternatives is insufficient to achieve its stated goals—or why AB 290's First Amendment restrictions are necessary. *See Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1228 (9th Cir. 2019) (holding state must "demonstrate[ ] why the challenged restriction, rather than a less restrictive alternative, is necessary").

II. The Court Should Strike Down AB 290 in Its Entirety, Affirming in Part and Reversing in Part.

Because the State has no evidence justifying AB 290, and because AB 290 infringes on First Amendment rights, the statute should be struck down in its entirety. The district court correctly recognized several of AB 290's constitutional infirmities but erred in trying to salvage several of the statute's impermissible provisions, which even the State concedes are closely interrelated.

A. The District Court Correctly Invalidated Three of AB 290's Central Provisions.

The district court correctly recognized that three of AB 290's central provisions—the Advising Restriction, the Patient Disclosure Mandate, and the Financial Assistance Restriction—violate the First Amendment. These provisions restrict the advice AKF can offer to its HIPP patients, force AKF to disclose the identities of HIPP patients to private insurance companies, and undermine AKF's *raison d'etre* by prohibiting it from providing HIPP assistance only to ESRD patients who are receiving dialysis or received a kidney transplant within the last year.

1. ***The Advising Restriction.*** The district court correctly held that AB 290's provisions prohibiting AKF from "steer[ing], direct[ing], or advis[ing]" a patient "into or away from a specific coverage program option or health care service plan contract" unconstitutionally restrict AKF's speech. AB 290 §§ 3(b)(4), 5(b)(4); 1-ER-38–46. Although the district court should have applied strict scrutiny, it recognized that, even under intermediate scrutiny, the State could not justify limiting AKF's right to speak freely to the patients who receive charitable assistance.

As explained above, and as the district court found, the State presented no meaningful evidence of patient harm caused by "steering"

or "distortions" to the insurance risk pool. 1-ER-42–45. The State's reliance on a rulemaking record for a federal rule that never took effect was insufficient because the record was defective as the federal agency "failed to assemble a complete record," 1-ER-42–43 (citing *Dialysis Patients Citizens*, 2017 WL 365271, at *5–6), and the State's remaining evidence amounted to "little more than 'mere speculation or conjecture,'" 1-ER-43 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)). Similarly, the State's proffered expert testimony concerning California's insurance risk pool was entitled to no weight, as it examined *all* ESRD patients instead of only those who were allegedly improperly steered. 1-ER-44–45.

The district court was also correct to hold that AB 290's provisions limiting AKF's free speech rights were not sufficiently tailored. 1-ER-45–46. As the court explained, the State has multiple less-restrictive alternatives, including enforcing fraud laws and undertaking a campaign to educate ESRD patients about their insurance options. 1-ER-45 (collecting cases). There is no reason to commandeer AKF by preventing it from communicating with its own patients and advising them as it sees fit.

2. ***The Patient Disclosure Mandate.*** The district court correctly held that AB 290's provisions requiring AKF to disclose HIPP patients' names to private insurers infringes on the associational rights of AKF and its patients. 1-ER-53–54; AB 290 §§ 3(c)(2), 5(c)(2).

In *Americans for Prosperity Foundation*, the Supreme Court held that a similar California regulation requiring tax-exempt charities to disclose donors' names, total contributions, and addresses to the California Attorney General violated the donors' associational rights. 594 U.S. at 618. The Supreme Court held that the disclosure of such "sensitive information" did not "form an integral part of California's fraud detection efforts" and that the State's "[m]ere administrative convenience" did not trump the burden the regulation imposed on the donors' associational rights. *Id.* at 613, 615, 618 (citing *Reed*, 561 U.S. at 196); *see also id.* at 614 ("the prime objective of the First Amendment is not efficiency").

The same analysis applies here. As the district court explained, AB 290 violates AKF's associational rights because it forces the disclosure of patient names to private insurers and serves no valid state interests. 1-ER-53–54. In fact, AB 290 is even more extreme than the

California regulation addressed in *Americans for Prosperity Foundation* because it forces AKF to disclose the names of HIPP patients not to the State, but to *private insurance companies* that have discriminated against ESRD patients due to the expense associated with treating them. 1-ER-54; *Ams. for Prosperity*, 594 U.S. at 615 (explaining "[m]ere administrative convenience" does not suffice). The State has never identified any valid interest in forcing AKF to disclose information to private parties, especially given the risks of harm that disclosure could pose to patients. Nor are AB 290's provisions properly tailored—the State has many other means to "regulat[e] insurance markets, protect[ ] patient health, and prevent[ ] [alleged] charitable fraud." 1-ER-54.

3. ***The Financial Assistance Restriction.*** The district court also properly held that AB 290's provisions prohibiting AKF from "condition[ing] financial assistance on eligibility for, or receipt of, any . . . transplant [or] procedure" violates AKF's associational rights. 1-ER-51–52 (quoting AB 290 §§ 3(b)(2), 5(b)(2)). Complying with this requirement would undermine a critical aspect of AKF's mission, which is to provide financial assistance to ESRD patients who are undergoing *dialysis* or who have received a kidney *transplant* within the last year. 6-ER-1342,

1344–1347 ¶¶ 2, 14–15, 21, 23. The court thus correctly recognized that AB 290 amounts to "unjustified government interference" with AKF's "internal organization or affairs[.]" 1-ER-53 (quoting *Roberts*, 468 U.S. at 623); *see also Ams. for Prosperity*, 594 U.S. at 606 (noting that "freedom of association may be violated where a group is required to take in members it does not want").

As the district court concluded, there is no merit to the State's argument that this prohibition limits only "certain practices" noted in the "CMS record" and AB 290's preamble. 1-ER-52 (quoting ECF No. 153, at 24). A court must "give [a] statute's words their plain, commonsense meaning" and interpret provisions "in context with the entire statute." *In re Jennings*, 95 P.3d 906, 910 (Cal. 2004); *Renee J. v. Super. Ct.*, 28 P.3d 876, 880 (Cal. 2001). Following these bedrock principles, the district court recognized that the "practices noted in the CMS record" are "found nowhere in the language of sections 3(b)(2) and 5(b)(2)." 1-ER-52 (quoting ECF 153 at 17). Likewise, a statute's preamble "[can]not change the plain meaning of the operative clause." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172–73 (2016). The district court properly held that the practices listed in AB 290's preamble do not alter the plain

meaning of the statute's provisions (§§ 3(b)(2) and 5(b)(2)), which make no mention of those practices. 1-ER-52–53.

B. The District Court Erred in Upholding Three of AB 290's Central Provisions.

The district court erred in upholding two of AB 290's unconstitutional provisions—the Coverage Disclosure Mandate and the Reimbursement Penalty—and failing to rule as to the constitutionality of a third—the Certification Requirement. These provisions compel AKF to speak in ways it otherwise would not and penalize donors for associating with and supporting AKF's charitable mission.

1. The district court erred in upholding AB 290's coverage disclosure mandate.

The district court erred in holding that AB 290's Coverage Disclosure Mandate—which compels AKF to disclose "all available health coverage options" to its patients—survives constitutional scrutiny. 1-ER-54–56; AB 290 §§ 3(b)(3), 5(b)(3).

The district court took a wrong turn in concluding that these provisions are subject only to intermediate scrutiny because they purportedly compel the disclosure of only "purely factual and uncontroversial" information under *Zauderer*. 471 U.S. at 651; 1-ER-55–56. *Zauderer* applies only to compelled commercial speech; it does not

apply where, as here, the speech involves and is inevitably intertwined with charitable expressive activities. *See CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 842 (9th Cir. 2019) (noting that *Zauderer* applies to "compel truthful disclosure in commercial speech"); *see also Riley,* 487 U.S. at 798–99. The information that AKF is being required to disclose is at odds with its charitable mission and its desire, consistent with federal law, to avoid addressing insurance options with HIPP patients.

Moreover, *Zauderer* applies only if the restriction on speech "relate[s] to the product or service that is provided by an entity subject to the requirement[.]" *CTIA*, 928 F.3d at 845; *see also NIFLA*, 585 U.S. at 769 (striking down requirement that clinics post notices regarding services they did not provide); *see also Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014) (noting that *Zauderer* applies only to disclosure of a "company's own products or services"). By holding AKF—a nonprofit charity that does not provide health insurance coverage—can be compelled to inform HIPP patients of "all available health coverage options" provided by private insurers, the district court ignored this essential requirement. AB 290 §§ 3(b)(3), 5(b)(3); 1-ER-54–56.

2. The district court erred in upholding AB 290's reimbursement penalty.

The district court erred by holding that the Reimbursement Penalty—which penalizes dialysis providers that donate to AKF by reducing the reimbursement they receive for treating HIPP patients to the (much lower) Medicare rate—is constitutionally permissible. 1-ER-48–51; AB 290 §§ 3(e)(1), 5(e)(1). It is well established that "charitable" activities are "worthy of constitutional protection under the First Amendment." *Roberts*, 468 U.S. at 626–27. Moreover, a statute is "presumptively inconsistent with the First Amendment" if it "imposes a financial burden" on the exercise of First Amendment rights. *Simon & Schuster*, 502 U.S. at 115.

The Reimbursement Penalty violates these bedrock principles. In reaching the opposite conclusion, the district court erred by holding that AB 290's provisions merely restrict "economic activity or non-expressive conduct" because dialysis providers' donations to AKF purportedly secure a "return on investment." 1-ER-49 (quoting ECF No. 152-1, at 14 (No. 8:19-cv-2130)). In other words, the district court held that dialysis providers' charitable contributions are not protected by the First Amendment because, in addition to supporting AKF's charitable mission

and helping to facilitate its expressive goals, they purportedly also could have an economic motive. *See* 1-ER-48 (referencing dialysis providers "secur[ing] a later return on investment"); 1-ER-49 (referencing purported "quid pro quo arrangement"); 1-ER-50 (stating dialysis providers have "much to gain financially" by donating to AKF).

First Amendment protections do not hinge on whether speech or conduct might be motivated in part by "economic" considerations. *Sorrell*, 564 U.S. at 567; *see also Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding state may not prohibit speech merely because it involves a financial gain); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding for-profit works are "safeguarded by the [F]irst [A]mendment"). The district court's reasoning overlooks that charitable donations to AKF support more than just HIPP—AKF funds a wide range of awareness, advocacy, prevention, public education, professional engagement, and clinical research with the funds it receives. 8-ER-1740 ¶ 37; 6-ER-1344–1345 ¶ 15.

Moreover, the record does not establish the existence of a "quid pro quo" arrangement, as the district court appeared to suggest. 1-ER-49. It is undisputed that AKF provides no input to HIPP applicants about their

insurance choices, HIPP applicants must *already* have insurance coverage when they apply, and less than one-third of California HIPP patients are covered by commercial health insurance plans. 4-ER-754, 755 ¶¶ 73–74, 78; 6-ER-1346–1348 ¶¶ 23, 26. Moreover, more than 50 percent of the dialysis providers that have referred patients to HIPP do not contribute to AKF. 6-ER-1354 ¶ 44. A passing remark in AKF's 2015 HIPP manual taken out of context (*see* 1-ER-49–50) is sufficient neither to rebut this undisputed evidence nor to establish evidence of an industry-wide quid pro quo arrangement.

The district court likewise erred by failing to consider the "financial burden" the Reimbursement Penalty places on protected First Amendment conduct. *Simon & Schuster*, 502 U.S. at 117. The provision not only regulates charitable donations to AKF and interferes with AKF's expressive activities, it also *penalizes* dialysis providers that support AKF's charitable mission by lowering the reimbursement they receive for treating HIPP patients. AB 290 §§ 3(e)(1), 5(e)(1). Such financial burdens—even when they involve speech or conduct that might have a "financial motive"—are subject to strict scrutiny. *See Simon & Schuster*, 502 U.S. at 116–23 (holding New York statute "singl[ing] out income

derived from expressive activity" failed to satisfy strict scrutiny); *Ark. Writers' Project*, 481 U.S. at 231–34 (holding tax on magazines failed to satisfy strict scrutiny).

3. The district court erred in upholding AB 290's certification requirement.

The district court compounded these errors by failing to rule on the constitutionality of the Certification Requirement, which requires AKF to certify its compliance with the Advising Restriction and the Coverage Disclosure Mandate. AB 290 §§ 3(c)(1), 5(c)(1). These provisions compel AKF's speech by requiring it to certify its compliance with the unconstitutional provisions of AB 290 (in sections 3(b) and 5(b)), including the Advising Restriction, and these provisions are likewise subject to strict scrutiny. The Certification Requirement also fails strict scrutiny for the same reasons as those provisions, as it is supported by the same unfounded "steering" rationale.

C. AB 290's Provisions Are Not Severable.

Because all of AB 290's provisions are unconstitutional, the statute should be invalidated in its entirety. But even if some provisions could pass constitutional muster, the statute should still be struck down. The

district court erred in holding that AB 290's unconstitutional provisions are severable from the remainder of the statute. 1-ER-63–66.

The California Supreme Court applies a two-step test: A reviewing court must first look to any severability clause, the presence of which "establishes a presumption in favor of severance." *Cal. Redevelopment Ass'n v. Matosantos*, 267 P.3d 580, 607 (Cal. 2011). If a statute lacks such a clause, the court must analyze whether the provisions are "grammatically, functionally, and volitionally separable." *Id.* (quoting *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1256 (Cal. Ct. App. 1989) (en banc)).

"Grammatical separability" depends on whether the invalid portions of a statute can be stricken "'without affecting the wording' or coherence of what remains." *Id.* (quoting *Calfarm Ins.*, 771 P.2d at 1256). "Functional separability" turns on whether the rest of the statute "is complete in itself" without the severed provisions. *Barlow v. Davis*, 72 Cal. App. 4th 1258, 1264–65 (1999). And "[v]olitional separability" depends on whether the remaining provisions "'would have been adopted by the legislative body'" had the legislature "'foreseen the partial

invalidation of the statute.'" *Matosantos*, 267 P.3d at 608 (quoting *Santa Barbara Sch. Dist. v. Super. Ct.*, 530 P.2d 605, 618 (Cal. 1975) (en banc)).

The district court correctly concluded that AB 290 lacks a severability clause, *see* 1-ER-64, and correctly held that the Advising Restriction and the Reimbursement Penalty, "taken together," are not separable from the rest of AB 290, 1-ER-64–65. But the court erred in holding that AB 290's unconstitutional provisions—the Advising Restriction, the Financial Assistance Restriction, and the Patient Disclosure Mandate—may be severed from the remainder of AB 290. 1-ER-64–66. Those provisions are not functionally or volitionally separable because AB 290 is unworkable without them.

For example, the Reimbursement Penalty cannot survive without the Patient Disclosure Mandate. The Reimbursement Penalty reduces the rates private insurers pay dialysis providers that donate to AKF for treating HIPP patients. *See* AB 290 §§ 3(e)(1), 5(e)(1). The *only* mechanism in AB 290 that allows insurers to identify HIPP patients for whom the Reimbursement Penalty applies is the Patient Disclosure Mandate, which requires that AKF disclose the names of California HIPP recipients to health insurers. *Id.* §§ 3(c)(2), 5(c)(2). The State itself has

conceded that the Patient Disclosure Mandate is "necessary to implement" the Reimbursement Penalty because "[w]ithout such disclosures," insurers "have no mechanism" to identify HIPP patients for whom the Reimbursement Penalty applies. ECF No. 209-1, at 6; *see also id.* at 2 (arguing Patient Disclosure Mandate is "essential" to implementing the Reimbursement Penalty).

In short, without the provisions the district court properly struck down, AB 290 is reduced to an incoherent collection of restrictions and disclosure requirements that do not serve the statute's stated purposes of reducing or eliminating patient "steering." *See Barlow*, 72 Cal. App. 4th at 1266–67 (holding entire statute to be void where "the Legislature inextricably connected the policies and goals of the statute to the invalid provisions of the law"). There is no reason to think the California Legislature would ever seek to pass such a law. *See Matosantos*, 267 P.3d at 608.

III. AB 290 Is Preempted by Federal Law and Violates the Petition Clause.

AB 290 also should be invalidated because it is preempted by federal law. AB 290 conflicts with the federal Beneficiary Inducement Statute as interpreted by HHS OIG in Advisory Opinion 97-1, and it

thwarts Congress's policy goals. Recognizing the conflict between federal and state law, AB 290 requires AKF to seek a new advisory opinion from the OIG, but that requirement violates the First Amendment by compelling AKF to petition the government when it otherwise would not.

Federal preemption applies when a state attempts to intrude on a field of regulation occupied by federal law and "when it is impossible for a private party to comply with both state and federal requirements." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 303 (2019); *see also PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) (explaining impossibility preemption exists when it is "not lawful under federal law for [affected parties] to do what state law require[s] of them"). For "impossibility" preemption to apply, the question is whether the private party "c[an] independently do under federal law what state law requires of it." 564 U.S. at 620. In addition, when a state statute "present[s] an obstacle to the variety and mix of [regulatory approaches]" selected by Congress, it is preempted by federal law. *Geier*, 529 U.S. at 881. Among the "special features" of federal law that may require obstacle preemption, *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990), is a specialized federal enforcement regime that would be thwarted by state

legislation, *see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990).

AB 290 directly interferes with the federal Beneficiary Inducement Statute as interpreted by HHS OIG in Advisory Opinion 97-1. AB 290 requires AKF to disclose the names of HIPP patients to private insurers so those insurers can reduce the reimbursement rates they pay dialysis providers as to those patients. AB 290 §§ 3(c)(2), 3(e), 5(c)(2), 5(e). As a result, when HIPP patients receive their explanations of benefits showing these lower payments, they will know their dialysis provider donates to AKF. That undermines a key factual predicate of Advisory Opinion 97-1, which OIG issued on the understanding that neither AKF nor dialysis providers would "disclose *directly or indirectly* to individual patients . . . that such [dialysis providers] have contributed to AKF[.]" 8-ER-1712 (emphasis added).

The State itself recognizes that AB 290 is designed to interfere with federal regulation and that complying with both AB 290 and remaining within the federal safe harbor provided by the federal Advisory Opinion 97-1 would be impossible. According to the California Legislative Counsel Bureau, "[t]he changes [to HIPP] required by AB 290 would

remove the legal protection afford by [Advisory] Opinion 97-1" because "it may be possible . . . for a patient to infer that the patient's provider had donated [to AKF]." 4-ER-759 ¶ 102; 8-ER-1725. In an attempt to remedy this problem, AB 290 provides that it shall not become operative unless "one or more parties to Advisory Opinion 97-1 requests an updated opinion" from OIG. AB 290 § 7. But that only confirms that AB 290 seeks to interfere with federal regulation under the Advisory Opinion 97-1 and the Beneficiary Inducement Statute. It is well settled that "an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability." *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 488 (2013).

In holding that AB 290 is not preempted by the federal Beneficiary Inducement Statute, *see* 1-ER-31–34, the district court erred in two ways.

First, the court held that it was "speculative" that a patient would "connect a lower reimbursement rate" with their dialysis provider's "donations to AKF[.]" 1-ER-34. But the mere fact that a patient *could* make the connection is all that is necessary to undermine the safe harbor of Advisory Opinion 97-1, which is based on the notion that neither AKF nor dialysis providers will "disclose *directly or indirectly*" that a dialysis

provider donates to AKF. 8-ER-1712 (emphasis added). A patient seeing that his or her dialysis provider receives a uniquely low reimbursement rate—a rate that applies *only* to dialysis providers that donate to AKF—is exactly the sort of "indirect[ ]" disclosure contemplated by OIG. 8-ER-1712.

Second, the district court concluded that the "mere existence" of AB 290's section 7 "is insufficient" to demonstrate impossibility preemption. 1-ER-34. The district court misapprehended AKF's argument. Section 7 underscores the State's awareness that complying with both AB 290 and remaining within the safe harbor provided by the Advisory Opinion would be "impossible"—section 7 is not itself the source of the impossibility.

The district court also failed to recognize that AB 290's requirement that AKF petition the federal government to avoid the conflict with federal law adds to the statute's First Amendment problems and shows that California is interfering in a field of federal authority. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). The

district court suggested that AB 290's section 7 is not constitutionally suspect because it does not "curtail[ ] Plaintiffs' access to the courts[.]" 1-ER-56–57. But that misses the point.

The Petition Clause applies to "other forums established by the government for the resolution of legal disputes," not only the courts. *Guarnieri*, 564 U.S. at 387; *see also White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) ("[T]he right to petition extends to all departments of the government, including the executive department, the legislature, agencies, and the courts."). Petitioning HHS (a cabinet-level executive branch department of the federal government) to determine whether AKF's conduct comports with the federal Beneficiary Inducement Statute (a federal law) is plainly encompassed by the right to petition under the First Amendment. Moreover, that right guards against not only *abridged* petition, but also *compelled* petition. *See Wooley*, 430 U.S. at 714 ("[T]he First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."); *see also Wayte v. United States*, 470 U.S. 598, 610 & n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.").

Finally, in addition to interfering with AKF's operations under federal law, AB 290 conflicts with the policies and goals of the federal MSPA. Under Congress's federal framework, private health insurers are the primary payers for ESRD patients' dialysis treatments during the 30-month coordination period, and Medicare is the primary payer thereafter. 4-ER-749 ¶¶ 45–47; *see also Marietta Mem'l Hosp. Emp. Health Benefit Plan v. DaVita Inc.*, 596 U.S. 880, 883 (2022) (explaining purpose of MSPA is to prevent plans from "denying or reducing coverage for an individual who has end-stage renal disease, thereby forcing Medicare to incur more of those costs"); *Va. Mason Mem'l Hosp.*, 981 F.3d at 685 (summarizing legislative history of MSPA). In conflict with this framework, the stated purpose of AB 290 is to enforce state measures that combat the purported "steer[ing]" of ESRD patients to *private* (as opposed to *public*) insurance coverage. *See* AB 290 § 1. Those measures conflict with the goal of the MSPA, which contemplates that private insurers will be the primary payers of ESRD patients' dialysis treatment for at least the 30 months of the coordination period. 4-ER-749 ¶¶ 45–47; *see also Marietta Mem'l*, 596 U.S. at 883. By penalizing dialysis providers that contribute to AKF and support its charitable mission, and

by forcing AKF to disclose the names of HIPP patients to private insurers, AB 290 risks encouraging ESRD patients to leave private insurance coverage prematurely, thus increasing costs to Medicare.

CONCLUSION

The Court should hold that AB 290 violates the First Amendment and is preempted by federal law, and it should strike down the statute in its entirety.

Respectfully submitted,

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September 23, 2024

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, aside from *Fresenius Medical Care Orange County, LLC v. Bonta*, No. 24-3654, which is consolidated with this case, and the cross-appeal, *Doe v. Bonta*, No. 24-3700, I state that I am not aware of any related case pending in this Court.

Date: September 23, 2024

/s/Ashley C. Parrish
Ashley C. Parrish
Counsel for Appellants-Cross-Appellees Jane Doe, Stephen Albright, American Kidney Fund, Inc., and Dialysis Patient Citizens, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) because it contains 12,475 words, as counted by Microsoft Word, excluding the items that may be excluded under Rule 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 365ProPlus in Century Schoolbook 14-point font.

Date: September 23, 2024

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