

Nos. 24-3654, 24-3655, 24-3700

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRESENIUS MEDICAL CARE ORANGE COUNTY, LLC, *et al.*,
Plaintiffs-Appellants,

v.

JANE DOE, *et al.*,
Plaintiffs.

v.

ROB BONTA, in his Official Capacity as Attorney General of
California, *et al.*,
Defendants-Appellees.

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) (Carter, J.),

**California State Conference of the National Association of
Colored People *AMICUS* Brief In Support of Plaintiffs-
Appellants**

David L. Schrader, Bar No. 149638
david.schrader@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90071-3132
Telephone: +1.213.612.2500
Facsimile: +1.213.612.2501

Amicus Attorneys for California State
Conference of the National Association
of Colored People

TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. CALIFORNIA NAACP’S COMMITMENT TO RACIAL JUSTICE AND EQUALITY.	2
III. AB 290 DISCRIMINATES AGAINST MINORITY AND LOW INCOME HEALTH CARE PATIENTS.....	3
IV. AB 290 WILL CAUSE MASSIVE AND IRREPARABLE HARM TO MINORITIES WHO NEED HEALTH CARE TO SURVIVE	6
V. AB 290 VIOLATES PATIENTS’ RIGHTS TO RECEIVE INFORMATION ABOUT THEIR MEDICAL CARE OPTIONS.	8
VI. CONCLUSION	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Kleindienst v. Mandel</i> , 408 U. S. 753 (1972)	8
<i>M.R. v. Dreyfus</i> , 697 F.3d 706 (9th Cir. 2012).....	6
<i>Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Counsel, Inc.</i> , 425 U.S. 748 (1976)	8
Other Authorities	
First Amendment	2, 8
California Assembly Bill 290	2
https://khn.org/news/no-cash-no-heart-transplant-centers- require-proof-of-payment (last visited Sep. 29, 2024).....	7
https://www.californianaacp.org/about/overview (last visited Sep. 29, 2024)	3
National Kidney Foundation, https://www.kidney.org/kidney-topics/social- determinants-health-and-chronic-kidney-disease (last visited Sep. 29, 2024)	4
R.App.P. 29.....	1

RULE 29 STATEMENT

Pursuant to F.R.App.P. 29, the California State Conference of the National Association of Colored People (“California NAACP”) provides the following statement. The California NAACP is dedicated to stopping policies that disproportionately impact communities of color. The California NAACP is interested in this matter because the proposed law at issue on this appeal represents such a policy. The California NAACP previously submitted an *amicus* brief to the district court supporting entry of a preliminary injunction to prohibit implementation this proposed law. No party’s counsel authored this brief, in whole or in part. No party or party’s counsel, or any other person, contributed money to fund preparing or submitting this brief.

All parties to this matter, through their counsel, have consented to the California NAACP filing this *amicus* brief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The proposed law at issue on this appeal -- California Assembly Bill 290 (“AB 290”) -- embodies terrible public policy that discriminates against the poorest dialysis patients in California. If implemented, AB 290 will cause massive harm to minority, low income, and vulnerable Californians who are suffering from life threatening diseases. It will jeopardize financial assistance they need for their life-sustaining medical care, violate their rights to privacy, and interfere with their First Amendment rights to receive information about their healthcare options. For those reasons, the California NAACP urges this Court to strike down AB 290 and find it unconstitutional.

II. CALIFORNIA NAACP’S COMMITMENT TO RACIAL JUSTICE AND EQUALITY.

The National Association for the Advancement of Colored People (“NAACP”) is the nation’s largest and strongest civil rights organization. The NAACP’s principal objectives are to ensure the political, educational, social and economic equality of minority citizens of the United States and to eliminate race prejudice. The NAACP seeks to remove all barriers of racial discrimination through

democratic processes. This mission is accomplished by seeking the enactment and enforcement of laws securing civil rights and by informing the public of the adverse effects of racial discrimination.

The California NAACP consists of 72 branches and youth units mobilized across the state to help ensure racial justice and equality in California. See <https://www.californianaacp.org/about/overview> (last visited Sep. 29, 2024). The California NAACP is dedicated to stopping discriminatory policies that disproportionately impact communities of color and low-income Californians and improving quality of life of the downtrodden. The California NAACP submits this *amicus* brief because AB 290 will disproportionately impact and harm communities of color and low-income Californians.

III. AB 290 DISCRIMINATES AGAINST MINORITY AND LOW INCOME HEALTH CARE PATIENTS.

Dialysis patients are among the most vulnerable in society. Dialysis patients must get dialysis three times a week, for three to four hours at a time, to stay alive. The process of dialysis, removing toxins and fluid build-up, is so critical that missing just one treatment increases patient risk of death significantly.

Kidney disease disproportionately affects people of color by a wide margin. According to the National Institute of Diabetes and

Digestive and Kidney Disease, Black Americans are approximately *four times more likely* than White Americans to develop end-stage kidney disease; Hispanics and Native Americans are more twice as likely to develop end-stage kidney disease.

www.niddk.nih.gov/health-information/kidney-disease/race-ethnicity

(last visited Sep. 29, 2024). These “[r]acial disparities in [chronic kidney disease] stem from historical inequities, not race itself.”

National Kidney Foundation, <https://www.kidney.org/kidney-topics/social-determinants-health-and-chronic-kidney-disease> (last visited Sep. 29, 2024) (Identifying those most at risk as Black/African American, Hispanic/Latino. American Indian/Alaska Native, and other minorities).

The extraordinary challenges and burdens imposed (both physical and financial) on those undergoing kidney dialysis treatment, as described in the Opening Brief For Plaintiffs-Appellants, are beyond dispute. Nonprofit American Kidney Fund (“AKF”) helps relieve some of those burdens. AKF does this by offering charitable premium grants to thousands of low-income dialysis patients in California to help pay their insurance premiums. Most of those patients who receive this assistance are minorities. One hundred percent (100%) are low income, averaging less than \$32,000 a year in

annual income. *See* Opening Brief for Plaintiffs-Appellants Fresenius Medical Care Orange County, et al., p. 11 (citing District Court record).

If signed into law, the assistance provided by AKF to these vulnerable members of our society will either be reduced or dismantled. AB 290 will cause that outcome by imposing monetary penalties on certain healthcare providers (which have historically made significant donations to AKF) that will discourage them from providing further charitable support to AKF – support upon which AKF relies. *See* AB 290, § 3. Indeed, AKF previously stated that it would be forced to leave California and stop charitable grants to these patients in California if AB 290 became the law. Any curtailment of AKF grants, however, will be devastating for low-income dialysis patients who depend on this safety net to pay for their healthcare that keeps them alive.

It does not end there. AB 290 would also force AKF to create a list of the low-income, minority patients to whom it provides grants and require AKF to share this confidential list of patients with insurance companies. AB 290 violates their rights to privacy and empowers insurance companies and creates new opportunities for them to discriminate against those with pre-existing conditions. The

district court correctly found these provisions in AB 290 to be unconstitutional; the California NAACP respectfully submits, however, that the district court erred in finding that other provisions did not likewise violate the constitution.

Low-income, minority dialysis patients should not be victimized further by being caught in the middle of a dispute between insurance companies and dialysis providers.

IV. AB 290 WILL CAUSE MASSIVE AND IRREPARABLE HARM TO MINORITIES WHO NEED HEALTH CARE TO SURVIVE .

As this Court has held “several times,” beneficiaries of public assistance “may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule ‘may deny them needed medical care.’” *See M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2012) (citations omitted). The rational of these holdings is obvious and applies equally to beneficiaries of charitable assistance. No one should not be denied access to critical medical care, and people certainly should not be denied such access in a discriminatory manner.

AB 290, if enacted, would discriminate against low-income dialysis patients by, among other things, making it difficult to impossible for them to get kidney transplants -- the best option for

dialysis patients to live a longer life. Obtaining a kidney transplant usually requires registering on the transplant waitlist. Suzanne M. Kirchhoff, Cong. Res. Serv., Medicare Coverage of End-Stage Renal Disease (ESRD) 4 (Aug. 16, 2018) (“CRS Report”). To qualify for a kidney transplant and get on the waitlist, patients must be able to demonstrate they have comprehensive health care coverage. *See* <https://khn.org/news/no-cash-no-heart-transplant-centers-require-proof-of-payment> (last visited Sep. 29, 2024). That is because bills for a kidney transplant could total more than \$400,000. *Id.* (providing cost estimates as of 2017). Patients on Medicare without private insurance are less likely to be waitlisted. *See* Yue-Harn Ng et al., Does Racial Disparity in Kidney Transplant Waitlisting Persist After Accounting for Social Determinants of Health?, 104 *Transplantation* 1445, 1452 (2020); accord D. Keith et al., Insurance Type and Minority Status Associated with Large Disparities in Prelisting Dialysis among Candidates for Kidney Transplantation. 3 *Clin. J. Am. Soc. Nephrol.* 463, 464-65 (2008).

AKF helps address these issues by paying for supplemental plans for many of its grantees, which is the only way they can afford the coverage. Without it, patients will be deprived of their ability to secure supplemental plans and, ultimately, of their opportunity to be

included on a transplant waitlist. AB 290 will deny them life-saving medical care.

V. **AB 290 VIOLATES PATIENTS' RIGHTS TO RECEIVE INFORMATION ABOUT THEIR MEDICAL CARE OPTIONS.**

In addition to jeopardizing the health and financial welfare of kidney dialysis patients, AB 290 also would deny them their First Amendment rights to receive information about their medical care. The First Amendment protects not only the right to speak but also the right to receive information. *See, e.g., Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 756 (1976) (“But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.”); *Kleindienst v. Mandel*, 408 U. S. 753, 762-763 (1972) (freedom of speech “necessarily protects the right to receive.”) (citations omitted). AB 290 would interfere with that right by providing that a chronic dialysis clinic cannot “advise a patient regarding any specific converge program option or health care service plan contract.” AB 290, § 2. As described above, coverage is a critical element of the care these patients may or may not receive, including life-saving kidney transplants. The broad prohibition in AB

290 against discussions of this issue and associated penalties could restrict (i.e., have a chilling effect on) dialysis providers in providing health care information to patients who need information to make informed decisions.

VI. CONCLUSION

For the foregoing reasons, the California NAACP urges this Court to find that AB 290 is unconstitutional in its entirety.

Dated: September 30, 2024 MORGAN, LEWIS & BOCKIUS LLP
David L. Schrader

By /s/ David L. Schrader
David L. Schrader
Amicus Attorneys for the California
State Conference of the National
Association of Colored People

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains words, including words

manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties.
 - a party or parties are filing a single brief in response to multiple briefs.
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature Date
(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov