No. 24-3654, 24-3655, 24-3700

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

and

JANE DOE, *et al.*,
Plaintiffs, Appellants, and Cross Appellees,

v.

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

On Appeal from the United States District Court
for the Central District of California
Nos. 19-cv-2105, 19-cv-2130
Hon. David O. Carter, District Judge

CROSS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

In its cross-appeal, the State made a considered decision not to seek this Court's review of the district court's conclusion that AB 290's anti-steering provisions, §§ 3(b)(4), 5(b)(4), are invalid under the First Amendment. While the State continues to vigorously defend the rest of the statute, and respectfully disagrees with the district court's decision regarding the anti-steering provisions, it has not challenged that aspect of the decision below here.

Plaintiffs assert in their third briefs on cross-appeal that the State's decision in that regard somehow undermines its defense of the remainder of the statute. There is no merit to that contention. As it has done throughout this litigation, the State continues to defend AB 290's reimbursement cap on the ground that is an economic regulation of non-expressive conduct. It seeks to prevent dialysis providers and affiliated entities from reaping a financial windfall—at the expense of enrollees in commercial insurance plans—by facilitating a shift of high-cost ESRD patients from Medicare and Medi-Cal into commercial insurance plans that pay significantly higher reimbursement rates to dialysis providers. The Legislature condemned that practice, which it concluded drives up commercial insurance premiums, and sought to remove the financial incentive for it. That concern remains valid and provides a basis for the statute's reimbursement cap regardless of whether the anti-steering provisions are in effect.

With respect to the remainder of the State's cross-appeal, Plaintiffs fail to rebut the State's arguments. AB 290's prohibition on conditioning financial assistance does not impair Plaintiffs' organizational mission—it allows them to focus their charitable efforts on ESRD patients, while protecting patients by prohibiting entities like the American Kidney Fund (AKF) from conditioning financial assistance on a patient's chosen course of treatment for ESRD. And AB 290's requirement that entities like AKF disclose to insurers the names of patients receiving third-party premium support is a carefully tailored requirement in the commercial context that involves a disclosure of one piece of purely factual, uncontroversial information—a patient's name—to enable the reimbursement cap to operate as intended. These provisions do not violate the First Amendment.

ARGUMENT

I. THE STATE'S DECISION NOT TO APPEAL THE DISTRICT COURT'S RULING INVALIDATING AB 290'S ANTI-STEERING PROVISIONS DOES NOT UNDERMINE THE STATE'S DEFENSE OF THE STATUTE'S OTHER PROVISIONS

Plaintiffs' arguments relating to the State's cross-appeal focus less on the arguments the State makes than on an argument the State declined to make—namely, its decision not to seek this Court's review of the district court's ruling invalidating the anti-steering provisions, which made it unlawful for financially interested entities to "steer, direct, or advise" patients "into or away from" any health insurance option. AB 290, §§ 3(b)(4), 5(b)(4); *see* Principal & Response Br.

(State Br.) 58-59; AKF Response & Reply Br. (AKF Resp. Br.) 8-20; Fresenius Response & Reply Br. (Fresenius Resp. Br.) 19-25. Plaintiffs contend that the State's decision not to appeal this aspect of the district court's ruling is "fatal to its defense" of AB 290. Fresenius Resp. Br. 21; *see* AKF Resp. Br. 9-15. It is not.

As an initial matter, the State has not "concede[d]" that these anti-steering provisions "[are] unconstitutional." AKF Resp. Br. 8. The State mounted a vigorous defense of these provisions in the district court, which it stands by; and the district court agreed that "the record supports the State's position that a significant economic incentive exists to steer dialysis patients into private insurance," 1-PER-42. But the State now accepts that AB 290's other provisions, particularly the reimbursement cap, adequately serve the State's interests in reducing healthcare costs and protecting patients, and do so "without restricting the dialogue between patients and providers." 1-ER-51; *see* 1-ER-45-46; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (regulation of commercial speech must be "not more extensive than is necessary to serve" the government's interest). As appellate courts frequently remind litigants, they "need not (and should not) raise every nonfrivolous claim" on appeal, but may instead "select from among them" to present their strongest arguments. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

Plaintiffs' argument that the State's defense of the remaining provisions of AB 290 "founder[s] on the conceded lack of steering," Fresenius Resp. Br. 21 (capitalization omitted); *see* AKF Resp. Br. 9-15, is doubly flawed. First, the State has never conceded that steering has not occurred. As the district court recognized, the Centers for Medicare and Medicaid Services (CMS) rulemaking record is replete with evidence that providers have steered dialysis patients into commercial insurance plans, which they have a "significant economic incentive" to do. 1-ER-42; *see* 1-ER-41-42.[1]

Second, and more importantly at this stage, the State's defense of AB 290's remaining provisions, particularly the reimbursement cap, does *not* depend on evidence of "steering," as Plaintiffs use that term. *See* State Br. 37 n.9. Plaintiffs assert that they have not steered patients in the sense of "influenc[ing]" their "decisions about insurance coverage" or advising them to switch to commercial insurance plans. AKF Resp. Br. 10; *see also* Fresenius Resp. Br. 22. But even absent explicit encouragement or advice to switch coverage, Plaintiffs do not (and

[1] AKF complains that "CMS 'failed to assemble a complete record' and a federal court enjoined the rule on that basis." AKF Resp. Br. 26. That characterization is misleading at best. While a federal court enjoined the CMS rule because it concluded that the agency improperly failed to engage in notice-and-comment rulemaking, the court did not otherwise question the validity of the CMS record or its evidence of steering. *Dialysis Patient Citizens v. Burwell*, No. 17-cv-16, 2017 WL 365271, at *6 (E.D. Tex. Jan. 25, 2017). Nor does AKF point to anything that would undermine the evidence regarding steering in the CMS record.

cannot) deny that the existence of third-party financial assistance of the sort AKF provides facilitates a shift of high-cost ESRD patients away from Medicare or Medi-Cal and into commercial insurance plans. It is *that* shift of patients, and the resulting effects on the commercial insurance market and financial windfall to dialysis providers, that the reimbursement cap seeks to prevent.

Plaintiffs resist this conclusion, arguing that "[t]he private insurance risk pool cannot be 'distorted' unless patients are improperly 'steered' from public to private insurance." AKF Resp. Br. 11. That view is mistaken. What distorts the private insurance risk pool is the introduction of high-cost ESRD patients who would otherwise be covered at a lower cost by Medicare or Medi-Cal. The resulting effect on the commercial insurance market is the same regardless of whether a patient is explicitly encouraged to switch to commercial insurance or uses third-party premium support to make the change without any explicit encouragement.

Plaintiffs also dispute that an increase in high-cost ESRD patients into the commercial insurance pool will ultimately lead to an eventual increase in premiums for non-ESRD enrollees. *See* Fresenius Resp. Br. 26-30. It bears emphasis that this argument comes into play only if this Court applies the *O'Brien* framework or some other First Amendment intermediate scrutiny doctrine. *See* State Br. 32-44. If the Court agrees that providers' contributions to AKF are non-expressive in nature—for instance, because a reasonable observer would

understand that they provide a financial benefit to providers well in excess of the value of the contributions themselves—then no further First Amendment scrutiny is required. *See id.* at 23-31.

In any event, Plaintiffs' critiques of the State's evidence on this point miss the mark. Plaintiffs contend that the number of ESRD patients enrolling in commercial insurance plans because of third-party premium support is "small." Fresenius Resp. Br. 28; *see also id.* at 26 n.4 (describing the number as "modest"). But the Legislature is entitled to take action to solve modest problems as well as larger ones. The State's expert, Mr. Bertko, explained that the data indicated that approximately 700 ESRD patients had joined commercial insurance plans in 2016, and that thousands more were expected to do so in subsequent years. State Br. 36 n.8; *see* 1-SER-269-279. Mr. Bertko found that an "increase of approximately 1.7%" in commercial insurance premiums would be expected to occur for each additional thousand ESRD patients enrolling in individual-market plans, 1-SER-244—which is not surprising, given that average monthly healthcare spending for ESRD patients is 33 times higher than for non-ESRD patients, 1-SER-255. Plaintiffs do not contest these figures.[2]

[2] Plaintiffs assert that the "risk mix" of commercial insurance was "consistent" overall during the period Mr. Bertko analyzed. Fresenius Resp. Br. 27. But as Mr. Bertko explained in his report, the increase in ESRD patients threatened to disrupt (continued…)

These arguments are in no way a "revisionist justification[]" or a "new rationale[]" for AB 290. Fresenius Resp. Br. 21 (capitalization omitted). On the contrary, the State's concern about an influx of ESRD patients into commercial insurance plans causing an increase in healthcare costs and insurance premiums has been central to the legislation and this litigation from the beginning. *See* 1-PER-51 (district court summary judgment ruling); 5-PER-970-975 (opposition to motion for preliminary injunction). While the Legislature also sought to protect ESRD patients from the harmful effects of steering, the Legislature's "intent" to "protect the sustainability of risk pools within the individual and group health insurance markets," AB 290, § 1(*i*), is not dependent on its separate goal of preventing harm to ESRD patients. The Legislature's concern about ESRD patients causing an increase in commercial insurance premiums remains present whether or not the ESRD patients are "steered"—in the sense of being explicitly advised or encouraged—to select commercial insurance plans.

Ultimately, the text and structure of AB 290 refute Plaintiffs' argument that "the Legislature had no . . . interest" in "reduc[ing] premiums for non-ESRD patients" independent of preventing explicit steering that also harms ESRD

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that risk mix in future years. 1-SER-242-243, 285. And, absent the increase in high-cost ESRD patients resulting from third-party premium support, the risk mix would have been even more favorable. *See* 1-SER-273-280.

patients. Fresenius Resp. Br. 23. If that had been what the Legislature had in mind, it could have applied the reimbursement cap only to ESRD patients who were expressly advised or encouraged to select commercial insurance plans. But that is not the statute the Legislature enacted. Instead, it applied the reimbursement cap to *all* ESRD patients receiving third-party premium support, AB 290, §§ 3(e), 5(e), reflecting its concern that all such patients artificially increase costs and premiums for patients on commercial insurance plans.

Plaintiffs complain that this understanding of AB 290 is at odds with "California's longstanding support for measures that help sick, low-income patients afford the insurance of their choice." Fresenius Resp. Br. 23; *see id.* at 23-24. But "no legislation pursues its purposes at all costs," and "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Medicare and Medi-Cal coverage remain available to ESRD patients, and some ESRD patients may be able to obtain commercial insurance through an employer-sponsored plan or on the individual market. In enacting AB 290, however, the Legislature made a policy judgment that, notwithstanding California's general support for the goal of expanding health insurance coverage, it would not allow dialysis providers to obtain a financial windfall and unjustly enrich themselves—at the expense of non-ESRD enrollees in

commercial insurance plans—by subsidizing the premiums of ESRD patients through entities like AKF. While Plaintiffs are certainly entitled to disagree with that policy judgment, their concerns should be directed to the Legislature, not to this Court in the context of a First Amendment challenge.

II. THE DISTRICT COURT ERRED IN INVALIDATING AB 290'S PROVISIONS PROHIBITING THE CONDITIONING OF FINANCIAL ASSISTANCE AND REQUIRING THE DISCLOSURE OF PATIENT NAMES TO INSURERS

This Court should reverse the district court's judgment invalidating AB 290's prohibition on conditioning financial assistance and its requirement that entities like AKF disclose to insurers the names of patients receiving third-party premium support. *See* State Br. 58-65. Plaintiffs' arguments to the contrary lack merit.

A. The Prohibition on Conditioning Financial Assistance Is a Lawful Consumer-Protection Regulation

Sections 3(b)(2) and 5(b)(2) of AB 290 specify that financially interested entities may not "condition financial assistance on eligibility for, or receipt of, any surgery, transplant, procedure, drug, or device." As the State has explained (State Br. 59-62), these provisions simply seek to prohibit entities like AKF from engaging in abusive practices such as terminating financial assistance to ESRD patients who choose a course of treatment other than dialysis. They do not prohibit AKF from focusing its charitable mission on ESRD patients to the exclusion of patients with other kinds of diseases.

Plaintiffs do not contend that these provisions would violate the First Amendment if they are construed as the State proposes. Rather, they argue only that the State's interpretation should be rejected because "[t]he limitation urged by the State is found nowhere in the text" of AB 290. AKF Resp. Br. 35; *see id.* at 34-38. As Plaintiffs recognize, the constitutional-avoidance canon places a heavy burden on them in making this argument: They must show that the State's interpretation is not even "'*plausible*.'" *Id.* at 36 (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 298 (2018)); *accord, e.g.*, *Hooper v. California*, 155 U.S. 648, 657 (1895) ("every reasonable construction must be resorted to in order to save a statute from unconstitutionality").

Plaintiffs cannot carry that burden. Their interpretation of the statute—that its reference to "any transplant or procedure" "would prevent AKF from conditioning charitable assistance on ESRD patients' need of dialysis or a kidney transplant," AKF Resp. Br. 34 (alterations and emphasis omitted)—ignores the context and purpose of the statute. The Legislature sought to protect ESRD patients from the threat of having financial assistance withdrawn should they prove ineligible for, or decline to select, a financially interested entity's preferred course of treatment, particularly dialysis. *See* State Br. 59-60; 1-SER-93, 123. There is no indication that the Legislature sought to prohibit entities like AKF from focusing their

charitable mission on ESRD patients rather than other kinds of patients. Plaintiffs do not suggest that the Legislature had any such intent.

Instead, Plaintiffs contend that the statute's reference to "any surgery, transplant, procedure, drug, or device," AB 290, §§ 3(b)(2), 5(b)(2), compels their reading. Not so. While the word "any" is certainly broad, the Supreme Court has long cautioned that "'any' can and does mean different things depending upon the setting." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004); *see United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) ("general words," such as "any," must be "limited . . . to those objects to which the legislature intended to apply them"); *Small v. United States*, 544 U.S. 385, 388 (2005) (collecting cases). Thus, for instance, the Court has interpreted the phrase "convicted in any court" to "encompass[] only domestic, not foreign, convictions," *Small*, 544 U.S. at 387, and has interpreted the phrase "any entity" to include only private and not public entities, *Nixon*, 541 U.S. at 132-33.

Similarly here, AB 290's prohibition on "condition[ing] financial assistance on eligibility for, or receipt of, any surgery, transplant, procedure, drug, or device," §§ 3(b)(2), 5(b)(2), should be interpreted to prohibit conditioning financial assistance *provided to ESRD patients* on the patient's "eligibility for, or receipt of, any surgery, transplant, procedure, drug, or device." Under that interpretation, entities like AKF may condition their assistance on a patient having ESRD in the

first place. But they may not condition their assistance on an ESRD patient's eligibility for, or decision to receive, dialysis or any other treatment—because the threat of having financial assistance withdrawn could unduly influence a patient's chosen course of treatment. That is a garden-variety consumer-protection measure that does not implicate the First Amendment. *See* State Br. 60-61.[3]

Plaintiffs' remaining arguments are equally meritless. They seek to distinguish *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), from this case. AKF Resp. Br. 37-38. But as those decisions illustrate (State Br. 62), especially in the context of this facial challenge, this Court should accept the narrowing construction of Section 3(b)(2) and 5(b)(2) that the Attorney General offers here, which would preserve the constitutionality of those provisions. *See Broadrick*, 413 U.S. at 617-18. Plaintiffs also dispute whether the record supports the Legislature's concern that entities like AKF have in the past conditioned financial support on a patient's decision to receive dialysis as opposed to a transplant or some other treatment. AKF Resp. Br.

[3] Plaintiffs correctly note that the state consumer-protection laws at issue in *Morris v. California Physicians' Service*, 918 F.3d 1011 (9th Cir. 2019), and *Hansen v. Group Health Cooperative*, 902 F.3d 1051 (9th Cir. 2018), are factually distinguishable from AB 290. AKF Resp. Br. 35-36. The State cited those cases as examples of other consumer-protection measures that are widespread in the context of healthcare and health insurance, *see* State Br. 60-61, not because they are on all fours with this case factually.

38. Yet CMS found evidence that entities like AKF "that receive significant financial support from dialysis facilities will support payment of health insurance premiums only for patients currently receiving dialysis." 1-SER-123; *see* 1-SER-93. And even absent such evidence, the State is entitled to enact legislation that "is prophylactic in nature" and "does not wait" for a patient to suffer the harm it seeks to prevent. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980).

B. The Insurer Disclosure Requirement Is Permissible Under the *Zauderer* Framework

Sections 3(c)(2) and 5(c)(2) of AB 290 prohibit entities like AKF from making third-party premium payments unless they disclose to the patient's insurer "the name of the enrollee . . . on whose behalf a third-party premium payment . . . will be made." As the State has explained (State Br. 62-65), this requirement is subject to, and satisfies, the framework set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). It involves the disclosure of "purely factual and uncontroversial information" in the commercial context that is "reasonably related" to the State's interest in facilitating enforcement of the reimbursement cap, and it is not "unjustified or unduly burdensome." *Id.* at 651. The Legislature enacted the disclosure requirement to help allow for health insurers to pay providers the proper amount for patients subject to the reimbursement cap—which, of course, is precisely why Plaintiffs dislike it.

Plaintiffs do not dispute that the information at issue is purely factual and uncontroversial, nor do they assert that the disclosure requirement is burdensome. They contend only that *Zauderer* is inapposite because the disclosure requirement is "intertwined with protected charitable activities," so "exacting scrutiny" should be applied instead. AKF Resp. Br. 39 (citing *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021)); *see* Fresenius Resp. Br. 40 n.9. Plaintiffs also maintain that *Zauderer* does not apply because AKF is not the entity providing the "product or service" at issue. AKF Resp. Br. 39. Neither argument is persuasive.

Americans for Prosperity does not hold, or even suggest, that any disclosure requirement that is somehow related to charitable activities is subject to exacting scrutiny. *See* State Br. 64-65. The case involved a state law requiring disclosure of "a charity's top donors." 594 U.S. at 612. Relying heavily on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452-53 (1958), which involved an effort by Alabama during the Jim Crow era to obtain a list of the NAACP's members, the Court applied exacting scrutiny. *Americans for Prosperity*, 594 U.S. at 606-07. It concluded that the law requiring disclosure of a charity's top donors could "chill association" with the charity, *id.* at 616, just as the law at issue in *Patterson* had an obvious "chilling effect" that threatened the First Amendment associational rights of the group's members, *id.* at 606-07. The Court explained: "Exacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to

associate, and by the possible deterrent effect of disclosure." *Id.* at 616 (internal quotation marks and emphasis omitted).

Plaintiffs fail to show—indeed, they do not even attempt to argue—that AB 290's insurer disclosure requirement has the potential to chill or curtail anyone's freedom to associate. They assert that the disclosure of the identity of patients receiving premium support "captures the fact and nature of patients' 'affiliation with' AKF's 'advocacy.'" AKF Resp. Br. 40. Even if that is so, Plaintiffs do not explain how or why that disclosure would tend to deter patients from affiliating with AKF, which is what "trigger[s]" exacting scrutiny, *Americans for Prosperity*, 594 U.S. at 616. Nor could they. Unlike the laws at issue in *Patterson* and *Americans for Prosperity*, where the potential chilling effect was clear, *see id.* at 616-17, there is no reason to believe that patients would be deterred from receiving premium support from AKF simply because their insurance company would be informed of that fact.

Plaintiffs' argument that *Zauderer* is inapplicable because the insurer disclosure requirement does not "relate[] to the product or service" provided by entities like AKF, AKF Resp. Br. 39, fares no better. Plaintiffs note that patient names "are not a 'product or service' . . . that AKF provides." *Id.* That is true; the names are the information being disclosed. The relevant "product or service" is the premium support that AKF provides, which enables patients to obtain

commercial insurance. State Br. 52-53; *see CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019). The Supreme Court articulated the "product or service" requirement in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) (*NIFLA*), where a state law required pregnancy clinics "to disclose information about *state*-sponsored services—including abortion," rather than the services provided by the clinics themselves. *Id.* at 769. While *NIFLA* precludes a State from requiring the disclosure of information about services that the "entity subject to the requirement" does not provide, *CTIA*, 928 F.3d at 845, AB 290 does not violate that element of the *Zauderer* framework because the disclosure of patient names relates to third-party premium support, which *is* a product or service that entities like AKF provide. The disclosure of patient names is plainly related to that product or service, and furthers the State's substantial interest in enforcing the reimbursement cap.[4]

[4] Plaintiffs reiterate their argument that the reimbursement cap should be invalidated because it cannot be severed from the insurer disclosure requirement. Fresenius Resp. Br. 39-44; AKF Resp. Br. 41-42. Of course, the Court need not reach that issue if it concludes that the insurer disclosure requirement is lawful under *Zauderer*. But the reimbursement cap should be upheld even if the insurer disclosure requirement is not. This brief does not address that severability issue because it is outside the scope of the State's cross-appeal, but the State stands by its prior arguments. *See* State Br. 47-49.

CONCLUSION

The judgment of the district court should be affirmed in part and reversed in part, and the case should be remanded for entry of judgment in favor of the State Defendants with respect to all provisions of AB 290 other than the anti-steering provisions.

Dated: May 6, 2025

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I certify that on May 6, 2025, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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