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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JANE DOE, *et al.*

Plaintiffs,

v.

XAVIER BECERRA, *et al.*

Defendants.

Case No. 8:19-cv-02105-DOC-ADS

PLAINTIFFS' MEMORANDUM IN RESPONSE TO THE COURT'S QUESTIONING AT THE DECEMBER 16, 2019 HEARING

Date: December 18, 2019
Time: 5:00 p.m.
Place: Courtroom 9D

The following responds to questions raised by this Court at the hearing held December 16, 2019.

Strict Scrutiny. Strict scrutiny generally applies to laws that restrict or compel speech, expression, or expressive association based on who is speaking or what they say. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988). In the case of AB 290, this means strict scrutiny applies to Sections 2(a), 2(b), 3(b)(1), 3(b)(2), 3(b)(3), 3(b)(4), 3(c)(1), 3(c)(2), 5(b)(1), 5(b)(2), 5(b)(3), 5(b)(4), 5(c)(1), and 5(c)(2). AKF makes charitable grants to pay insurance premiums and has no financial stake in the transactions; this is not "commercial speech." *Charles v. City of Los Angeles*, 697 F.3d 1146, 1151 (9th Cir. 2012) ("Where the facts present a close question, 'strong support' that the speech should be characterized as commercial speech is found *where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation*.") (emphasis added). *See also Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1016-18 (9th Cir. 2004).

Anticipatory Harm. "A preliminary injunction is appropriate where plaintiffs demonstrate . . . a likelihood of success on the merits and the *possibility* of irreparable injury." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (emphasis added). Although "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction," proof of "immediate threatened injury" is enough. *Disney Enters. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 966 (C.D. Cal. 2016) (quoting *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). Plaintiffs' declarations are more than sufficient to meet this standard. *See*, *e.g.*, AKF Decl. ¶¶ 21, 32, 47, 52; Doe Decl. ¶¶ 16-17; Albright Decl. ¶¶ 11-14. *See also* Supplemental Declaration of Donald Roy (filed today), ¶¶ 4. Plaintiffs have provided much more detail and analysis than affidavits rejected by the Ninth Circuit as "conclusory" and

therefore insufficient to support a preliminary injunction. *Compare*, *e.g.*, *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (reversing the district court's grant of a preliminary injunction in part because the movant's affidavits were "conclusory and without sufficient support in facts").

Severability. If preempted by federal law, AB 290 would fall as a whole. Focusing on only the provisions invalid under the First Amendment, California law rejects severability when the legislature would not have passed the law but for the invalidated provision. *See Jevne v. Superior Court*, 111 P.3d 954, 971 (Cal. 2005); *Kornblum v. Newark Unified Sch. Dist.*, 112 Cal. Rptr. 457, 460 (Cal. Ct. App. 1974). The main stated purpose of AB 290 is to prevent patient steering. *See* AB 290 §§ 1(c), (d), (e), (f), (h). If the patient-steering provisions are not valid, the impetus for enacting the law falls away with them. Moreover, as shown above ("Strict Scrutiny"), so many provisions of the statute are invalid that the remainder cannot stand on its own.

Preemption. The Court asked if Section 7, which attempts to cure the preemption problem, means that AB 290 is "self-abrogating." It is not. "The question for 'impossibility' [preemption] is whether the private party could independently do under federal law what state law requires of it." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620 (2011) (for generic drugs, changes in labeling subject to FDA approval and contrary state law preempted). *Compare Wyeth v. Levine*, 555 U.S. 555, 568 (2009) (for branded drugs, "an FDA regulation . . . permits a manufacturer to make certain changes to its label before receiving the agency's approval," and contrary state law not preempted). Advisory Opinion 97-1 (RJN, Exh. 3 at 26) provides a safe harbor for HIPP "as long as all of the material facts have been fully, completely, and accurately presented, and *the arrangement in practice comports with the information provided*." (emphasis added). In other words, AKF cannot unilaterally make the changes to HIPP that AB 290 demands without running afoul of the Advisory Opinion and losing the safe harbor.

Respectfully submitted,

DATED: December 18, 2019

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