

1 JOSEPH N. AKROTIRIANAKIS (SBN 197971)
jakro@kslaw.com

2 KING & SPALDING LLP
633 West Fifth Street, Suite 1600
3 Los Angeles, CA 90071
Telephone: (213) 443-4355
4 Facsimile: (213) 443-4310

5 ASHLEY C. PARRISH (*pro hac vice*)
aparrish@kslaw.com

6 KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
7 Washington, DC 20006
Telephone: (202) 737-0500
8 Facsimile: (202) 626-3737

9 Attorneys for Plaintiffs
JANE DOE, STEPHEN ALBRIGHT,
10 AMERICAN KIDNEY FUND, INC.,
and DIALYSIS PATIENT CITIZENS, INC.
11

12
13 UNITED STATES DISTRICT COURT

14 CENTRAL DISTRICT OF CALIFORNIA

15 SOUTHERN DIVISION

16 JANE DOE, *et al.*

17
18 Plaintiffs,

19 v.

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

21
22 Defendants.
23

Case No. 8:19-cv-02105 (ADSx)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR
RECONSIDERATION OF A
PORTION OF THE COURT'S
ORDER ON SUMMARY
JUDGMENT [ECF NO. 209]**

Date: April 8, 2024
Time: 8:30 AM
Place: Courtroom 9D

INTRODUCTION

Plaintiffs Jane Doe, Stephen Albright, the American Kidney Fund, Inc. (“AKF”), and Dialysis Patient Citizens respectfully oppose the State’s Motion for Reconsideration of a Portion of the Court’s Order on Summary Judgment (ECF No. 209) (“Motion” or Mot.).¹ As relevant to the State’s motion, sections 3(c)(2) and 5(c)(2) of AB 290 prohibit AKF from carrying out a core part of its charitable mission—providing financial assistance to low-income ESRD patients to help them afford insurance needed to pay for life-sustaining dialysis services—unless AKF “[d]iscloses” to private insurers “prior to” providing financial assistance “the name” of any patient who participates in AKF’s charitable assistance program. AB 290 §§ 3(c)(2), 5(c)(2) (“Patient Disclosure Mandate”). The Court correctly held that these provisions violate AKF’s and its patients’ First Amendment rights to freedom of association.

In seeking reconsideration, the State does not identify any error or manifest injustice resulting from the Court’s ruling. The State instead asserts that its purported showings under the more lenient *Zauderer* standard—which applies to “purely factual and uncontroversial” compelled speech in a commercial context—were enough to satisfy the more rigorous “exacting scrutiny” the Court correctly held applies to compelled disclosures that burden associational rights. But the State made *no showing* under the proper framework in its summary judgment briefing, and it cannot do so for the first time now.

¹ The Providers—Fresenius Medical Care Orange County, LLC, Fresenius Medical Care Holdings, Inc., doing business as Fresenius Medical Care North America, DaVita Inc., and U.S. Renal Care, Inc.—join in this opposition. The State argues that their interests are not implicated by the Patient Disclosure Mandate because it applies only to “financially interested entities like AKF.” Mot. 4 n.2. That is wrong. The Providers challenged the same provisions of AB 290, suing on behalf of the interests of their ESRD patients. *See* Fresenius Compl. ¶¶ 91, 113–17. Moreover, if the Court were to grant reconsideration, it would need to address the Providers’ claim that AB 290’s penalty for non-compliance with the Patient Disclosure Mandate violates due process. *Id.* ¶¶ 157–62; ECF No. 176 at 22–23.

1 The State has not satisfied the demanding standards for reconsideration, and
2 its motion should be denied.

3 LEGAL STANDARD

4 Reconsideration is an “extraordinary remedy, to be used sparingly[.]” *Kona*
5 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A motion for
6 reconsideration “may not be used to raise arguments ... for the first time when they
7 could reasonably have been raised earlier in the litigation.” *Id.* Nor may it “in any
8 manner repeat any oral or written argument made in support of, or in opposition to,
9 the original motion.” C.D. Cal. L.R. 7-18. Reconsideration is appropriate only when
10 a court “commit[s] *clear error*” or its “initial decision [is] *manifestly unjust*.” *School*
11 *Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)
12 (emphasis added); C.D. Cal. L.R. 7-18(c) (listing grounds for reconsideration).
13 Mere disagreement with a ruling is not a proper basis for reconsideration. *See*
14 *McCandless Grp., LLC v. Coy Collective*, No. LA CV 21-02069-DOC-KES, 2023
15 WL 8896885, at *2 (C.D. Cal. Nov. 6, 2023) (Carter, J.).

16 ARGUMENT

17 The Court committed no “clear error” or “manifest” injustice in striking down
18 AB 290’s Patient Disclosure Mandate. *School Dist. No. 1J*, 5 F.3d at 1263. The
19 Court correctly held that the mandate triggers exacting scrutiny under the First
20 Amendment because it compels AKF to disclose the names of individual patients
21 receiving charitable assistance to private insurance companies. *See* ECF No. 207 at
22 42–43. As the Court explained, the mandate invades AKF’s and patients’ rights to
23 associate and is not tailored to advance a substantial state interest. *See id.* at 43.

24 In seeking reconsideration, the State faults the Court for not addressing an
25 argument the State chose not to raise. The State’s sole argument at summary
26 judgment—both in briefing and at oral argument—was that the Patient Disclosure
27 Mandate should be upheld under the test for *compelled commercial speech* set forth
28 in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S.

1 626, 651 (1985). *See* ECF No. 128-1 at 20–23; ECF No. 153 at 17–20; ECF No.
 2 171 at 12–13; ECF No. 171 at 12–13; ECF No. 202 at 96–97; *see also Fresenius*
 3 Docket, No. 19-cv-02130, ECF No. 152-1 at 2, 16. The State contended that the
 4 disclosure of “purely factual and uncontroversial” information was “reasonably
 5 related” to California’s “substantial governmental interest” in preventing patient
 6 “steering.” ECF No. 153 at 17–20. The State addressed AKF’s *associational* rights
 7 only once in its briefing—in a footnote arguing that the Patient Disclosure Mandate
 8 did not sufficiently chill associational rights to *trigger* exacting scrutiny. ECF No.
 9 171 at 13 n.7. But the State nowhere made any attempt to explain how the Patient
 10 Disclosure Mandate *satisfied* exacting scrutiny, as the Court correctly recognized.
 11 *See* ECF No. 207 at 43.

12 The State now attempts to overcome this default by listing times it discussed
 13 the mandate’s purpose in support of its arguments under the *Zauderer* standard. *See*,
 14 e.g., Mot. 3 (bullets), *id.* at 6–7. But this sleight-of-hand should be rejected. The
 15 *Zauderer* test applies to compelled speech, not associational rights, and the test is
 16 less demanding than the test that applies to a disclosure regime that burdens
 17 associational rights. The *Zauderer* test is akin to rational basis review, requiring
 18 primarily that any compelled disclosure of purely factual and uncontroversial
 19 commercial speech be “reasonably related to a substantial government interest.”
 20 *CTIA – The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019);
 21 *see also* ECF No. 207 at 43–45 (applying *Zauderer* to different provision of AB
 22 290). By contrast, compelled disclosures that burden associational rights are
 23 “reviewed under exacting scrutiny,” which requires “a substantial relation between
 24 the disclosure requirement and a sufficiently important governmental interest” and
 25 “narrow[] tailor[ing] to the government’s asserted interest.” *Ams. for Prosperity*
 26 *Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). The State’s arguments under
 27 *Zauderer* thus cannot substitute for the State’s failure to defend the Patient
 28 Disclosure Mandate under exacting scrutiny. And reconsideration cannot be used to

1 present new arguments that could have been, but were not, raised at summary
2 judgment. *See Kona Enters.*, 229 F.3d at 890.

3 The State also argues that it showed a “substantial state interest” because the
4 Patient Disclosure Mandate is purportedly “necessary” to implement a different
5 provision of AB 290, namely AB 290’s “[R]eimbursement [C]ap.” Mot. 6. But the
6 Court addressed this argument, reasoning that “[e]ven if such a requirement would
7 meaningfully assist the State,” the Patient Disclosure Mandate was “not sufficiently
8 tailored.” ECF No. 207 at 43; *see also id.* (“[T]he prime objective of the First
9 Amendment is not efficiency[.]” (quoting *Ams. for Prosperity Found.*, 141 S. Ct. at
10 2376)). The State is wrong to say that the Court “fail[ed] to consider” this point.
11 Mot. 5.

12 In any event, the State’s argument is meritless. Contrary to the State’s
13 position, it is not Plaintiffs’ burden to identify alternative, constitutionally sound
14 “mechanism[s]” to implement the Reimbursement Cap. Mot. 7. Moreover, the State
15 ignores the different levels of scrutiny that the Court applied to the Reimbursement
16 Cap and the Patient Disclosure Mandate. In upholding the Reimbursement Cap, the
17 Court held that it does not regulate dialysis providers’ speech or association and
18 targets only “economic activity or nonexpressive conduct,” and the Court therefore
19 applied a less demanding level of scrutiny. ECF No. 207 at 38–40. Concluding that
20 the Reimbursement Cap does not have an “expressive element,” the Court concluded
21 that a generalized “interest in neutralizing the reimbursement rates for commercial
22 insurance” was sufficient. *Id.* at 39–40.

23 Plaintiffs respectfully disagree with this aspect of the Court’s decision, but for
24 purposes of the State’s motion for reconsideration it is enough to observe that
25 whatever level of constitutional scrutiny properly applies to the Reimbursement Cap,
26 the relationship between AKF, an expressive non-profit charitable organization, and
27 the patients to whom it provides charitable support implicates protected First
28 Amendment associational rights and thus demands more rigorous scrutiny. The

1 Patient Disclosure Mandate compels AKF to engage in speech—communicating to
2 private insurers the identities of patients with it whom it affiliates and for whom it
3 provides charitable aid—over AKF’s objections and with no consideration for the
4 associational, privacy, health, or other dignitary interests of patients. *See* ECF No.
5 132 at 17; ECF No. 167 at 10–11. That interferes with “the vital relationship
6 between freedom to associate and privacy in one’s associations,” and it therefore
7 triggers exacting First Amendment scrutiny. *Ams. for Prosperity*, 141 S. Ct. at 2382.

8 The Court was thus correct to recognize that the State never met its burden to
9 explain how the disclosure of patient names advances a substantial state interest. *See*
10 ECF No. 207 at 43. Again, the only purported governmental interest the State
11 identified was “shield[ing]” patients from “potential harm” caused by patient
12 “steering.” ECF No. 128-1 at 22; *see also* ECF No. 153 at 17–20; ECF No. 171 at
13 12–13. But as AKF and the Providers explained—and as this Court held—the State
14 never adduced *any* evidence of patient harm or “steering.” *See* ECF No. 128-1 at
15 12–14; ECF No. 156 at 8–10; ECF No. 167 at 8–9; ECF No. 207 at 30 (“On the
16 record developed so far, the Court finds that the State has not identified any real
17 patient or public harm from any purported steering to support its asserted interest.”);
18 *id.* at 31–33 (discussing lack of record evidence). Accordingly, even under the less-
19 demanding standard that applies to commercial speech restrictions, the Court
20 correctly concluded that the State “has not identified any real patient or public harm”
21 and failed to present “sufficient evidence that any purported steering has distorted,
22 or will distort, California’s risk pools.” ECF No. 207 at 30, 34. The same conclusion
23 necessarily applies under the higher level of exacting constitutional scrutiny that
24 governs the associational rights of AKF and its patients.

25 CONCLUSION

26 For the reasons set forth above, the Court should deny the State’s motion for
27 reconsideration.

28 //

DATED: February 6, 2024

KING & SPALDING LLP

/s/ David W. Ogden

DAVID W. OGDEN (*pro hac vice*)

David.Ogden@wilmerhale.com

KELLY P. DUNBAR (*pro hac vice*)

Kelly.Dunbar@wilmerhale.com

ARI HOLTZBLATT (*pro hac vice*)

Ari.Holtzblatt@wilmerhale.com

WILMER CUTLER PICKERING

HALE AND DORR LLP

2100 Pennsylvania Avenue NW

Washington, DC 20037

Telephone: (202) 663-6440

Facsimile: (202) 663-6363

JOSHUA A. VITTOR (SBN 326221)

Joshua.Vittor@wilmerhale.com

WILMER CUTLER PICKERING

HALE AND DORR LLP

350 South Grand Avenue, Suite 2400

Los Angeles, CA 90071

Telephone: (213) 443-5375

Facsimile: (213) 443-5400

Attorneys for Plaintiff DaVita Inc.

/s/ Kristopher R. Wood

KRISTOPHER R. WOOD

(SBN 284727)

kristopher.wood@orrick.com

ORRICK HERRINGTON &

SUTCLIFFE LLP

2050 Main Street, Suite 1100

Irvine, CA 92614

Telephone: (949) 567-6700

Facsimile: (949) 567-6710

ERIC A. SHUMSKY (SBN 206164)

eshumsky@orrick.com

/s/ Joseph N. Akrotirianakis

JOSEPH N. AKROTIRIANAKIS

(SBN 197971)

jakro@kslaw.com

KING & SPALDING LLP

633 West Fifth Street, Suite 1600

Los Angeles, CA 90071

Telephone: (213) 443-4355

Facsimile: (213) 443-4310

ASHLEY C. PARRISH (*pro hac vice*)

aparrish@kslaw.com

KING & SPALDING LLP

1700 Pennsylvania Avenue, NW, 2d Floor

Washington, DC 20006

Telephone: (202) 737-0500

Facsimile: (202) 626-3737

Attorneys for Plaintiffs

Jane Doe, Stephen Albright,

American Kidney Fund, Inc., and

Dialysis Patient Citizens, Inc.

/s/ Stuart S. Kurlander

STUART S. KURLANDER (*pro hac vice*)

Stuart.Kurlander@lw.com

ABID R. QURESHI (*pro hac vice*)

Abid.Qureshi@lw.com

MICHAEL E. BERN (*pro hac vice*)

Michael.Bern@lw.com

LATHAM & WATKINS LLP

555 Eleventh Street, NW, Suite 1000

Washington, DC 20004

Telephone: (202) 637-2200

Facsimile: (202) 637-2201

ANDREW GRAY (SBN 254594)

Andrew.Gray@lw.com

LATHAM & WATKINS LLP

650 Town Center Drive, 20th Floor

1 ORRICK, HERRINGTON &
2 SUTCLIFFE LLP
3 1152 15th Street NW
4 Washington, DC 20005
5 Telephone: (202) 339-8400
6 Facsimile: (202) 339-8500

Costa Mesa, CA 92626
Telephone: (714) 755-8017
Facsimile: (714) 755-8290

Attorneys for Plaintiff
U.S. Renal Care, Inc.

7 RACHEL G. SHALEV (*pro hac vice*)
8 rshalev@orrick.com
9 ORRICK HERRINGTON &
10 SUTCLIFFE LLP
11 51 West 52nd Street
12 New York, NY 10019
13 Telephone: (212) 506-5000
14 Facsimile: (212) 506-5151

15 JAMES F. BENNETT (*pro hac vice*)
16 jrbennett@dowdbennett.com
17 MEGAN S. HEINSZ (*pro hac vice*)
18 mheinsz@dowdbennett.com
19 DOWD BENNETT LLP
20 7733 Forsyth Blvd., Suite 1900
21 St. Louis, MO 63105
22 Telephone: (314) 889-7300
23 Facsimile: (314) 863-2111

24 ***Attorneys for Plaintiffs Fresenius***
25 **Medical Care Orange County, LLC**
26 **and Fresenius Medical Care**
27 **Holdings, Inc. d/b/a Fresenius**
28 **Medical Care North America**

ATTORNEY ATTESTATION

Pursuant to Civil L.R. 5-4.3.4(a)(2)(i), the filer attests that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

By: /s/ Joseph N. Akrotirianakis

Joseph N. Akrotirianakis