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

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

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February 19, 2025

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INTRODUCTION

The State's brief is a white flag. After more than five years of litigation, the State has still not identified any legitimate evidence that either the American Kidney Fund ("AKF"[1]) or any dialysis providers have improperly "steered" patients from public to private insurance options—the entire reason for enacting AB 290 in the first place. *See* State Br. 21 n.4, 38, 49, 58 (declining to defend AB 290's "anti-steering" provision and advising restrictions). The State also effectively concedes that AB 290's Advising Restriction, an essential provision designed to restrict what AKF can say to its patients, is unconstitutional. *See id.* These concessions doom the statute: Without evidence of patient "steering," the State lacks a sufficient interest in restricting AKF's First Amendment rights; and without the Advising Restriction, almost all of AB 290's other provisions are invalid because they cannot be severed from that concededly unconstitutional provision.

Even apart from these concessions, the State's arguments in defense of AB 290 are meritless. For instance, the State contends that

[1] Capitalized terms and abbreviations have the same meanings as in AKF's opening brief.

the Reimbursement Penalty survives scrutiny under *United States v. O'Brien*—but that case does not apply because AB 290 is targeted at expressive charitable activities (not non-expressive conduct) and, in any event, the argument is forfeited because the State never raised it before the district court. The State still has no explanation how the Financial Assistance Restriction, which prohibits AKF from reasonably conditioning charitable assistance on patients' receipt of dialysis treatment or eligibility for a kidney transplant, does not infringe AKF's associational rights. The State outright contradicts its earlier argument that the Patient Disclosure Mandate is "essential" and "necessary" to implement the statute's Reimbursement Penalty. And the State's insinuation that AKF—a nonprofit charity that has served kidney disease patients for more than fifty years—is not a legitimate charity is both baseless and offensive.

Because AB 290 is unconstitutional, it should be struck down in its entirety. The efforts the State has made to justify AB 290 are not supported by any meaningful evidence, and AB 290 is not sufficiently tailored. The statute's sweeping restrictions on AKF's expressive charitable activities—which help thousands of patients facing

debilitating end-stage renal disease—fail under any level of heightened constitutional scrutiny because they are based on unproven assumptions that have no support in the record and, in all events, could be addressed through more targeted and appropriate measures. The First Amendment's protections are too important, and the consequences of this improper attack on AKF's charitable mission are too great, to allow this unconstitutional statute to remain in effect.

SUMMARY OF ARGUMENT

1. The State's concessions provide two independent bases for invalidating AB 290 as unconstitutional.

First, although the State repeatedly claimed before the district court that AB 290's speech restrictions were needed to prevent the "steering" of patients from public to private insurance, the State now effectively acknowledges that it has no meaningful evidence of improper "steering." The State instead tries to repackage its arguments, asserting that AB 290 is needed to combat "distortions" to the private insurance risk pool and to prevent the "unjust enrichment" of dialysis providers. But those justifications fail because they too depend on unsupported assumptions about patient "steering." Without evidence of any actual

problem to solve, AB 290 falls short under any level of constitutional scrutiny.

Second, the State has declined to defend the statute's Advising Restriction and thus effectively concedes that the provision is unconstitutional. That concession means that several other provisions of AB 290 should also be struck down, including the statute's Coverage Disclosure Mandate, Financial Assistance Restriction, and Certification Requirement. Because those provisions all depend on the Advising Restriction and are not severable, they fail for the same reasons.

2. Even apart from the State's fatal concessions, AB 290's provisions are each unconstitutional.

First, the Reimbursement Penalty regulates expression and association—and not mere economic conduct—because it interferes with dialysis providers' charitable contributions to AKF. The State's argument that the framework set forth in *United States v. O'Brien* governs—an argument the State never raised below—fails both because it is forfeited and because the Reimbursement Penalty targets expressive and associative charitable activities (and goes far beyond imposing mere incidental burdens on protected speech). That provision is

unconstitutional under any level of scrutiny because the State lacks any evidence of patient "steering"—the only justification for AB 290's sweeping speech restrictions—and because the provision is not adequately tailored.

Second, the State's arguments in defense of AB 290's Coverage Disclosure Mandate—requiring AKF to inform patients about "all available health coverage options"—fail because that provision compels speech that is flatly inconsistent with AKF's policies and charitable mission. Contrary to the State's assertions, *Zauderer v. Office of Disciplinary Counsel of Superior Court* is irrelevant because AB 290's compelled-speech requirements are intertwined with expressive conduct, not mere "commercial speech." Moreover, *Zauderer* applies only when an entity is made to disclose facts about *its own* products and services. As a section 503(c) charity, AKF cannot be compelled to disclose information to patients about private health insurance options. AKF does not provide health insurance to patients and, in order to maintain a neutral position, has a long-standing practice of not providing patients with input or advice on their insurance options.

Third, because the State raises no argument in defense of the Certification Requirement—which requires AKF to express its compliance with AB 290's other provisions—the State has effectively conceded that the provision is unconstitutional.

Fourth, the State ignores the plain text of the Financial Assistance Restriction, which is unlawful because it facially prohibits AKF from providing charitable assistance to ESRD patients based on their receipt of dialysis or need of a kidney transplant. AKF reasonably restricts when it will provide charitable assistance to ensure that it is helping the most vulnerable and needy patients, and AB 290 seeks directly to interfere with that charitable mission by controlling AKF's rights of association. The State's attempt to recast AB 290 as a mere consumer-protection statute is inconsistent with the statutory text, and the State cannot use the canon of constitutional avoidance to rewrite the statute.

Fifth, the State's arguments in defense of the Patient Disclosure Mandate are meritless. *Zauderer* does not apply because the statute regulates far more than just commercial speech, and the names of AKF's patients are not products or services that AKF provides. The Supreme Court has already ruled that a California statute that required

disclosures of nearly identical information in order to regulate charitable contributions did not pass constitutional muster. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). The same analysis applies here.

3. The State fails to show why AB 290 is not preempted by federal law or violative of the Constitution's Petition Clause. AB 290's provisions will lead to patients discovering whether their dialysis providers donate to AKF. That undermines a key predicate of Advisory Opinion 97-1, which the HHS OIG issued on the understanding that AKF would not "directly or indirectly" disclose that a patient's dialysis provider donates to AKF.

The State nonetheless asserts that AB 290 does not interfere with federal law, gesturing to Section 7, which delays the statute's effective date if (but only if) AKF petitions HHS for a new advisory opinion. Section 7 thus effectively compels AKF to petition the government in violation of the Petition Clause. Under AB 290, AKF must either risk violating the Beneficiary Inducement Statute or else give up its right to petition the government at the time and in the manner of its choosing.

The State also fails to explain how AB 290 does not conflict with the Congressional goals of the Medicare Secondary Payer Act ("MSPA"). That statute protects the public fisc by ensuring private insurers pay their fair share of patients' dialysis treatments before patients are eligible for Medicare coverage. AB 290 has the opposite policy goal—under the guise of addressing the unproven problem of "steering," it seeks to regulate speech in a way that seeks to move patients away from private insurance and onto public insurance.

ARGUMENT

I. The State's Concessions Show AB 290 Should Be Struck Down as Unconstitutional.

The State's brief makes two key concessions. *First*, the State effectively concedes that it has no legally sufficient evidence of patient "steering"—even though that is the only "evil" that AB 290 was purportedly enacted to address. That means both that (1) the State lacks any governmental interest sufficient to justify AB 290's sweeping First Amendment restrictions and (2) the statute fails under any level of constitutional scrutiny. *Second*, the State abandons any defense of one of AB 290's centerpiece provisions—the Advising Restriction—and thus concedes that the provision is unconstitutional. *See* State Br. 21 n.4, 38,

49, 58. Because many of AB 290's other provisions are not severable from the Advising Restriction, they too must be invalidated.

A. AB 290 Should Be Struck Down Because the State Concedes There Is No Evidence of Patient Steering.

1. The State effectively concedes that there is no evidence sufficient to establish that AKF or providers have ever "steer[ed]" patients from public to private insurance options. In the district court, the State repeatedly argued that the Legislature enacted AB 290 to combat "the proliferation of [the] steering [of] patients into commercial insurance." ECF No. 151-2 at 1; *see also* ECF No. 128-1 at 1 (referencing "overwhelming evidence" of the "steering [of] end-stage renal disease . . . patients . . . into commercial insurance"); ECF No. 171 at 1 ("The California Legislature enacted Assembly Bill 290 to address [the] steering of patients into commercial insurance[.]"). The State now retreats from this rationale. It offers no evidence of "steering" and instead asserts that the Legislature enacted AB 290 to "prevent[ ] the unjust enrichment of dialysis providers" and to "protect[ ] . . . the stability of the health insurance market." State Br. 3, 19, 63.

The State's retreat is understandable because, after years of litigation, it has never offered any meaningful evidence of patient

"steering" or patient harm resulting from "steering." The undisputed record shows that the State has never identified a single California dialysis patient who was "steered" to a commercial insurance plan—and the State never attempted to identify such patients. 4-AKF-ER-760–763 ¶¶ 107, 109, 116, 123. Nor is there any evidence that AKF or a dialysis provider ever influenced a patient's decisions about insurance coverage. 4-AKF-ER-761–762 ¶¶ 110, 112, 117–18. The State has not received even a single complaint about patient steering. 4-AKF-ER-760–763 ¶¶ 108, 113, 120. The State does not dispute these facts or contest them in its brief.

The few pieces of evidence the State relied on in the district court do not establish that AKF "steered" California patients to private insurance coverage. *See* AKF Opening Br. 39–42. Moreover, other record evidence establishes that AKF's procedures guard against patient "steering." Applicants for charitable assistance select their health insurance with no input from AKF—and do so *before* submitting their applications. 4-AKF-ER-754 ¶ 74. AKF does not help patients find insurance and does not tell patients to keep or switch insurance. 4-AKF-ER-755 ¶ 78. And AKF continues providing charitable assistance when

patients change their insurance coverage or dialysis provider. 4-AKF-ER-755 ¶ 79. The State has never disputed or rebutted any of these facts either.

2. Without evidence of patient steering, the State has no justification for the speech and association restrictions imposed by AB 290. Its new justifications fail for the same reason as its never-supported assumptions about patient steering.

Unsupported assumptions about market distortions. The State's first justification—that AB 290 was enacted to "protect[ ]" the "commercial health insurance market," State Br. 3—fails because it is derivative of the State's unproven patient-steering justification. The private insurance risk pool cannot be "distorted" unless patients are improperly "steered" from public to private insurance. The State cannot abandon its baseless "steering" rationale and then offer a different rationale that is equally unsupported.

The State has no meaningful evidence that "distortions" have ever occurred as a result of AKF's activities. The two-page Research Letter the State relies on shows only that evidence "suggests" an "increasing share" of kidney-disease patients rely on "other coverage" besides

Medicare as their primary insurance payer. 1-SER-255. That is not evidence of a "distorted" insurance risk pool as opposed to merely a description of how patients have responded to their insurance options. Moreover, the Letter's conclusion that "[s]hifting" 10 percent of kidney-disease patients from Medicare to the private insurance market "would" increase spending is not evidence that such a "shift" has actually occurred or that any "shift" is improper. 1-SER-255. The J.P. Morgan analysis does not show any increase in premiums attributable to premium assistance in California. *See* 1-SER-150. The Avalere analysis examined the hypothetical impacts of "removing ESRD patients from the individual markets" of certain states, 2-SER-302; it is not proof that patients are distorting those markets after being improperly "steered" to private health coverage. Moreover, the report's analysis is outdated and flawed, as it relies on unfounded assumptions, including that insurers would lower premiums if kidney-disease patients were "remov[ed]" from the insurance risk pool. 2-SER-302; *see also* 3-PER-535–539 (opining that AB 290 is unlikely to lower premiums). Indeed, nothing in AB 290 requires insurers to lower insurance premiums (or otherwise pass any "savings" on to consumers).

The State also relies on deposition testimony from its expert, Dr. Bertko, but the cited testimony only highlights the inadequacy and unreliability of his analysis. Dr. Bertko *admitted* that California "successfully" kept the "risk mix" of the private insurance pool "consistent," 4-PER-646–647, undermining any assertion that there has been "distortion" to the private insurance market that could justify AB 290's sweeping restrictions on speech. Moreover, Dr. Bertko acknowledged that the purported one-year increase of "3,000 high risk enrollees using dialysis" was "a misstatement" and "wasn't precise." 1-SER-269–272. And Dr. Bertko admitted that he examined *all* ESRD patients who selected private insurance for their own valid reasons and failed to isolate the effect of ESRD patients who were allegedly "steered" to private coverage. 3-AKF-ER-376–378 ¶ 44 (collecting testimony); 1-AKF-ER-44.

Unproven assumptions about unjust enrichment. The State's second justification is that it has an interest in preventing the "unjust enrichment" of dialysis providers. State Br. 3, 19. Before the district court, the State's only reference to "unjust enrichment" was in the context of advancing its anti-steering rationale, so the State has forfeited any

attempt to raise the argument as a separate basis for defending AB 290. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (explaining this Circuit applies "a 'general rule' against entertaining arguments on appeal that were not presented or developed before the district court" (quoting *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985)); *Smartt v. Kijakazi*, 53 F.4th 489, 500–01 (9th Cir. 2022) (similar). In any event, like the alleged "distortions" of the insurance risk pool, any "unjust enrichment" of dialysis providers can have occurred only if providers or AKF were improperly "steering" patients from public to private insurance coverage. The State cannot just point to shifts in insurance and assume that they have occurred for improper reasons. Again, the State has no evidence any patient "steering" has ever occurred, so there is no evidence that dialysis providers were ever "unjust[ly] enriched" as a result.

3. Without any justification for the statute, AB 290 does not survive any level of constitutional scrutiny and should be struck down. To pass muster under strict scrutiny, AB 290's restrictions must be narrowly tailored and justified by a "compelling governmental interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015). And to survive

intermediate scrutiny, the State must show that the statute's restrictions on speech "directly advance[ ] a substantial government[ ] interest" and are "drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571–72 (2011). Moreover, 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).

By backtracking from its anti-steering rationale, the State cannot demonstrate either an "actual problem" or a "compelling" or "substantial" governmental interest in solving that problem. *Reed*, 576 U.S. at 163; *Playboy*, 529 U.S. at 816–17, 822; *Turner*, 512 U.S. at 664. The State necessarily does not (and cannot) have a valid governmental interest in remedying problems for which it has no evidence. AB 290 thus fails under any level of constitutional scrutiny and should be struck down in its entirety.

B. Because the State Concedes That the Advising Restriction Is Unconstitutional, Multiple Other Provisions Must Also Be Struck Down.

Multiple provisions of AB 290 should also be struck down for a second, independent reason: The State "does not contest on appeal" the district court's holding invalidating the Advising Restriction, which prohibits 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." AB 290 §§ 3(b)(4), 5(b)(4); *see also* State Br. 38. Because that provision is central to AB 290 and is not severable, several of AB 290's other, interrelated provisions are also invalid.

Under California law, if a statute lacks a severability clause and a provision of that statute is unconstitutional, the statute's remaining provisions must also be struck down unless they are "grammatically, functionally, and volitionally separable." *Cal. Redevelopment Ass'n v. Matosantos*, 267 P.3d 580, 607 (Cal. 2011) (quoting *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1256 (Cal. Ct. App. 1989) (en banc)). "Grammatical separability" turns on whether the invalid provisions can be stricken without impacting the "'wording'" or "coherence" of the remaining provisions. *Id.* (quoting *Calfarm Ins.*, 771 P.2d at 1256).

"Functional[ ] . . . separab[ility]" requires that a statute be "complete in itself" without the invalid provisions. *Barlow v. Davis*, 72 Cal. App. 4th 1258, 1264–65 (1999) (quoting *Calfarm Ins.*, 771 P.2d at 1256). And "[v]olitional separability" depends on whether the legislature would have enacted the remaining provisions had it "'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)).

Applying these rules, the statute's Coverage Disclosure Mandate, Financial Assistance Restriction, and Certification Requirement are not functionally or volitionally separable from the Advising Restriction. All three provisions are therefore constitutionally invalid as a result of the State's decision not to defend the unconstitutional Advising Restriction.

Coverage Disclosure Mandate. The Coverage Disclosure Mandate compels AKF to disclose "all available health coverage options" to the patients to which it provides charitable assistance—even if compelling that speech undermines AKF's mission and strict policy not to influence patients' decisions about what insurance is best for their individual needs. AB 290 §§ 3(b)(3), 5(b)(3). AB 290's compelled disclosure requirement works in tandem with the Advising Restriction,

the very next provision, which prohibits AKF from "steer[ing]" or "advis[ing]" patients "into or away from" any particular coverage option. *Id.* §§ 3(b)(4), 5(b)(4). The two provisions are designed together to ensure that patients are not unduly directed toward a coverage option that might not be in their best interest. They accordingly cannot be severed: Statutory provisions that are "inextricably connected . . . by policy considerations" and work as parts of a "unitary whole" cannot survive apart. *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1120 (9th Cir. 2021) (quoting *People's Advoc., Inc. v. Super. Ct.*, 181 Cal. App. 3d 316, 332 (1986)).

Financial Assistance Restriction. The Financial Assistance Restriction prohibits AKF from "condition[ing] financial assistance on eligibility for, or receipt of, any . . . transplant [or] procedure." AB 290 §§ 3(b)(2), 5(b)(2). Restricting whether and how AKF "condition[s]" charitable assistance does not combat steering or protect the insurance risk pool without the Advising Restriction. Even accepting the State's atextual reading of this provision, *see* State Br. 62, the Financial Assistance Restriction does nothing to combat the "practices" described in the Center for Medicare and Medicaid Services ("CMS") record without

an accompanying prohibition on "steer[ing]" patients. Because the Financial Assistance Restriction does not further AB 290's purported goals without the Advising Restriction, it is not functionally or volitionally separable from it.

Certification Requirement. The Certification Requirement mandates that AKF certify its compliance with the Advising Restriction and the Coverage Disclosure Mandate. AB 290 §§ 3(c)(1), 5(c)(1). This provision is also not functionally or volitionally separable from the Advising Restriction and the Coverage Disclosure Mandate.

Contrary to the State's assertions, AKF has properly preserved its broader severability argument that AB 290 is "unworkable" without the Advising Restriction, Patient Disclosure Mandate, and Financial Assistance Restriction—all of which the district court correctly struck down. *See* AKF Opening Br. 56–57. In its first brief, AKF noted that AB 290 cannot survive without these provisions because "the Legislature inextricably connected the policies and goals of the statute to the invalid provisions of the law." *Id.* at 58 (quoting *Barlow*, 72 Cal. App. 4th at 1266–67). For instance, the Reimbursement Penalty—which embodies one of the statute's key "goals"—cannot be severed from the

unconstitutional Patient Disclosure Mandate because (as the State has acknowledged) the Patient Disclosure Mandate is "essential" and "necessary" to implement the Reimbursement Penalty. 2-PER-91, 94–95. The argument has even more force now that the State concedes that the Advising Restriction, one of AB 290's two keystone provisions, is unconstitutional.

II. AB 290's Provisions Are Independently Unconstitutional.

Even putting the State's concessions to one side, AB 290's provisions are unconstitutional, and the State's arguments lack merit.

A. The District Court Erred in Upholding the Reimbursement Penalty, the Coverage Disclosure Mandate, and the Certification Requirement.

The Reimbursement Penalty, the Coverage Disclosure Mandate, and the Certification Requirement are all unconstitutional, and the district court erred by upholding them. In trying to defend these provisions, the State relies on arguments it never raised in the district court and fails to explain how any of these provisions survive constitutional scrutiny.

1. The district court erred in upholding the Reimbursement Penalty.

The Reimbursement Penalty—which penalizes dialysis providers that donate to AKF by reducing the reimbursement they receive for treating HIPP patients, AB 290 §§ 3(e)(1), 5(e)(1)—is invalid because it places a financial burden on dialysis providers' charitable contributions to AKF and thus regulates AKF's expressive conduct and interferes with the providers' rights of association. The Reimbursement Penalty does not survive any level of constitutional scrutiny.

The Reimbursement Penalty is not an economic regulation of non-expressive conduct. The State's contention that dialysis providers' charitable contributions are not "expressive" in nature is fundamentally wrong. *See* State Br. 24. The Supreme Court has held that "charitable" activities are "worthy of constitutional protection under the First Amendment." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626–27 (1984); *see also Boy Scouts v. Dale*, 530 U.S. 640, 648 (2000) (explaining the First Amendment protects associating with any group that "engage[s] in some form of expression, whether . . . public or private"); *see also Americans for Prosperity*, 594 U.S. at 606–07, 618 (holding contributions to charitable organizations chills "an individual's ability to join with others to further

shared goals" in violation of "freedom of association"). The law is equally clear that this protection extends to financial contributions. *See McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (explaining financial contributions "serve[ ] as a general expression of support" for the recipient and "affiliate" the donor with the recipient (quoting *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (per curiam)); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (explaining contributions "enable[ ] speech" by assisting the recipient in "communicat[ing]" a "message with which the contributor agrees" (emphasis omitted)); *see also Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (per curiam) ("[C]ontributions, in both charitable and political contexts, function as a general expression of support for the recipient and its views and, as such, are speech entitled to protection under the First Amendment."). Dialysis providers' charitable contributions to AKF—which fund AKF's educational and advocacy work, such as providing summer camp scholarships for children with kidney disease or providing educational materials to patients during the COVID-19 pandemic, 8-AKF-ER-1740 ¶ 37; 6-AKF-ER-1344–1345 ¶ 15—are thus expressive conduct protected by the First Amendment.

The State hangs its hat on *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879 (9th Cir. 2018), *see* State Br. 24–27, but that reliance is misplaced. As the State acknowledges, the framework set out in *Interpipe* applies where "[c]onduct-based laws may implicate" the First Amendment. *Interpipe*, 898 F.3d at 895. The Reimbursement Penalty does just that: It targets *expressive* conduct—specifically, dialysis providers' association with AKF in the form of *charitable* contributions in support of AKF's *charitable* mission. *See Roberts*, 468 U.S. at 626–27; *McCutcheon*, 572 U.S. at 203; *Kamerling*, 295 F.3d at 214. The State is thus correct that "context" matters, but the context here makes clear that AB 290 is targeting core expressive conduct in service of AKF's charitable mission. The State cannot evade the First Amendment by recasting expressive conduct as mere economic regulation. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (explaining that the Constitution "nullifies sophisticated as well as simple-minded" violations).

Interpipe's inapplicability is also confirmed by its facts. The statute at issue in *Interpipe* allowed employers to satisfy California's "prevailing wage" requirement for public works employers in part by making contributions to third-party advocacy groups, but only if the employees

consented to the contributions. 898 F.3d at 883. The plaintiffs sued, arguing that employers should be able to make contributions *without* their employees' consent. *Id.* at 885. This Court rejected the argument, holding that the provisions regulated the "payment of wages" and thus "d[id] not target conduct that communicates a message" or "contain[s] an expressive element." *Id.* at 895–96. As the Court explained, there is a difference between, on one hand, regulations that directly penalize speech that occurs through charitable contributions and other forms of expressive conduct and, on the other hand, regulations that regulate non-expressive conduct (the payment of wages) that might indirectly limit the funds that are available to finance speech. *See id.* at 895.

The "payment of wages" at issue in *Interpipe* could not be farther from dialysis providers' charitable contributions to AKF at issue here. As AKF has explained, the charitable contributions that it receives are designed to fund a wide range of expressive efforts relating to helping patients with kidney disease, including awareness, advocacy, prevention, public education, professional engagement, clinical research, and HIPP. *See* 8-AKF-ER-1740 ¶ 37, 6-AKF-ER-1344–1345 ¶ 15. AB 290 is directly targeted at that expressive conduct because it penalizes providers that

support AKF's charitable mission and expressive activities. The burden that AB 290 places on protected expressive conduct is thus significant.

The State's argument that dialysis providers' contributions to AKF do not receive First Amendment protection merely because they may also result in a financial benefit to the dialysis providers is incorrect. State Br. 26–27. It is black-letter law that First Amendment protections do not hinge on whether speech or conduct may be motivated by "economic" considerations. *See Sorrell*, 564 U.S. at 567 (explaining "a great deal of [protected] expression" "results from an economic motive"); *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, 500 (1952) (holding for-profit works are "safeguarded by the [F]irst [A]mendment"). What a "reasonable observer" might believe about the motivations animating dialysis providers' expressive charitable contributions is simply irrelevant.

Nor is there any legitimate evidentiary support for the State's assertion that AKF and dialysis providers are engaged in a "quid pro quo" arrangement. State Br. 26–27 (quoting 1-PER-49, 1-AKF-ER-49). The State identifies only three pieces of evidence pertaining to AKF:

(1) findings from an enjoined CMS rule, (2) a 2015 letter, and (3) excerpts from AKF's 2014 and 2015 HIPP handbooks. State Br. 27 (citing 1-SER-169, 175, 182). 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. 1-AKF-ER-42–43 (citing *Dialysis Patients Citizens v. Burwell*, 2017 WL 365271, at *5–6 (E.D. Tex. Jan. 25, 2017)). Likewise, the passing remarks in the letter and HIPP manuals are not proof of the overarching "quid pro quo" arrangement the State alleges. Without record evidence, the State's argument fails for this additional, independent reason.

In addition to regulating AKF's rights to engage in expressive conduct, the Reimbursement Penalty burdens the associational rights of dialysis providers. The Supreme Court has made clear that deterring contributions to charitable organizations chills "an individual's ability to join with others to further shared goals" in violation of "freedom of association." *Americans for Prosperity*, 594 U.S. at 606–07, 618. In *Americans for Prosperity*, the Supreme Court held that a California regulation requiring tax-exempt charities to disclose donors' names, total contributions, and addresses to the California Attorney General violated

the donors' associational rights by deterring the donors from associating with the charity. *Id.* at 618. The Reimbursement Penalty is a far harsher deterrent. AB 290 §§ 3(e)(1), 3(f)(1), 5(e)(1), 5(f)(1).

***The Reimbursement Penalty is not constitutional under* United States v. O'Brien.** The State forfeited its *O'Brien* argument by failing to raise it before the district court. *See Peterson*, 140 F.3d at 1321; *Smartt*, 53 F.4th at 500–01; *United States v. Sayer*, 748 F.3d 425, 434 n.8 (1st Cir. 2014) ("Even if *O'Brien* were applicable, Sayer has waived any argument that § 2261A(2)(A) fails *O'Brien*'s requirements."). The State cannot rely on an argument that it never raised and on which the district court never ruled.

The State's argument also fails because the *O'Brien* framework applies only to regulations of "*conduct*" that impose "*incidental limitations* on First Amendment freedoms." 391 U.S. 367, 376 (1968) (emphasis added). As noted above, dialysis providers' charitable contributions to AKF are fundamentally *expressive* in nature. *Roberts*, 468 U.S. at 626–27; *McCutcheon*, 572 U.S. at 203; *Kamerling*, 295 F.3d at 214. Nor are the limitations that AB 290 imposes "incidental." The whole point of the Reimbursement Penalty is to "remove the incentive[s]"

for providers to contribute to AKF. Under AB 290, a dialysis provider that donates even *one dollar* to AKF is penalized by having the reimbursement it receives for *all* HIPP patients in California steeply reduced to either the Medicare reimbursement rate or a rate determined by an "independent dispute resolution process." AB 290 §§ 3(e)(1), 3(f)(1), 5(e)(1), 5(f)(1).

In any event, the State acknowledges that any restriction of expression under *O'Brien* must be "no greater than is essential" to further the State's interest. 391 U.S. at 377. It is clear here that the State could accomplish its stated objectives without regulating speech or penalizing dialysis providers for donating to AKF and supporting its charitable mission. The State has never explained why, if it is truly concerned about the cost of insurance premiums to consumers, it has not decided to directly regulate the insurance market. That telling omission is devastating to its position.

The State likewise acknowledges that, to pass muster under *O'Brien*, a First Amendment restriction must "further[ ] an important or substantial governmental interest." 391 U.S. at 377. As explained above, the State has no legitimate evidence of patient "steering," "distortions" of

the insurance risk pool, or any other justification for AB 290. Moreover, nothing in AB 290 requires insurers to pass any cost savings to consumers. The State cannot have a "substantial" interest in solving problems for which it has no evidence.

The Reimbursement Penalty does not survive any level of constitutional scrutiny. Laws that place financial burdens on expressive conduct—even when that conduct has a "financial motive"—are subject to strict scrutiny. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116–23 (1991) (holding New York statute "singl[ing] out income derived from expressive activity" failed to satisfy strict scrutiny); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231–34 (1987) (holding tax on magazines failed to satisfy strict scrutiny). At the very least, burdens on charitable contributions are subject to exacting scrutiny, as *Americans for Prosperity v. Bonta* squarely holds. 594 U.S. at 607–08.

Here, the Reimbursement Penalty places an immense financial burden on the First Amendment rights of AKF and its donors. The Reimbursement Penalty penalizes dialysis providers that support AKF's charitable mission by lowering the reimbursement rate those providers

receive for treating HIPP patients. AB 290 §§ 3(e)(1), 5(e)(1). In function, it is no different from the law at issue in *Simon & Schuster*, which similarly imposed a financial burdened on expressive activity by requiring a disfavored class of individuals to relinquish the income they received from publishing books. 502 U.S. at 116–23.

Moreover, the Reimbursement Penalty fails under any level of constitutional scrutiny because the State has no evidence of patient "steering," "distortions" of the insurance risk pool, or any other justification for AB 290. Nor are the provisions sufficiently tailored, as the State could have instead enacted any number of less restrictive alternatives. *See Playboy*, 529 U.S. at 813 ("If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative."); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (explaining restriction must be "not more extensive than is necessary" to survive intermediate scrutiny). Among numerous other alternatives, the State could have directly regulated California's insurance markets instead of trying to regulate them by penalizing dialysis providers for making charitable contributions to AKF. It makes no sense to regulate expressive conduct,

with the hope that the restricting speech and rights of association will incidentally further other regulatory goals. After more than five years of litigation, the State still has not explained why it has not pursued less restrictive and more constitutionally appropriate alternatives.

2. The district court erred in upholding the Coverage Disclosure Mandate.

The State contends that the Coverage Disclosure Mandate—which compels AKF to disclose "all available health coverage options" to its HIPP patients, AB 290 §§ 3(b)(3), 5(b)(3)—passes muster under *Zauderer v. Office of Disciplinary Counsel of Superior Court*, 471 U.S. 626 (1985) because it compels the disclosure of only "purely factual and uncontroversial" information, State Br. 50–53 (quoting *Zauderer*, 471 U.S. at 651). That is wrong. *Zauderer* is inapplicable for two reasons.

First, *Zauderer* applies only to "compel[led] truthful disclosure in commercial speech," not to speech intertwined with charitable expressive and associational activities. *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 842 (9th Cir. 2019); *cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–99 (1988) (applying strict scrutiny, the test for "protected expression," to North Carolina law that compelled charity to disclose "factual" information). There is nothing "commercial"

about AKF's "relationship" to the patients it serves. State Br. 50. AKF's assistance is strictly charitable in nature.

Second, the State cannot deny that *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 (emphasis added); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA*), 585 U.S. 755, 769 (2018) (striking down requirement that clinics post notices regarding services they did not provide); *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" (emphasis added)). Nor can the State deny that AKF does not sell or otherwise provide insurance coverage.

Attempting to sidestep this requirement, the State asserts that AKF—the nation's leading 501(c)(3) nonprofit charity focused on extremely vulnerable end-stage renal patients—is actually in the business of "subsidiz[ing]" private health insurance premiums. State Br. 53. According to the State, AKF's charity is commercial because it "facilitate[s] a *change* in healthcare coverage" "from Medicare or Medi-Cal to commercial insurance plans," which the State claims "is a

quintessentially commercial activity." State Br. 53 (emphasis added); *see id.* (arguing that HIPP "facilitate[s] the transfer" of patients to commercial plans). But AKF's relationship with patients does not become commercial merely because, downstream, the patients engage in commercial activity with someone else. In any event, the State's premise is wrong: The majority of HIPP recipients use AKF's assistance to *maintain* the coverage they had beforehand, and a majority are on public options. 6-AKF-ER-1346–1348.

3. The district court erred in upholding the Certification Requirement.

AKF's opening brief explains that 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)—violates the First Amendment by compelling AKF to engage in speech and certify its compliance with AB 290's other unconstitutional provisions. AKF Opening Br. 55. The State raises no argument to the contrary, therefore conceding that the Certification Requirement is unconstitutional. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (holding that failure to raise an issue in the argument section of the opening brief is deemed waiver of the issue).

B. The District Court Correctly Struck Down AB 290's Financial Assistance Restriction and the Patient Disclosure Mandate.

The district court correctly struck down the Financial Assistance Restriction and the Patient Disclosure Mandate. The State's interpretation of the Financial Assistance Restriction is atextual and unsupported, and the State cannot explain how the Patient Disclosure Mandate does not improperly burden AKF's associational rights.

1. The district court correctly struck down the Financial Assistance Restriction.

The State's brief confirms that the Financial Assistance Restriction—which prohibits AKF from "condition[ing] financial assistance on eligibility for, or receipt of, any . . . transplant [or] procedure," AB 290 §§ 3(b)(2), 5(b)(2)—is unconstitutional. The plain language of this provision would prevent AKF from conditioning charitable assistance on ESRD patients' need of *dialysis* or a kidney *transplant*, thus undermining a critical aspect of AKF's organizational mission. AKF Opening Br. 47–48; *see also* 6-AKF-ER-1342, 1344–1347 ¶¶ 2, 14–15, 21, 23.

The State contends that the Financial Assistance Restriction prohibits AKF from "ending premium support for patients who select a

non-dialysis treatment option." State Br. 59. That argument is meritless. The limitation urged by the State is found nowhere in the text of the Financial Assistance Restriction. A court must "'give [a] statute's words their plain, commonsense meaning'" and interpret provisions "in context with the entire statute"—a court cannot rewrite a statute. *In re Jennings*, 95 P.3d 906, 910 (Cal. 2004) (quoting *Kavanaugh v. W. Sonoma Cnty. Union High Sch. Dist.*, 62 P.3d 54, 59 (Cal. 2003)); *Renee J. v. Super. Ct.*, 28 P.3d 876, 880 (Cal. 2001); *see also* 1-AKF-ER-52 (district court holding that State's proffered limitations are "found nowhere in the language" of the Financial Assistance Restriction). Moreover, the State's reliance on the CMS record is misplaced. State Br. 59. As noted above, CMS "failed to assemble a complete record" and a federal court accordingly enjoined the rule. AKF Opening Br. 40–41 (quoting 1-AKF-ER-42–43 (citing *Dialysis Patients Citizens*, 2017 WL 365271, at *5–6)).

The State's assertion that the Financial Assistance Restriction is a garden-variety "consumer-protection regulation" is likewise baseless. State Br. 60. The Ninth Circuit's decision in *Morris v. California Physicians' Service*, 918 F.3d 1011 (9th Cir. 2019), concerned the Affordable Care Act's "Medical Loss Ratio," which requires an insurer to

pay a rebate to its enrollees if the amount the insurer pays out in claims for medical services is less than 80 percent of the revenue the insurer takes in. *Id.* at 1012; 42 U.S.C. § 300gg-18(b)(1)(A)(ii). The requirement at issue in *Morris* bears no resemblance to the Financial Assistance Restriction. Even further afield is *Hansen v. Group Health Cooperative*, 902 F.3d 1051 (9th Cir. 2018). That case concerned whether a putative class action initially filed in state court alleging the defendant insurance company's use of screening criteria for mental healthcare coverage violated the Washington Consumer Protection Act was properly removed to federal court. *Id.* at 1055. It has no relevance here.

Nor does the constitutional-avoidance canon save the Financial Assistance Restriction. *See* State Br. 61–62. "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings v. Rodriguez*, 583 U.S. 281, 298 (2018). Rather, under the constitutional-avoidance doctrine, a court is constrained to choosing between competing "*plausible* interpretations" of the statutory text. *Id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)). There is no "plausible" interpretation of the Financial Assistance Restriction that limits its broad prohibition against "condition[ing] financial assistance

on eligibility for, or receipt of, any . . . transplant [or] procedure" to only the narrow categories of conduct urged by the State. AB 290 §§ 3(b)(2), 5(b)(2).

For this reason, the State's cited cases do not support its argument. In *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988)—which concerned a statutory provision making it unlawful "'to knowingly display'" certain materials "'for commercial purpose in a manner whereby juveniles may examine or peruse'" those materials—the Virginia attorney general took the position that a bookseller would not be liable if "the bookseller prevents a juvenile observed reviewing covered works from continuing to do so." *Id.* at 396–98 (quoting Va. Code Ann. § 18.2-391). The Supreme Court certified this question to the Supreme Court of Virginia. *Id.* at 397–98. In turn, the Supreme Court of Virginia held that the attorney general's interpretation was a plausible reading of the statute's text, which required that a bookseller "*knowingly*" allow a juvenile to "*peruse*" (not merely look at) the prohibited materials. *Commonwealth v. Am. Booksellers Ass'n*, 372 S.E.2d 618, 624–25 (Va. 1988) (emphasis added).

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Supreme Court recognized that state government employees who "actively participated in the 1970 re-election campaign" of their supervisor violated an Oklahoma statute modeled on the federal Hatch Act that prohibited state government employees from engaging in such political activities. *Id.* at 609, 617. The employees' conduct violated the "contested paragraphs" of the statute itself in addition to the "authoritative opinions" of the Oklahoma Attorney General. *Id.*

The State's assertion that AKF "discriminat[es]" against ESRD patients—the very class of patients AKF was founded to serve—is baseless and offensive. State Br. 59. There is no record evidence showing AKF "steers" or otherwise discriminates against its HIPP patients. Rather, the record shows that AKF has provided financial assistance, education, and advocacy on behalf of ESRD patients for decades. 8-AKF-ER-1740–1741 ¶¶ 37–38; 6-AKF-ER-1344–1345 ¶ 15. The State's unfounded accusation provides no support for its position.

2. The district court correctly struck down the Patient Disclosure Mandate.

The Patient Disclosure Mandate—which requires AKF to disclose the names of HIPP patients to private insurance companies, AB 290

§§ 3(c)(2), 5(c)(2)—infringes the associational rights of AKF and its patients. The State contends that this disclosure provision passes constitutional muster under *Zauderer*, State Br. 62–64, but this argument fails for the same reasons as the State's first *Zauderer* argument. The State ignores that *Zauderer* applies only to "compel[led] truthful disclosure in commercial speech," not to speech intertwined with protected charitable activities. *CTIA*, 928 F.3d at 842; *see also Riley*, 487 U.S. at 796–99. It also ignores that *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 (emphasis added). Here, the State doubly fails to show this requirement is satisfied: The names of HIPP patients are not a "product or service," let alone a "product or service" that AKF provides.

Accordingly, the standard that applies comes not from *Zauderer* but from *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021). That case plainly holds that "compelled disclosure of affiliation with groups engaged in advocacy" is subject to "exacting scrutiny," which requires the State to show that the law is "narrowly tailored to an important government interest." *Id.* at 606–07, 617.

The State fails to distinguish *Americans for Prosperity*. *See* State Br. 64–65. First, the State highlights factual differences between that case and this one, emphasizing that the law in Americans for Prosperity required the disclosure of "the names, addresses and contribution amounts" of the members, whereas AB 290 requires disclosure "only of enrollees' names and the fact that they are receiving third-party premium support." State Br. 64–65. But that information captures the fact and nature of patients' "affiliation with" AKF's "advocacy"—just what *Americans for Prosperity* says the First Amendment protects. Second, the State observes that subjects of the disclosure law in *Americans for Prosperity* had faced "threats and harassment in the past." State Br. 64 (quoting *Americans for Prosperity*, 594 U.S. at 604). The Supreme Court, however, was clear that this "demanding showing" "is not required . . . where—as here—the disclosure law fails to satisfy [the] criteria" of exacting scrutiny in the first place. *Americans for Prosperity*, 594 U.S. at 617. Third, the State says the compelled disclosure in *Americans for Prosperity* was relevant to its enforcement efforts in only a small number of cases. State Br. 64–65. But again, that is why the law

failed heightened scrutiny, not what subjected it to heightened scrutiny in the first place.

As in *Americans for Prosperity*, the Patient Disclosure Mandate fails exacting scrutiny, for the same reasons the Reimbursement Penalty does. It fails even setting that aside. The State argues that the Reimbursement Penalty will be "difficult or impossible" to implement without the Patient Disclosure Mandate, State Br. 65, but "mere administrative convenience" cannot justify burdening First Amendment Rights, especially not when the State has ample, less-burdensome alternatives to effectuate its regulatory goals.

Ultimately, whether it is the Patient Disclosure Mandate or the Reimbursement Penalty that is unconstitutional (or both), it is clear that neither can stand without the other. The State has repeatedly asserted that the only purpose served by the Patient Disclosure Mandate is to facilitate the implementation of the Reimbursement Penalty, and thus that the Penalty cannot function without the Mandate. *See* State Br. 65 (asserting the Reimbursement Penalty will be "difficult or impossible" to implement without the Patient Disclosure Mandate); 2-PER-91, 94 (arguing Patient Disclosure Mandate is "essential" to the

Reimbursement Penalty's implementation); 2-PER-95 (arguing the Patient Disclosure Mandate is "necessary to implement" the Reimbursement Penalty). Taking the State at its word, the two provisions are therefore not functionally or volitionally separable from each other. Accordingly, under basic principles of severability, if one falls, so must the other.

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

The State's brief also shows that AB 290 should be struck down for a third set of interrelated reasons: AB 290 is preempted by both the Beneficiary Inducement Statute and the MSPA, and the State's attempt to solve this problem itself violates the Constitution's Petition Clause.

A. AB 290 Is Preempted by the Beneficiary Inducement Statute and Violates the Petition Clause.

The State's brief makes clear that AB 290 conflicts with, and is thus preempted by, the Beneficiary Inducement Statute as interpreted by HHS OIG in Advisory Opinion 97-1. The State does not debate that 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, HIPP patients will know their dialysis provider donates

to AKF when they see their explanations of benefits showing these lower reimbursement rates. AKF Opening Br. 60. AKF's opening brief explains that these disclosures undermine 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[.]" AKF Opening Br. 59–60 (emphasis added) (quoting 8-AKF-ER-1712). Under Advisory Opinion 97-1, AKF cannot disclose to HIPP patients that their dialysis providers donate to AKF, but AB 290 *requires* the disclosure of exactly this information.

The State, echoing the district court's flawed reasoning, argues that there is "no . . . evidence" that a HIPP patient would make the connection between low reimbursement rates and the fact that his or her dialysis provider donated to AKF. State Br. 55. The State does not explain how such "evidence" could exist at this juncture, given that AB 290 has not gone into effect. Setting that aside, the State misapprehends what Advisory Opinion 97-1 requires. OIG issued Advisory Opinion 97-1 with the understanding that AKF would not—either directly or indirectly—"*disclose*" that a dialysis provider donates to AKF. 8-AKF-ER-1712

(emphasis added). The mere fact that a patient *could* make the connection is thus all that is needed to undermine Advisory Opinion 97-1's safe harbor.

The State cannot contest that it recognized the conflict between AB 290 and Advisory Opinion 97-1 before enacting the statute. The State does not dispute that the California Legislative Counsel opined that "[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-AKF-ER-759 ¶ 102; 3-AKF-ER-394. Nor does the State deny that, 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. The State argues that Section 7 merely allows AKF to "test [its] preemption theory" by "requesting an updated advisory opinion," State Br. 56, but this argument only proves AKF's point.

Under AB 290, AKF must either (1) risk leaving the safe harbor of Advisory Opinion 97-1 by complying with AB 290, or else (2) petition HHS for a revised advisory opinion. The existence of Section 7 thus

confirms that AB 290 seeks to interfere with federal regulation under the Advisory Opinion 97-1 and the Beneficiary Inducement Statute. *See Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 488 (2013) ("[A]n actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability.").

The State's brief also confirms that AB 290 violates the Petition Clause for the same reasons. The State's only argument is that Section 7 of AB 290 "does not *compel*" AKF to request a revised advisory opinion. State Br. 56–57. The State ignores that, under AB 290, AKF's only alternative to requesting a revised advisory opinion is to risk leaving the safe harbor of Advisory Opinion 97-1—and thus potentially incurring liability under the Beneficiary Inducement Statute. Section 7 thus *does* compel AKF to petition the government.

B. AB 290 Is Preempted by the Medicare Secondary Payer Act.

The State acknowledges that Congress enacted the MSPA to protect the public fisc—specifically, to end *private* insurers' practice of "declin[ing] to pay the expense[s]" of ESRD patients until a *public* payer, Medicare, "had paid first." State Br. 57 (quoting *DaVita Inc. v. Va. Mason Mem'l Hosp.*, 981 F.3d 679, 685 (9th Cir. 2020)); *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"). The State likewise acknowledges that AB 290 has the opposite policy goal—the Legislature enacted AB 290 to combat the purported "steer[ing]" of ESRD patients from *public* to *private* insurance options. *See* State Br. 36–37 (discussing purported "influx of ESRD patients with high healthcare costs" to the "*private* insurance patient pool" (emphasis added)); *id.* at 53 (asserting AKF "facilitate[s] the transfer of ESRD patients from Medicare or Medi-Cal to commercial insurance plans"). The State thus concedes that AB 290 interferes with the policy goals of the MSPA and is therefore preempted. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (explaining state statutes are preempted by federal law where they "present[s] an obstacle to the variety and mix of [regulatory approaches]" selected by Congress).

The State's argument that AB 290 does not require health plans to "differentiate" between patients or "take into account" their Medicare eligibility is misplaced. State Br. 57 (quotation marks omitted). AKF

argues that AB 290 stands as an obstacle to Congress's policy goals under the MSPA, *not* that AB 290 requires health plans to violate the MSPA. The State's argument is thus irrelevant.

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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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 8,871 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.

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