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and DIALYSIS PATIENT CITIZENS, INC.  
11

12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**  
14 **SOUTHERN DIVISION**

16 JANE DOE, *et al.*,  
17 Plaintiffs,  
18 v.  
19 XAVIER BECERRA, *et al.*  
20 Defendants.  
21

Case No. 8:19-cv-2105-DOC-ADS  
**DECLARATION OF DONALD J.  
ROY, JR., IN SUPPORT OF  
MOTION FOR A PRELIMINARY  
INJUNCTION**  
Date: December 16, 2019  
Time: 8:30 a.m.  
Place: Courtroom 9D

1 I, Donald J. Roy, Jr., do hereby declare as follows:

2 1. I currently serve as the Executive Vice President, Chief Operating  
3 Officer, and Chief Financial Officer at the American Kidney Fund (AKF). In this  
4 role, I manage AKF's supporting services of finance, administration, human  
5 resources and IT functions. I also serve as the staff liaison with AKF's Board of  
6 Trustees' Audit and Finance Committees. I previously served as the Interim Chief  
7 Executive Officer of AKF and have been with the organization for over 21 years.

8 2. I have personal knowledge of the facts set forth herein. If asked to do  
9 so, I could testify truthfully about these matters.

10 3. I offer this Declaration in response to the State's Opposition to  
11 Plaintiffs' Motion for a Preliminary Injunction in this case ("Opp."), which I have  
12 read. As I will explain below, the State misunderstands key aspects of AKF's  
13 operations and compliance with Advisory Opinion 97-1. The Declaration sets the  
14 record straight on these issues.

15 **The Health Insurance Premium Program**

16 4. AKF's Health Insurance Premium Program ("HIPP") has always been  
17 run as a program through which AKF assists dialysis patients by paying the  
18 premiums on their health insurance policies. I have personal knowledge of this  
19 because I helped develop and implement the program in the mid-1990s.

20 5. The reason for HIPP is straightforward, though deeply saddening.  
21 Dialysis patients have significant, complex, and costly health care needs. Without  
22 insurance, they can face ruinous financial costs and life-threatening illness.  
23 However, the very illness that afflicts them renders many unable to work full or even  
24 part time. Thus, many dialysis patients face an unworkable dilemma: they  
25 desperately need health insurance in the face of their illness, but their illness makes  
26 the retention of insurance incredibly difficult.

27 6. HIPP exists to resolve this problem. Through HIPP, AKF provides  
28 charitable grants to pay dialysis patients' insurance premiums. The program is need-

1 based and neutral as to insurer or provider. To be eligible, patients must be low-  
2 income, possess health insurance, and require dialysis. No other factors are  
3 considered, and grants are awarded on a first-come, first-served basis. AKF provides  
4 grants to patients on a wide range of insurance plans, with roughly 52% of the patient  
5 policies AKF supports in California being governmental and the remainder being  
6 private or commercial plans. For 10% of California HIPP recipients, AKF provides  
7 premium assistance for both private/commercial plans and Medicare or Medigap.  
8 Many more of the HIPP recipients for which AKF provides private/commercial plan  
9 assistance are also enrolled in Medicare.

10 7. Once a patient is admitted to HIPP, AKF makes a commitment to that  
11 patient to provide premium grants for the entirety of an insurance plan year (typically  
12 January 1<sup>st</sup> until December 31<sup>st</sup>). For patients who have received a kidney transplant,  
13 HIPP continues its assistance for the remainder of the plan year and, if the transplant  
14 occurs in the final quarter of the plan year and AKF has already begun paying  
15 premiums for the new plan year, assistance will continue for the remainder of the  
16 new plan year. I would also observe that HIPP assistance is often essential for  
17 ESRD patients to maintain the insurance that keeps them on transplant lists. A  
18 disruption of insurance coverage can result in a patient being dropped from a  
19 transplant list, placing their health in serious jeopardy. The State's suggestion that  
20 HIPP assistance jeopardizes eligibility for transplants is the exact opposite of the  
21 facts; HIPP assistance is often essential for patients to remain eligible for the  
22 transplant list, and over 1,000 HIPP beneficiaries received transplants in 2018,  
23 including 46 in California. In 2019, 50 California HIPP beneficiaries have received  
24 transplants thus far. HIPP therefore makes transplants possible for many low-  
25 income individuals.

26 8. The State seems to suggest that AKF uses debit cards to conceal its  
27 HIPP payments from the State. Opp. at 16. That is incorrect. AKF seeks to make  
28 payment in the format that works best for its patients. Some patients are on insurance

1 that will not accept direct payment from AKF while other patients are unbanked and  
2 thus cannot rely on personal accounts for payment. In any event, fewer than 10% of  
3 AKF's grants in California are done with a debit card.

4 **Advisory Opinion 97-1**

5 9. When AKF was developing HIPP, its leadership wanted to ensure that  
6 it would comply with the highest ethical and legal safeguards. Of particular concern  
7 was compliance with federal law prohibiting the provision of things of value in order  
8 to influence patients' decisions regarding which medical providers to seek treatment  
9 from (the "Beneficiary Inducement Statute"). AKF has long had relationships with  
10 dialysis providers, which have given to our charity for many years. Our concern was  
11 that the donations from dialysis providers used to finance HIPP could be viewed,  
12 however incorrectly, as an effort to induce patients to seek treatment from those  
13 same providers.

14 10. AKF and several dialysis providers thus sought an opinion from the  
15 Office of the Inspector General ("OIG") of the Department of Health and Human  
16 Services ("HHS") that HIPP would not violate the Beneficiary Inducement Statute.  
17 In order to obtain the advisory opinion, AKF engaged in an extensive consultation  
18 process with OIG and HHS regarding HIPP and how it would function.

19 11. The end result of that process was Advisory Opinion 97-1, which  
20 concluded that HIPP, with particular restrictions and requirements, would not violate  
21 the Beneficiary Inducement Statute. It goes without saying that we at AKF treat  
22 Advisory Opinion 97-1 as our lodestar for HIPP. HIPP was designed to comply with  
23 it, and AKF has followed it to the letter ever since.

24 12. At core, Advisory 97-1 requires that AKF preserve a firewall between  
25 the patients who receive HIPP grants and the providers who give to AKF. AKF does  
26 not communicate to patients whether their particular provider has contributed to  
27 AKF, and AKF does not consider whether a patient's dialysis facility has or has not  
28 contributed to HIPP in any of AKF's grant approval decisions. A provider who gives

1 to AKF has no say in who receives HIPP grants and no guarantee at all that needy  
2 patients who use its facilities will receive grants from the program. Grants are issued  
3 to financially eligible patients on a first come, first served basis.

4 13. AKF has rigorously adhered to Advisory Opinion 97-1's requirements  
5 since it was first issued. Violations of the Beneficiary Inducement Statute carry  
6 significant civil penalties and the OIG can revoke Advisory Opinion 97-1 if HIPP  
7 does not conform to facts as originally presented to the OIG. Consequently, to depart  
8 from Advisory Opinion 97-1's guidelines would be to risk AKF's legal status,  
9 reputation, and financial health. AKF has also carefully monitored subsequent OIG  
10 opinions to stay abreast of their approach to these issues. AKF has seen that many  
11 of the opinions issued are modeled after Advisory Opinion 97-1 and are based upon  
12 the same underlying standards.

### 13 **The State's Misunderstanding of HIPP**

14 14. In their Opposition, the State demonstrates its misunderstanding of  
15 AKF, HIPP, and Advisory Opinion 97-1 in a variety of ways. I would like to set the  
16 record straight in the remainder of this Declaration.

#### 17 ***AKF Does Not "Steer" Patients into Any Form of Insurance or to Any*** 18 ***Particular Provider***

19 15. To begin, the State's assertion that AKF "inappropriately steer[s]  
20 patients onto commercial insurance plans for their own—not the patient's—benefit"  
21 is completely wrong on multiple levels. Opp. at 4. In support of this point, the State  
22 relies on a deeply inaccurate 2016 *New York Times* article that claimed that AKF  
23 does not give HIPP grants to patients at clinics that do not donate to AKF. See Opp.  
24 at 5. They also cite to a 2019 letter written by a Member of Congress making similar  
25 accusations. Opp. at 10 n.10 (citing Medley Decl., Exh. 5 at 3).

26 16. The State's accusation is false. I want to emphasize that AKF ***does not,***  
27 ***and has never,*** considered a patient's form of insurance or dialysis provider when  
28 administering HIPP grants. Indeed, to suggest this misunderstands how HIPP works

1 in practice. Patients are usually referred to HIPP by their social workers, often  
2 through dialysis providers. (Patients work closely with their social workers to  
3 address a variety of psycho-social and economic needs, and Medicare rules require  
4 all dialysis patients to be assigned a social worker.) Patients can qualify for the  
5 program only if they already have health insurance in place. In other words, all  
6 patients seek out AKF's assistance with health insurance plan already in place, and  
7 the vast majority have already selected a provider. AKF does not encourage patients  
8 to utilize any particular form of insurance or any particular provider. AKF simply  
9 makes charitable grants to patients so that they can keep their preferred insurance  
10 and utilize their preferred provider. In fact, close to 40 percent of people who  
11 develop kidney failure do so unexpectedly and with little to no preparation because  
12 kidney disease has no early symptoms. Many of AKF's patients, as a result, come  
13 to AKF with a form of employer health insurance either in the form of COBRA or  
14 an Employer Group Health Plan policy. Moreover, as the Patient Plaintiffs in this  
15 case have indicated, halting HIPP will prevent patients from keeping the health  
16 insurance they desire and have had for years.

17 17. Based on these significant factual errors, AKF put out a press release to  
18 respond to the newspaper article and sought the retraction of the article. Both of  
19 these documents are attached to this Declaration as Exhibits A and B. AKF also  
20 responded to the congressperson's letter at length, rebutting its allegations in detail.  
21 That response is attached to this Declaration Exhibit C.

22 18. It is likewise wrong to suggest, as the State does, that AKF administers  
23 HIPP for its own "benefit." AKF is a widely-praised, highly-reputable, and *non-*  
24 *profit* charity, having been recognized for 18 straight years with a 4-star (out of 4)  
25 rating from Charity Navigator and the Platinum Seal of Transparency from  
26 GuideStar. Everything AKF does is to help kidney disease patients and their  
27 families. Year after year, approximately 97% of AKF's funding goes to support its  
28 programs of education, prevention screenings, financial assistance, clinical research

1 and advocacy, meaning only 3% goes to administrative and overhead costs. AKF  
2 was formed in 1971 to assist one individual who needed help with the costs of his  
3 dialysis care. Forty-eight years later, AKF helps more than 75,000 patients  
4 nationwide maintain their health insurance. The suggestion that AKF has some  
5 unspecified corrupt motive for running HIPP is shameful; it also neglects the tens of  
6 thousands of desperately ill and financially disadvantaged individuals who annually  
7 receive access to lifesaving treatment from HIPP.

8 ***AKF Provides HIPP Support to Patients Who Have Received Kidney***  
9 ***Transplants***

10 19. The State also claims that AKF ““will not continue to provide financial  
11 assistance once a patient receives a successful kidney transplant.”” Opp. at 5  
12 (quoting 81 Fed. Reg. 90211, 90215 (Dec. 14, 2016)). The source of this quote only  
13 states that “[d]ocuments in the record show” this to be the case. 81 Fed. Reg. 90215.  
14 I do not have access to the referenced, unspecified documents, but I know of my  
15 personal knowledge that this statement is incorrect. AKF has made it clear that  
16 transplant patients will receive continued support following a transplant for the  
17 remainder of their full plan year and, at times when receiving the transplant at the  
18 end of their plan year, for a full additional plan year after their procedure. This  
19 approach is entirely sensible. Once a patient has received a transplant and recovered  
20 from the surgery and transplantation, he or she no longer needs dialysis, and post-  
21 transplant patients are often able to return to work and lead normal lives. At that  
22 point, AKF’s resources are better directed to those who have not had the good  
23 fortune of receiving a transplant and still depend on dialysis to stay alive.

24 ***AKF Has No Choice But to Cease HIPP in California By January 1, 2020***

25 20. The State claims that AKF’s decision, if AB 290 goes into effect, to  
26 cease HIPP within California on January 1, 2020, is an “arbitrary decision.” Opp.  
27 at 1. That is far from the case. I can attest that AKF made this decision only with  
28 the greatest reluctance and after ample consideration of all relevant factors. AKF is

1 a charity committed to helping patients suffering from kidney disease; AKF never  
2 wants to retreat from its efforts if it can possibly avoid doing so. But Assembly Bill  
3 290 leaves AKF with no choice as it must consider the 75,000 patients nationwide  
4 who rely on this program and AKF cannot jeopardize their assistance.

5 21. As I explained above, AKF provides HIPP assistance to patients for a  
6 full plan year. AKF sees this as a moral and ethical obligation, but also as a practical  
7 necessity. The patients who receive HIPP assistance rely upon the support that AKF  
8 commits to giving. If AKF provided support for less time, it would put patients in  
9 an impossible situation. Patients would seek out the best health insurance for their  
10 particular circumstances, but would be uncertain about how they would be able to  
11 pay for such insurance once their HIPP grants ran out. AKF cannot in good  
12 conscience do that.

13 22. Thus, even assuming that Assembly Bill 290 would not take effect until  
14 July 2020, as the State claims, the commitment of support that AKF makes to its  
15 beneficiaries means that if AKF begins HIPP support for plan years commencing in  
16 January 2020, AKF will have to continue that support until the end of that plan year  
17 and into the effective period for the Act. Moreover, patients receiving the assistance  
18 will be subject to the “grandfathering” and “former grandfathering” provisions of  
19 the Act, which take effect on October 1, 2019 and March 31, 2020 respectively, the  
20 consequences of which are difficult to foresee. That means that AKF will  
21 necessarily be subject to the unconstitutional provisions of the Act with no  
22 opportunity for withdrawal from them after January 1, 2020. In fact, once Assembly  
23 Bill 290 takes effect, its provisions prevents AKF from withdrawing HIPP support  
24 even if it wanted to do so. As a result, AKF’s First Amendment rights would be  
25 violated and AKF would be forced to operate outside of Advisory Opinion 97-1’s  
26 safeguards. These results pose intolerable risks to both AKF and its mission  
27 throughout the rest of the country, including for the tens of thousands of non-  
28 California HIPP patients it supports.

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23. AKF’s leadership has considered these consequences at length, and we communicated them repeatedly to California’s representatives throughout the legislative process. That the Legislature nonetheless enacted Assembly Bill 290 is strong evidence that this is a crisis of its own choosing.

I declare under the penalty of perjury and the laws of the United States that the foregoing is true and correct this 2nd day of December 2019, at Rockville, Maryland.

  
\_\_\_\_\_  
DONALD J. ROY, JR.