

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ASSOCIATION OF AMERICAN	)
PHYSICIANS & SURGEONS, INC.,	)
	) Civil Action
Plaintiff,	)
	)
vs.	) No. _____
	)
EDMUND G. BROWN, JR., in his official capacity	)
as Governor of the State of California,	)
and Shelley Rouillard, in her official capacity as	)
as the Director of the California Department	)
of Managed Health Care,	) <b>COMPLAINT</b>
	)
Defendants.	)
_____	)

The Association of American Physicians & Surgeons, Inc. (“AAPS”) seeks declaratory and injunctive relief against Edmund G. Brown, Jr., in his official capacity as Governor of California, and Shelley Rouillard, in her official capacity as the Director of the California Department of Managed Health Care, as follows:

**NATURE OF THE ACTION**

1. Defendant California Governor Edmund G. Brown, Jr., signed Assembly Bill No. 72 (the “Act” or “AB 72”) into law on September 23, 2016, and unless enjoined it will violate multiple constitutional rights of physicians and patients.

2. In an unprecedented manner, the Act authorizes an insurance company to limit what physicians who are outside of its network (“out-of-network” or “noncontracting”) may charge. This is akin to a company dictating

how much a competitor – with which it has no contractual relationship – may make. The Act violates the U.S. and California Constitutions in at least three ways.

3. First, the Act violates the Due Process Clauses of the U.S. and California Constitutions by delegating rate-setting authority to private insurance companies, with respect to physicians who are not under any contract with the insurance companies. In addition, the Act is unconstitutional under the Due Process Clauses by requiring arbitration for out-of-network physicians on their reimbursements, thereby denying them their due process rights in court on their claims.

4. Second, the Act violates the Takings Clauses of the U.S. and California Constitutions because the Act empowers private insurance companies to deprive out-of-network physicians of the market value for their services, and arbitrarily denies them just compensation for their labor.

5. Third, the Act violates the Equal Protection Clauses of the U.S. and California Constitutions by having a disparate impact on minority patients for whom the availability of medical care will sharply decline as out-of-network physicians are coerced by the Act to withdraw services from predominantly minority communities.

6. These violations of constitutional rights by the Act cause harm to AAPS members who practice in California and to their patients.

7. AAPS, on behalf of its members in California and their patients,

seeks declaratory and injunctive relief under 42 U.S.C. § 1983 and the equitable powers of this Court to enjoin these imminent violations of the U.S. and California Constitutions.

### **THE PARTIES**

8. Plaintiff AAPS is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. Founded in 1943, AAPS has members in virtually every specialty. Many AAPS members are out-of-network with insurance companies, and many contribute charity care to patients in underserved and minority communities. These members of AAPS in California are harmed by the violations of the U.S. and California Constitutions by the Act. The protection of AAPS members from unconstitutional action is central to AAPS's mission on behalf of its members.

9. Defendant Edmund G. Brown, Jr., in his official capacity as Governor of California, is the chief executive of California having the ultimate responsibility for enforcing AB 72.

10. Defendant Shelley Rouillard, in her official capacity as the Director of the California Department of Managed Health Care (the "Department"), is the executive authorized to oversee the regulation of health plans in California and to implement AB 72.

### **JURISDICTION AND VENUE**

11. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, as this action arises under the Fifth and Fourteenth Amendments to

the U.S. Constitution and federal law; under 28 U.S.C. § 1343(a)(3), in that this action is brought to redress deprivations, under color of state law, of rights, privileges and immunities secured by the U.S. Constitution; and under 42 U.S.C. § 1988(a), with respect to the claims under the California Constitution.

12. Supplemental jurisdiction over Plaintiff's claims under the California Constitution also exists under 28 U.S.C. § 1367.

13. Venue is proper in the United States District Court for the Eastern District of California under 28 U.S.C. § 1391(b) in that Defendant Edmund G. Brown, Jr., resides in this judicial district and all the Defendants reside in California, and a substantial part of the events or omissions giving rise to the claims occurred here. All acts alleged herein of Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and continue to be done under the color of state law.

### **Standing**

14. AAPS members, including California ophthalmologist Michael Couris, M.D., suffer imminent threatened injury in the form of denial of their rights under the Due Process, Takings, and Equal Protection Clauses, including financial harm, as a result of the enactment and upcoming enforcement of the Act. In addition, with respect to the Equal Protection claims below, the patients of AAPS members suffer imminent threatened injury in the form of reduced availability for medical care to them.

15. The requested declaratory and injunctive relief will prevent these

injuries, and does not require the participation of individual AAPS members. The protection of its members from these constitutional violations is central to AAPS's purpose.

### **FACTUAL BACKGROUND**

16. Out-of-network physicians, who are called "noncontracting" physicians by AB 72, do not have the benefits or obligations of being contractually bound with insurance companies. There are both advantages and disadvantages to patients and physicians resulting from an out-of-network status.

17. Some physicians are out-of-network not by choice, but because insurance companies increased their profits by excluding them for reasons other than quality of care.

18. Out-of-network physicians often lack the referral volume of physicians who are within the networks of insurance companies, and as a result out-of-network physicians tend to provide more charity care than in-network physicians do. To remain in business, out-of-network physicians may charge more for certain services than the in-network insurance reimbursement rates.

19. Insured patients, in many cases, obtain policies that require their insurance company to pay the charges by out-of-network physicians, or at least a substantial percentage of those charges.

20. The only meaningful leverage that a physician or hospital has in negotiating a contract with an insurance company is the option of the physician or hospital to go out-of-network and not accept the insurance company rates.

21. AB 72 denies the right of a physician to go out-of-network with an insurance company and charge out-of-network rates. Signed into law by the Defendant Governor of California on September 23, 2016, AB 72 adds several new sections to the Health and Safety Code and the Insurance Code to limit the rights of reimbursement for out-of-network physicians.

22. Specifically, the Act requires the following for out-of-network physicians, effective July 1, 2017:

unless otherwise agreed to by the noncontracting individual health professional and the plan, the plan shall reimburse the greater of the average contracted rate or 125 percent of the amount Medicare reimburses on a fee-for-service basis for the same or similar services in the general geographic region in which the services were rendered. For the purposes of this section, “average contracted rate” means the average of the contracted commercial rates paid by the health plan or delegated entity for the same or similar services in the geographic region. This subdivision does not apply to subdivision (c) of Section 1371.9 or subdivision (b) of this section.

The Act § 2 (adding Section 1371.31 to the Health and Safety Code).

23. The Act prohibits an out-of-network physician from recovering fully on his claims for services lawfully rendered. Specifically, the Act establishes that, beginning with health plans issued on or after July 1, 2017:

An enrollee shall not owe the noncontracting individual health professional more than the in-network cost-sharing amount for services subject to this section. ...

A noncontracting individual health professional shall not bill or collect any amount from the enrollee for services subject to this section except for the in-network cost-sharing amount. ...

If the noncontracting individual health professional has received more than the in-network cost-sharing amount from the enrollee for services subject to this section, the noncontracting individual health professional shall refund any overpayment to the enrollee within 30 calendar days after receiving payment from the enrollee.

The Act § 3 (adding Section 1371.9 to the Health and Safety Code).

24. This ban in the Act on collecting from enrollees has the effect of preventing out-of-network physicians from recovering their fees from the insurance carriers that cover the enrollees for services rendered.

25. In addition, the Act requires the Department, by September 1, 2017, to “establish an independent dispute resolution process for the purpose of processing and resolving a claim dispute between a health care service plan and a noncontracting individual health professional for services” rendered. The Act § 1 (adding Section 1371.30 to the Health and Safety Code). Out-of-network physicians are thereby required to participate in this alternative dispute resolution on their claims, rather than pursue their remedies in court.

26. The Act generally exempts medical services rendered on an emergency basis, but does not expressly exempt services rendered on a quasi-emergency basis, such as after a patient has been transferred from an emergency room to an intensive-care unit (ICU).

**FIRST CLAIM FOR RELIEF  
(UNDER SECTION 1983  
FOR VIOLATION OF THE DUE PROCESS CLAUSE OF  
THE U.S. CONSTITUTION)**

27. Plaintiff repeats and incorporates herein by reference the allegations contained in all the other Paragraphs in this Complaint.

28. By authorizing private insurance companies to set rates for out-of-network physicians, the Act violates the Due Process Clause of the Fourteenth

Amendment of the U.S. Constitution.

29. The price-setting by insurance companies under the Act with respect to out-of-network physicians imposes *confiscatory* rates in violation of this Due Process Clause.

30. By requiring out-of-network physicians, including members of AAPS, to participate in arbitration rather than pursue their claims in court, the Act further violates this Due Process Clause.

31. The Act improperly shifts the burden onto physicians to challenge the price controls, and the Act denies them their due process rights to do so.

32. Plaintiff AAPS seeks a declaratory judgment that the Act with respect to its limitations on out-of-network billing and its imposition of arbitration constitutes a violation of this Due Process Clause.

33. Plaintiff AAPS seeks an injunction prohibiting enforcement of the Act with respect to its limitations on out-of-network billing and its imposition of arbitration, based on the Due Process Clause of the U.S. Constitution.

34. Plaintiff requests attorneys' fees under 42 U.S.C. § 1988(b).

**SECOND CLAIM FOR RELIEF  
(UNDER SECTION 1983  
FOR VIOLATION OF THE TAKINGS CLAUSE  
OF THE U.S. CONSTITUTION)**

35. Plaintiff repeats and incorporates herein by reference the allegations contained in all the other Paragraphs in this Complaint.

36. By forbidding out-of-network physicians from collecting by suing

on their claims for services rendered, the Act deprives them of their property interests in reimbursements, without just compensation, in violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution.

37. The rate mechanism imposed by the Act constitutes *confiscatory* wage controls on physicians, thereby depriving them of their property rights for their labor, without just compensation, which further violates this Takings Clause.

38. In addition, the Act violates this Takings Clause by transferring property from one private group (physicians) to other private entities, namely insurance companies, in the form of the latter's underpayment for services.

39. By compelling out-of-network physicians to participate in arbitration as required by the Act, Plaintiff's members are further deprived of just compensation for the services that they rendered.

40. Plaintiff AAPS is entitled to a declaratory judgment that the Act is an unconstitutional violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution.

41. Plaintiff AAPS is entitled to an injunction against these restrictions on and requirements of out-of-network physicians, based on this Takings Clause.

42. Plaintiff requests attorneys' fees under 42 U.S.C. § 1988(b).

**THIRD CLAIM FOR RELIEF  
(UNDER SECTION 1983  
FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE  
OF THE U.S. CONSTITUTION)**

43. Plaintiff repeats and incorporates herein by reference the allegations contained in all the other Paragraphs in this Complaint.

44. Many out-of-network physicians, including members of Plaintiff AAPS, depend on their ability to bill market rates for their services to insured patients in order to be able to offer charity or undercompensated care to underserved minority patients.

45. Underserved minority patients depend on the continued availability of medical care from these out-of-network physicians, including members of Plaintiff AAPS.

46. The Act will force out-of-network physicians, including members of AAPS, out of business or into insurance networks that render it infeasible to provide substantial amounts of care to underserved, uninsured, predominantly minority patients.

47. These patients face imminent harm, in the form of lost access to out-of-network physicians and decreased availability of medical care, if the Act goes into effect.

48. The Act will have a disparate impact on these underserved, minority patients.

49. Plaintiff AAPS seeks a declaratory judgment that the Act is unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

50. Plaintiff AAPS seeks an injunction, on behalf of its members and

their patients, against the Act to prevent it from going into effect, based on this Equal Protection Clause.

51. Plaintiff seeks attorneys' fees under 42 U.S.C. § 1988(b).

**FOURTH CLAIM FOR RELIEF  
(FOR VIOLATION OF THE DUE PROCESS CLAUSE OF  
THE CALIFORNIA CONSTITUTION)**

52. Plaintiff repeats and incorporates herein by reference the allegations contained in all the other Paragraphs in this Complaint.

53. By authorizing private insurance companies to set rates for out-of-network physicians, even *confiscatory* rates, the Act violates the Due Process Clause of the California Constitution, Art. I, § 7.

54. The Act further violates this Due Process Clause by requiring arbitration and shifting the burden onto physicians to challenge the price controls.

55. Plaintiff AAPS seeks a declaratory judgment that the Act with respect to its limitations on out-of-network billing and its imposition of arbitration constitutes a violation of the Due Process Clause of the California Constitution.

56. Plaintiff AAPS seeks an injunction prohibiting enforcement of the Act with respect to its limitations on out-of-network billing and its imposition of arbitration, under the Due Process Clause of the California Constitution.

**FIFTH CLAIM FOR RELIEF  
(FOR VIOLATION OF THE TAKINGS CLAUSE  
OF THE CALIFORNIA CONSTITUTION)**

57. Plaintiff repeats and incorporates herein by reference the allegations contained in all the other Paragraphs in this Complaint.

58. The Act deprives physicians of their property interests in reimbursements in violation of the Takings Clause of the California Constitution, Art. I, § 19.

59. Plaintiff AAPS is entitled to a declaratory judgment that the Act is an unconstitutional violation of the Takings Clause of the California Constitution.

60. Plaintiff AAPS is entitled to an injunction against the Act's restrictions on and requirements of out-of-network physicians, based on this Takings Clause.

**SIXTH CLAIM FOR RELIEF  
(FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE  
CALIFORNIA CONSTITUTION)**

61. Plaintiff repeats and incorporates herein by reference the allegations contained in all the other Paragraphs in this Complaint.

62. The Act will have a disparate effect on underserved, minority patients, as alleged above.

63. Plaintiff AAPS seeks a declaratory judgment against the constitutionality of the Act based on the Equal Protection Clause of the California Constitution, Art § 7, subdivisions (a) and (b).

64. Plaintiff AAPS seeks an injunction, on behalf of its members and their patients, against the Act to prevent it from going into effect, based on this Equal Protection Clause.

**Jury Demand**

65. Plaintiff requests a trial by jury for all issues triable by jury.

**Prayer For Relief**

Wherefore, Plaintiff respectfully requests the following relief:

- (i) Declaratory relief that the Act is unconstitutional under the Due Process, Takings, and/or Equal Protection Clauses of the U.S. Constitution, and in violation of 42 U.S.C. § 1983;
- (ii) Declaratory relief that the Act is unconstitutional under the Due Process, Takings, and/or Equal Protection Clauses of the California Constitution;
- (iii) Injunctive relief blocking enforcement of the Act as unconstitutional under the Due Process, Takings, and/or Equal Protection Clauses of the U.S. Constitution, and in violation of 42 U.S.C. § 1983;
- (iv) Injunctive relief blocking enforcement of the Act as unconstitutional under the Due Process, Takings, and/or Equal Protection Clauses of the California Constitution;
- (v) reasonable attorneys' fees and costs under 42 U.S.C. § 1988(b) as appropriate; and
- (vi) such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Lawrence J. Joseph

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