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PURSUANT TO SENATE RULE 29.10(d)

SUBJECT

Gender-affirming health care

DIGEST

This bill enacts various safeguards against the enforcement of other states' laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California.

EXECUTIVE SUMMARY

In recent months, a series of regressive transphobic laws and executive orders have been adopted in other states that target transgender youth, their parents, and their medical providers. Many of these laws and orders impose civil and/or criminal liability on transgender youth and the adults who assist them in obtaining gender-affirming care, putting parents and doctors in the position of risking sentences of up to ten years in prison for simply getting their child the medical care they need. Worse, many of these laws and orders are not limited in geographic scope, meaning the state could attempt to penalize a transgender youth or other person for obtaining gender-affirming care in a state where that care is legal, such as California.

This bill seeks to enact several reforms to California law in an attempt to provide legal safeguards to transgender youths and their families who obtain gender-affirming care that is legal in this state. This bill enacts new prohibitions against the sharing of medical records regarding the receipt of gender-affirming care; prohibits the enforcement of out-of-state subpoenas seeking information regarding the receipt of gender-affirming medical care in California; revises the Uniform Child Custody Jurisdiction and Enforcement Act to provide California courts jurisdictional guidance on family law matters arising as a result of a minor receiving gender-affirming care; and makes several reforms to California's criminal laws regarding the enforcement of out-of-state criminal statutes related to gender-affirming health care. This bill is a gut-and-amend of

an unrelated bill, so this is the first time this Committee has heard this bill. This analysis also contains a comment from Senate Public Safety Committee staff because this bill touches on matters within that committee's jurisdiction.

This bill is sponsored by Equality California, Lieutenant Governor Eleni Kounalakis, and Planned Parenthood Affiliates of California and is supported by a number of organizations dedicated to LGBTQ+ rights and civil rights, medical organizations, and public entities and officials. This bill is opposed by a number of organizations that oppose providing gender-affirming care to transgender youth.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Provides that each state shall give full faith and credit to the public acts, records, and judicial proceedings of every other state, and that Congress may prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. (U.S. Const., art. IV, § 1.)

2) Provides that a person charged in any state with treason, felony, or other crime who fled from that state and is found in another state shall, on demand from the executive authority of the state from which the person fled, be delivered to the state having jurisdiction of the crime. (U.S. Const., art. IV, § 2; 18 U.S.C. § 3182.)

3) Provides that persons in the United States may travel freely throughout the United States. (*E.g.*, *U.S. v. Guest* (1966) 383 U.S. 745, 758 ("freedom to travel throughout the United States has long been recognized as a basic right under the Constitution").)[1]

4) Provides that records and judicial proceedings of any court of any state, territory or possession, or copies thereof, must be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form; and that such acts, records, and judicial proceedings, or copies thereof, once authenticated, have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, territory or possession from which they are taken. (28 U.S.C. § 1738.)

5) Establishes, under the federal Health Insurance Portability and Accountability Act (HIPAA), privacy protections for patients' protected health information and generally provides that a covered entity, as defined (including a health plan, health

[1] Although the right to travel is not expressly set forth in the Constitution, it has been recognized as emanating from both the Interstate Commerce Clause (*e.g.*, *Edwards v. People of State of California* (1941) 314 U.S. 160, 174) and the Privileges and Immunities Clause (*e.g.*, *Saenz v. Roe* (1999) 526 U.S. 501-502).

care provider, and health care clearing house), may not use or disclose protected health information except as specified or as authorized by the patient in writing. (45 C.F.R. §§ 164.500 *et seq*.)

Existing state law:

1) Provides that all people have inalienable rights, including the right to pursue and obtain safety, happiness, and privacy. (Cal. Const., art. I, §1.)

2) Prohibits, under the California Medical Information Act (CMIA), providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient's written authorization, subject to certain exceptions. (Civ. Code, div. 1, pt. 2.6, §§ 56 *et seq*.)

3) Requires, under the CMIA, a provider of health care, health care service plan, or contractor to disclose medical information if the disclosure is compelled by any of the following:
   a) By a court pursuant to an order of that court.
   b) By a board, commission, or administrative agency for purposes of adjudication to its lawful authority.
   c) By a party to a proceeding before a court or administrative pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Code of Civil Procedure section 1987, or any provision authorizing discovery in a proceeding before a court or administrative agency.
   d) By a board, commission, or administrative agency pursuant to an investigative subpoena, as specified.
   e) By an arbitrator or arbitration panel, as specified, pursuant to a subpoena duces tecum.
   f) By a search warrant lawfully issued to a governmental law enforcement agency.
   g) By the patient or the patent's representative, as specified.
   h) By a medical examiner, forensic pathologist, or coroner, under specified circumstances.
   i) Where otherwise specifically required by law. (Civ. Code, § 56.10(b).)

4) Permits, under the CMIA, a provider of health care, health care service plan, or contractor to disclose medical information in specified circumstances to specified recipients, including to medical practitioners for diagnostic and health care purposes, insurers or other payors, and public agencies. (Civ. Code, § 56.10(c).)

5) Provides that a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States. (Code Civ. Proc., § 410.10.)

6) Provides that when a court, upon motion of a party or its own motion, finds that in the interest of substantial justice a civil action should be heard in a forum outside this state, the court must stay or dismiss the action in whole or in part on any conditions that may be just. (Code Civ. Proc., § 410.30.)

7) Permits a defendant in a civil action, on or before the last day of their time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:
   a) To quash service of summons on the ground that the court lacks jurisdiction over them;
   b) To stay or dismiss the action on the ground of inconvenient forum; and
   c) To dismiss the action for failure to prosecute the action in a timely manner. (Code Civ. Proc., § 418.10.)

8) Enumerates, under the Interstate and International Depositions and Discovery Act, the procedure for obtaining discovery in California for a civil case pending in a jurisdiction outside of California. (Code Civ. Proc., pt. 4, tit. 4, ch. 12, art. 1, §§ 2029.100 *et seq*.)

9) Establishes the Uniform Child Custody Jurisdiction and Enforcement Act, which sets forth guidelines for California courts regarding the jurisdiction and disposition of family law and child custody matters involving parties in multiple states. (Fam. Code, div. 8, pt. 3, §§ 3400 *et. seq*.)

10) Enumerates, under the Insurance Information and Privacy Protection Act (IIPPA), requirements and steps insurers must take to protect the confidentiality of an insured's medical information. (Ins. Code, div. 1, pt. 2, art. 6.6, §§ 791 *et seq*.)

11) Sets forth a subpoena process by which the attendance of a witness may be required to appear before a court or magistrate in a criminal action, which may include a subpoena compelling the production of records or other documents. (Pen. Code, § 1326.)

12) Requires, subject to the Constitution and laws of the United States, the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State, provided specified requirements related to the request are met. (Pen. Code, §§ 1548.1, 1548.2.)

13) Permits, but does not require, the Governor of this State to surrender, on demand of the executive authority of any other state, any person in this state charged with a crime in another state when the accused was not in the demanding state at the commission of the crime and has not fled from that state. (Pen. Code, § 1549.1.)

14) Defines "gender affirming health care" to mean medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, which may include, but is not limited to, the following:
    a) Interventions to suppress the development of endogenous secondary sex characteristics.
    b) Interventions to align the patient's appearance or physical body with the patient's gender identity.
    c) Interventions to alleviate symptoms of clinically significant distress resulting from gender dysphoria, as defined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition. (Welf. & Inst. Code, § 16010.2(b)(3)(A).)

15) Defines "gender affirming mental health care" to mean mental health care or behavioral health care that respects the gender identity of the patient, as experienced and defined by the patient, and may include, but is not limited to, developmentally appropriate exploration and integration of identity, reduction of distress, adaptive coping, and strategies to increase family acceptance. (Welf. & Inst. Code, § 16010.2(b)(3)(B).)

This bill:

1) Generally incorporates the definitions of "gender-affirming health care" and "gender affirming mental health care" from Welfare and Institutions Code section 16010.2(b)(3) and the definition of "sensitive services" from Insurance Code section 791.02(ac).

2) Prohibits a provider of health care, health care services, or contractor from releasing medical information relating to person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to any civil action based on another state's law that authorizes a person to bring a civil action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care
    a) "Person" means an individual or government subdivision, agency, or instrumentality.

3) Limits the Interstate and International Depositions and Discovery Act as follows:
    a) A clerk of a superior court in the county in which discovery in a foreign action is sought may not issue a subpoena for discovery in this state based on a foreign subpoena if the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care.
    b) An attorney licensed to practice in this state and retained by a party in a proceeding pending in a foreign jurisdiction may not issue a subpoena in that action based on a foreign subpoena if the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a

child to receive gender-affirming health care or gender-affirming mental health care.

4) Provides that the presence of a child in this state for the purpose of obtaining gender-affirming health care or gender-affirming mental health care is sufficient to grant a court in this state the jurisdiction to make an initial child custody determination for the child.

5) Provides that a court of this state has temporary emergency jurisdiction over a child if the child is present in the state because the child has been unable to obtain gender-affirming health care or gender-affirming mental health care.

6) Provides, notwithstanding general considerations to determine whether a court in this state is an inconvenient forum, a court shall not, in a case where the provision of gender-affirming health care or gender-affirming mental health care to the child is at issue, determine that it is an inconvenient forum where the law or policy of the other state that may take jurisdiction limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.

7) Provides that a court, when determining whether to decline jurisdiction because the person seeking its jurisdiction has engaged in unjustifiable conduct, shall not consider as a factor weighing against the person seeking jurisdiction the removal of the child from a person with physical custody if there is evidence that the taking or retention of the child was for the purpose of obtaining gender-affirming health care or gender-affirming mental health care and the law or policy of the other state limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.

8) Provides that a law of another state that authorizes a state agency to remove a child from their parent or guardian based on the parent or guardian allowing their child to receive gender-affirming health care or gender-affirming mental health care is against the public policy of this state and shall not be enforced or applied in a case pending in a court in this state.

9) Declares that it is the public policy of this state that an out-of-state arrest warrant for an individual based on violating another state's law against providing, receiving, or allowing their child to receive gender-affirming health care or gender-affirming mental health care is the lowest law enforcement priority.

10) Prohibits California state and local law enforcement agencies from knowingly making or participating in an arrest or participating in any extradition of an individual pursuant to an out-of-state arrest warrant for violation of another state's law against providing, receiving, or allowing a child to receive gender-affirming

health care of gender-affirming mental health care if the care is lawful in this state, to the fullest extent permitted by federal law.

a) The above does not prohibit the investigation of any criminal activity in this state which may involve the performance of gender-affirming health care or gender-affirming mental health care provided that no information relating to any medical procedure performed on a specific individual may be shared with an out-of-state agency or any other individual.

11) Prohibits a provider of health care, health care service plan, or contractor from releasing medical information related to a person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to any foreign subpoena that is based on a violation of another state's laws authorizing a criminal action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care.

12) Includes a severability clause.

13) Incorporates chaptering-out provisions relating to foreign subpoenas that would require the provision of information relating to "sensitive services," as defined in Insurance Code section 791.02(ac), to avoid chaptering conflicts with AB 2091 (Bonta, 2022).

COMMENTS

1. Author's statement

According to the author:

> SB 107 reduces the harm done to transgender youth and their families by making it clear that other state's laws that punish people for providing or receiving gender-affirming health care is contrary to the public policy of California.
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> SB 107 would also bar health care providers from complying with subpoenas requiring the disclosure of medical information related to gender-affirming health care that interferes with a person's right to allow a child to receive said care.
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> Lastly, SB 107 would prohibit law enforcement agencies from making, or intentionally participating in, the arrest of an individual pursuant to an out-of-state arrest warrant based on another state's law against receiving, or allowing a child to receive, gender-affirming health care.

2. In the last year, certain states have passed or attempted to pass bills targeting transgender youths and their families

Conservative hysteria over transgender individuals reached new heights in 2022. While some states—including California—have implemented policies to ensure that transgender individuals are not discriminated against and can obtain gender-affirming care, other states have targeted transgender individuals with extreme vitriol. According to Human Rights Watch, as of March 2022, legislatures nationwide had introduced over 300 anti-LGBTQ+ bills, over 130 of which specifically targeted transgender people.[2] As Utah Governor Spencer Cox said in his veto message for a bill that would ban transgender youth from high school sports—a bill functionally targeting the *four* transgender youths playing high school sports in the state— "[r]arely has so much fear and anger been directed at so few."[3]

One particularly pernicious type of anti-transgender legislation that several states have passed or are considering is legislation to prevent gender-affirming medical care. As the Department of Health and Human Services explains, "[f]or transgender and nonbinary children and adolescents, early gender-affirming care is crucial to overall health and well-being."[4] Lack of gender-affirming care is a factor in the mental health crisis among transgender youth; according to one study, 56 percent of transgender youth have attempted suicide, and 86 percent of transgender youth have experienced suicidality.[5]

Yet rather than protecting and nurturing their transgender youths—or at least leaving the question of gender-affirming medical care to medical professionals—some states have passed laws specifically prohibiting transgender individuals from obtaining gender-affirming care. These state laws impose a range of potential civil and criminal liability for providing to a minor, or helping a minor obtain, gender-affirming care. For example, Alabama recently enacted a bill that makes it a felony to provide, or help to provide, certain types of gender-affirming care.[6] Arkansas prohibits a physician or other healthcare provider from providing or referring certain types of gender-affirming care

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[2] Human Rights Watch, Press Release, ICYMI: As Lawmakers Escalate Attacks on Transgender Youth Across the Country, Some GOP Leaders Stand Up for Transgender Youth (Mar. 24, 2022), https://www.hrc.org/press-releases/icymi-as-lawmakers-escalate-attacks-on-transgender-youth-across-the-country-some-gop-leaders-stand-up-for-transgender-youth (all links current as of August 29, 2022).
[3] Utah Gov. Spencer Cox, Veto Message to HB 11 (Mar. 22, 2022), reprinted in the St. Louis Tribune, *available at* https://www.sltrib.com/news/politics/2022/03/22/gov-spencer-coxs/. The Utah Legislature overrode the veto. (Medina, *Utah Legislature Overrides Governor's Veto of Transgender Athlete Bill*, NY Times (Mar. 25, 2022), *available at* https://www.nytimes.com/2022/03/25/us/utah-transgender-athlete-ban-override.html.
[4] Department of Health and Human Services, Office of Population Affairs, Gender-Affirming Care and Young People, *available at* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
[5] Austin, et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, Journal of Interpersonal Violence (Apr. 29, 2020).
[6] *See* Al. Code, § 26-26-4.

for a minor; a violation or "threatened violation" can be punished through a professional board or a civil action.[7]

While the majority of these measures have been enjoined by the courts, more states are moving forward with even more extreme anti-transgender measures. The Missouri Legislature, for example, debated whether to expand legislation prohibiting gender-affirming care for minors to prohibit gender-affirming care for adults under 25 years of age.[8] And Idaho's house of representatives passed a bill that would have criminalized helping a minor obtain gender-affirming procedures, including making it a felony punishable by life imprisonment for anyone who helped the minor cross state lines to obtain that care.[9]

3. This bill limits the State's participation in other states' laws attacking transgender youth and medical professionals

This bill makes several modifications to California law in order to provide protection for transgender youth and their families who seek medical care in California from regressive out-of-state laws that target gender-affirming care for minors. The bill also gives protections to the providers of such care.

First, this bill limits the ability of litigants in other states to obtain civil discovery in an out-of-state action that seeks to penalize an individual from obtaining, or for helping someone to obtain, gender-affirming care (including mental health care). The bill does so by prohibiting health care providers and insurers from providing health care records relating to gender-affirming care to persons seeking those records in response to out-of-state laws authorizing legal action against those receiving, or assisting a person in receiving, gender-affirming care. The bill also limits the ability of California courts to enforce subpoenas issued from out-of-state courts that seek medical records related to gender-affirming health care.

Second, this bill modifies several provisions of the Family Code that codify the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) to ensure that California courts can protect children and families from attempts by other states to enforce child abuse laws against families that simply come to California to receive gender-affirming care. The UCCJEA provides uniform rules for handling family law matters between states to ensure that parents involved in custody disputes cannot game one state against another in order to keep custody of a minor child. Generally, the UCCJEA seeks to

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[7] Ark. Stats. §§ 20-9-1502 & 20-9-1504.

[8] Migdon, *Missouri lawmakers consider extending proposed ban on gender-affirming care to adults*, The Hill (Apr. 22, 2022), https://thehill.com/changing-america/respect/equality/3460403-missouri-lawmakers-consider-extending-proposed-ban-on-gender-affirming-care-to-adults/.

[9] Yang, *Idaho bill that criminalizes medical trans youth treatments passes house*, The Guardian (Mar. 10, 2022), https://www.theguardian.com/us-news/2022/mar/10/idaho-bill-trans-youth-treatment-ban-passes-house.

ensure that the courts of the child's home state retain jurisdiction over family law matters, even if the child is moved to another state. However, certain exceptions apply, especially in cases of emergencies or when alleged abuse is involved. This bill expands upon the emergency provisions in California's codification of the Act to add cases in which a child is in California to obtain, or having previously obtained, gender-affirming healthcare to the list of instances in which California courts may retain jurisdiction over a family law matter. The bill further clarifies the provisions of the Act, as applied in California, to direct California courts to not apply the anti-transgender laws of other jurisdictions and instead apply California's more protective statutes.

Finally, this bill amends several sections of the Penal Code to ensure that California law enforcement are not forced to help other states' criminal action against persons who help a transgender youth obtain gender-affirming health care. Among other things, the bill:

- Provides that California law enforcement agencies shall not make or intentionally participate in the arrest of an individual pursuant to an out-of-state warrant for violation of another state's law against providing, receiving, or allowing a child to receive gender-affirming health care and gender-affirming mental health care that is legal in California, to the fullest extent permitted by federal law; and
- Prohibits California law enforcement from making or participating in any extradition of an individual pursuant to an out-of-state warrant for violation of another state's law against providing, receiving, or allowing a child to receive gender-affirming health care or gender-affirming mental health care, if the care is permitted under California law, to the fullest extent permitted by federal law.[10]

Collectively, these measures are intended to prevent California or its residents from being complicit in a lawsuit intended to impose civil or criminal liability for helping a youth obtain medical care that is legal under California law.

Many of the bill's opponents argue that the Legislature should vote against this bill because of what they characterize as the risks of gender-affirming care. While this bill has not been heard by either house's Health Committee, this state has repeatedly approved measures to ensure that gender-affirming health care and mental care are available to individuals.[11] This State has thus already come down in favor of permitting

[10] Under the United States Constitution's Extradition Clause and its enacting statute, the executive authority of a state may demand extradition of a fugitive (i.e., person who fled the jurisdiction) from the jurisdiction to which the fugitive fled and the executive of the state where the fugitive is located is required to cause the fugitive to be arrested and secured for 30 days so that an agent from the demanding state may return the fugitive to the jurisdiction. (U.S. Const., art. IV, § 2, cl. 2; 18 U.S.C. § 3182.) Because the bill's provisions clarify that law enforcement's obligation not to participate in an extradition demand extends " to the fullest extent permitted by federal law," it does not appear that the bill runs afoul of the fugitive extradition provisions.

[11] *E.g.*, AB 2218 (Santiago, Ch. 181, Stats. 2020) ; AB 2119 (Gloria, Ch. 385, Stats. 2018); *see also, e.g.*, 10 Cal. Code Regs., §§ 2561.1-2561.2 (prohibiting health insurer from refusing to cover health care services

transgender individuals to obtain gender-affirming medical and mental health care recommended by a medical professional. And while these procedures may pose some risk—virtually every procedure does—those risks must be weighed against the known, heartbreaking rates of suicide, attempted suicide, and suicidal ideation for transgender youths who do not obtain gender-affirming care. On balance, the benefits of gender-affirming care for transgender youth militate in favor of the State's current policy of allowing medical professionals to use their expert medical judgment to decide what care is appropriate, rather than deciding, on a blanket basis, what medical care should be available to a diverse group of individuals.

Relatedly, several of the bill's opponents accuse SB 107 of taking away the parental right to parent a child. This argument is confusing because it is the other states' anti-transgender laws and orders that have removed the ability of parents to make medical decisions for their children—even to the point of criminalizing a parent's choice to help their child obtain gender-affirming care. SB 107, on the other hand, does the opposite: provides parents assurances that, if they come to California with their child to obtain medical care for the child, their own parental choice will not be subject to second-guessing by their home state. So again, this bill simply reaffirms that parents and doctors, not legislators trying to score points in the culture wars, should decide what medical care is best for their children and patients, wherever they reside.

4. <u>Constitutional issues: the Full Faith and Credit Clause</u>

This bill, and the other states' laws this bill responds to, implicate the Constitution's Full Faith and Credit Clause. The Full Faith and Credit Clause states:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.[12]

The primary function of the Clause, it is generally agreed, is to require states to recognize judgments from other state courts, so that "a cause of action merged in a judgment in one state is likewise merged in every other."[13] Less clear, however, is how

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related to gender transition if coverage is available for the services when not in connection with gender transition).

[12] U.S. Const., art. IV, § 1.

[13] *Magnolia Petroleum Co. v. Hunt* (1943) 340 U.S. 430, 439; *see Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assn.* (1982) 455 U.S. 691, 703-704 ("Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. [Citations.] Recognizing that this risk of relitigation inheres in our federal system, the Framers provided that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.' ").

the Clause's mandate that states recognize each other's "public acts" operates in cases like this one—when one state's public acts purport to penalize conduct taking place in another state which is legal in that other state.

While Committee staff are not aware of any current state laws that *explicitly* prohibit a resident from obtaining gender-affirming care for a minor in a state where the care is legal, the clear intent of these laws are to chill parents' and providers' willingness to help transgender youth obtain such care. There is, however, precedent suggesting that a state's attempt to penalize gender-affirming care provided in California would violate the Clause in the first instance. The Supreme Court has held that "[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate,"[14] which implies that another state may not functionally prohibit its residents from obtaining medical procedures and care in California that California has deemed permissible. Additionally, the constitutional right to interstate travel might nullify state attempts to penalize individuals for traveling out of state to obtain medical care.[15] Justice Kavanaugh has stated that state laws attempting to prohibit residents from traveling to another state to obtain an abortion would be invalid under the constitutional right to travel;[16] there is no apparent basis for treating travel for the purpose of gender-affirming care differently.

Until there is a final determination on whether the state laws penalizing obtaining gender-affirming care in another state are constitutional, however, this State is at risk of being involved in lawsuits against individuals who obtained, or who helped others to obtain, medical care that is legal here. The ambiguity is also likely to deter some parents who are concerned about the risk of prosecution or civil liability. The bill thus appears to serve a purpose despite the potential unconstitutionality of the anti-care bills. The next question is whether this bill, by prohibiting cooperation with other states, runs afoul of the Fill Faith and Credit Clause.

With respect to whether a state must prioritize another state's laws at the expense of its own, the Supreme Court has noted that a "rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."[17] Thus, the law now acknowledges a preference to uphold the public policy of the forum state when a conflict of laws arises, recognizing that, "the Full Faith and Credit Clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders…"[18] The Supreme

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[14] *Baker v. GMC* (1998) 522 U.S. 222 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n* (1939) 306 U.S. 493, 501) (internal quotation marks omitted).

[15] *See, e.g.*, *Edwards v. People of State of California* (1941) 314 U.S. 160, 173.

[16] *See Dobbs v. Jackson Women's Health Organization* (2022) 142 S.Ct. 2228, 2309 (Kavanaugh, J., concurring).

[17] *Alaska Packers Association v. Industrial Accident Commission* (1935) 294 U.S. 532, 547.

[18] *Pink v. AAA Highway Express, Inc.* (1941) 314 U.S. 201,210.

Court has recognized similar policy limitations with respect to state records, holding "just as the mechanisms for enforcing a judgment do not travel with the judgment itself for the purposes of Full Faith and Credit … similarly [a state] decree cannot determine the evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the [that state's court]."[19]

Most of the bill's provisions appear to fall neatly within California's right to set its own policies and procedures. For example, the UCCJEA is a uniform act adopted by the State and others to facilitate interstate child custody disputes, but there is no mandate requiring the State to facilitate disputes that run contrary to the State's policies. The same reasoning would apply to subpoenas issued by attorneys in other states—California's participation in an interstate subpoena recognition system is voluntary and can be adjusted by this Legislature. In the event that the bill's prohibition on enforcing or issuing subpoenas based on a foreign subpoena issued by another state's court are found to conflict with the Full Faith and Credit Clause, the bill's severability clause should save the remainder of the bill from being invalidated.

5. Comment from Senate Public Safety Committee

Senate Public Safety Committee staff provided the below comments regarding matters within their jurisdiction:

This bill enacts various safeguards against the enforcement of out-of-state anti-transgender laws to protect individuals seeking and providing gender-affirming health care in California. The provisions that affect enforcement of criminal laws and subpoenas issued in criminal matters are within the jurisdiction of the Senate Public Safety Committee, however, due to the fast-approaching deadline to approve or reject legislation by August 31, this bill will only be heard by the Senate Judiciary Committee which has jurisdiction over the civil aspects of this bill.

The criminal aspects of the bill prohibit law enforcement from knowingly making or participating in any extradition of an individual pursuant to an out-of-state arrest warrant for violation of another state's laws against providing, receiving, or allowing a child to receive gender-affirming health care and gender-affirming mental health care in this state, if that care is lawful under California's laws, to the fullest extent permitted by federal law. Additionally, this bill prohibits a state or local law enforcement agency from cooperating with or providing information to any individual or out-of-state agency or department regarding gender-affirming health care or gender-affirming mental health care.

This bill does not prohibit the investigation of any criminal activity in this state which may involve the performance of gender-affirming health care or gender-affirming

[19] *Baker v. General Motors Corp.* (1998) 522 U.S. 222, 239.

mental health care provided that no information relating to any medical procedure performed on a specific individual may be shared with an out-of-state agency or any other individual.

Additionally, this bill prohibits a provider of health care, health care service plan, or contractor from releasing medical information related to a person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to a foreign subpoena that is based on a violation of another state's laws authorizing criminal action against allowing a child to receive such care.

This bill is part of a broader legislative effort to protect persons from the actions of other states that criminalize the right of individuals to make health care decisions that are protected under California's laws. Other bills are focused on protecting persons from other states using California's courts and law enforcements to aid in the enforcement of their anti-abortion laws. The most comparative of those bills is AB 1242 (Bauer-Kahan, 2022) which also prohibits law enforcement from knowingly arresting or participating in the arrest of an individual for performing, supporting, or aiding in the performance of an abortion and prohibits cooperating with or providing information to another state regarding an abortion that is lawful in California.

Generally, the laws of the state regulate conduct that occurs within that state. However, situations may arise where more than one state's laws may apply such as collection of previously-owed income taxes or child support obligations from another state. Or one state has jurisdiction to criminally prosecute an offense because someone has fled the state or committed part of the crime in the prosecuting state. Under the United States Constitution, states are required to provide full faith and credit to "to the public acts, records, and judicial proceedings of every other state."[20]

The Full Faith and Credit Clause may be implicated when there is a conflict between the laws of the different states. At least one court has held that any effort by a state to apply its criminal laws beyond its state borders to criminalize activity that is otherwise lawful in the other state.[21] However, the Supreme Court has also held that even when criminal conduct takes place outside of the state, extraterritorial jurisdiction may be proper when the conduct was intended to produce or did produce harmful effects within the state.[22]

The Supreme Court has also made a distinction between the strength of the Full Faith and Credit Clause's applications to judgements versus state law. "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. Regarding judgments, however, the full faith and credit obligation is exacting. A final

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[20] U.S. Const. art. IV, sec. 1.
[21] *Bigelow v. Virginia* (1975) 421 U.S. 809.
[22] *Strassheim v. Daily* (1911) 221 U.S. 280.

judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.' "[23] This concept is often referred to as the "public policy exception" meaning statutes in on states is given effect only if they do not contravene the public policy of the other state.

By refusing to recognize the laws of another state, this bill appears to implicate the Full Faith and Credit Clause. Additionally, by prohibiting a custodian of records (i.e., a health care provider, service plan, or contractor) to produce business records related to the receipt of gender-affirming health care pursuant to a subpoena issued in a criminal action in another state, this bill likely implicates the provisions of the Full Faith and Credit Clause.

A challenge based on a violation of the Full Faith and Credit Clause would likely be met with a response that the public policy exception applies. Whether such exception applies is ultimately up to the courts.

6. Arguments in support

According to Equality California, one of the co-sponsors of the bill:

> Despite longstanding evidence demonstrating how anti-LGBTQ+ legislation inflicts measurable harm on the health and well-being of the LGBTQ+ community, hundreds of anti-LGBTQ+ bills have been proposed nationally in 2022, and roughly half of those bills target the transgender community. One proposal alleged that gender-affirming care for transgender youth constitutes child abuse and should be grounds to remove children from the parents who support and affirm them. Other states are attempting to classify the provision of gender-affirming health care as a crime warranting prison time and are threatening parents with criminal penalties if they attempt to travel to another state in order to secure life-saving gender-affirming care for their child. While attacks on the transgender community are not new, we are experiencing alarmingly blatant attempts to use legislation, policy, and political rhetoric to restrict or eliminate the autonomy, freedom, and existence of transgender people across the country.
>
> While anti-LGBTQ+ legislation inflicts measurable harm on our communities, it is important to remember that the reverse is also true—pro-equality policies are a boon to LGBTQ+ youth, who attempt less often when they have access to LGBTQ+ and gender-affirming spaces at home, at school, with friends and family, and in their broader communities. SB 107 will move the needle toward a California that is healthy, just, and fully equal for all LGBTQ+ people and for transgender youth in particular.

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[23] *Baker*, *supra*, 522 U.S. at 232-233.

7. Arguments in opposition

This bill is opposed by several out-of-state anti-transgender organizations as well as the California Family Council. As the only wholly California-based opponent to this bill, the California Family Council writes:

> Despite what the bill author says, there is no universal agreement within the medical community regarding the best way to provide healthcare to transgender-identified individuals. The governments and medical institutions of the United Kingdom, Sweden, and Finland have rejected prioritizing "gender-affirming" treatment in favor of an emphasis on mental health.
>
> The vast majority of minors with gender dysphoria desist by adulthood if they are not transitioned and given puberty blockers and cross-sex hormones. Because of this, many doctors and medical professionals refuse to provide transitioning drugs and surgeries, especially on minors, knowing the long-term side effects and the lack of hard scientific evidence regarding the efficacy of "gender-affirming" treatments.

SUPPORT

Equality California (co-sponsor)
Lieutenant Governor Eleni Kounalakis (co-sponsor)
Planned Parenthood Affiliates of California (co-sponsor)
ACLU California Action
American Urological Association
California Coalition for Youth
California Insurance Commissioner Ricardo Lara
California Medical Association
California Nurse Midwives Association
City of Encinitas
City of Long Beach
City of West Hollywood
County of Los Angeles District Attorney's Office
County of San Mateo
NARAL Pro-Choice California
National Association of Social Workers – California Chapter
Society for Pediatric Urology

OPPOSITION

Alliance Defending Freedom
American College of Pediatricians
California Capitol Connection
Changed Movement

Concerned Women for America
International Federation for Therapeutic & Counselling Choice
Our Duty

RELATED LEGISLATION

Pending Legislation:

AB 2521 (Santiago, 2022) renames the Transgender Wellness and Equity Fund the Transgender, Gender Nonconforming, or Intersex Wellness and Equity Fund and defines the terms transgender, gender non-conforming, and intersex. AB 2521 has been passed by the Legislature and is awaiting the Governor's signature.

AB 2091 (Mia Bonta, 2022) prohibits the validation of foreign subpoenas pertaining to a foreign penal civil action and the sharing of specified information in response to subpoenas related to out-of-state anti-abortion statutes or foreign penal civil actions; authorizes the Insurance Commissioner to issue civil penalties against health insurers who violate the confidentiality of an insured's medical information; and prohibits prison staff from disclosing identifying medical information related to an incarcerated person's right to seek and obtain an abortion if the information is being requested is based on out-of-state anti-abortion statutes or foreign penal civil actions. AB 2091 is pending on the Senate Floor.

AB 1666 (Bauer-Kahan, 2022) declares that a law of another state that authorizes a person to bring a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in those actions, is contrary to the public policy of this state and prohibits this state from applying that law to a case or controversy heard in state court and the enforcement or satisfaction of a civil judgment received under that law. This bill provides that its provisions are severable, and declares that it is to take effect immediately as an urgency statute. AB 1666 is pending on the Senate Floor.

AB 1242 (Bauer-Kahan, 2022) prohibits law enforcement from knowingly arresting a person for performing or aiding in the performance of a lawful abortion or for obtaining an abortion and prohibits public agencies from cooperating with or providing information to an individual or agency from another state or federal law enforcement agency regarding a lawful abortion, except as provided. AB 1242 is pending on the Senate Floor.

Prior Legislation:

AB 2218 (Santiago, Ch. 181, Stats. 2020) established the Transgender Wellness and Equity Fund within the Office of Health Equity in the Department of Public Health, for the purpose of funding grants to organizations serving people that identify as

transgender, gender nonconforming, or intersex (TGI), to create or fund TGI-specific housing programs and partnerships with hospitals, health care clinics, and other medical providers to provide TGI-focused health care, as defined, and related education programs for health care providers

AB 2119 (Gloria, Ch. 385, Stats. 2018) clarified the right of foster youth to gender-affirming health care and gender-affirming mental health care and required the Department of Social Services to develop and issue written guidance regarding foster youth access to gender affirming health care and gender affirming mental health care by January 1,2020.

PRIOR VOTES:

Assembly Floor (Ayes 59, Noes 18)
Assembly Appropriations Committee (Ayes 11, Noes 4)
Assembly Public Safety Committee (Ayes 5, Noes 2)
Assembly Judiciary Committee (Ayes 7, Noes 1)
[Prior votes not relevant]

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