

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 345 (Skinner)  
Version: April 10, 2023  
Hearing Date: April 25, 2023  
Fiscal: Yes  
Urgency: No  
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**SUBJECT**

Health care services: legally protected health care activities

**DIGEST**

This bill enacts various safeguards against the enforcement of other states' laws that prohibit, criminalize, sanction, authorize a person to bring a civil action against, or otherwise interfere with a person, provider, or other entity in California that seeks, receives, causes, aids in access to, aids, abets, provides, or attempts or intends to seek, receive, cause, aid in access to, aid, abet, or provide, reproductive health care services or gender-affirming health care services.

**EXECUTIVE SUMMARY**

Since the 1973 holding in *Roe v. Wade*, the U.S. Supreme Court has continuously held that it is a constitutional right to access abortion before fetal viability. However, on June 24, 2022 the Court voted 6-3 to overturn the holding in *Roe* and found that there is no federal constitutional right to an abortion. As a result of the *Dobbs* decision, people in roughly half the country may lose access to abortion services or have them severely restricted. In addition, a growing number of states have been passing laws putting residents who seek essential gender-affirming care at risk of being prosecuted. States are attempting to classify the provision and seeking 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. Though California has enacted numerous laws to protect the right to gender-affirming care and the fundamental right to reproductive freedom, without federal protections there is nothing prohibiting those providing or seeking abortion or gender-affirming health care from being criminalized or held liable in other states. This bill seeks to address this issue in a myriad of ways including: prohibiting the sharing of information that is sought through subpoenas or a warrant for an out-of-state prosecution or law suit when the information is related to the legally protected health

care in California, authorizing a new cause of action for a person who is subject to abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, and prohibiting a business from tracking, using, storing, or selling geographic location data of a person physically located in or in close proximity to a family planning center. Similar laws were passed last year in Massachusetts and Colorado, and states such as New York have similar legislation pending currently.

The bill is sponsored by ACCESS Reproductive Justice, Black Women for Wellness Action Project, NARAL Pro-Choice California, and Training in Early Abortion for Comprehensive Healthcare. The bills is supported various reproductive rights organizations, medical associations, and other organizations. The bill is opposed by the California Catholic Conference and Frederick Douglass Foundation of California. The bill passed the Senate Committee on Public Safety on a vote of 4 to 0.

### **PROPOSED CHANGES TO THE LAW**

Existing federal law:

- 1) Provides that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state, and that the United States Congress may by general laws prescribe the manner in which such acts, records, and proceedings must be proved, and the effect thereof. (U.S. Const. art. IV, sec. 1.)
- 2) Provides that records and judicial proceedings of any court of any such 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, so 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.)

Existing state law:

- 1) Prohibits the state from denying or interfering with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. Specifies that this provision is intended to further the constitutional right to privacy guaranteed by Section 1 of Article I of the California Constitution, and the constitutional right to not be denied equal protection guaranteed by Section 7 of Article I of the California Constitution, and that nothing herein narrows or limits the right to privacy or equal protection. (Cal. Const., art. I, § 1.1.)

- 2) Provides that all people are by nature free and independent and have inalienable rights including, among others, the right to privacy. (Cal. Const., art. I, § 1.)
- 3) Provides that a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. (Cal. Const., art. I, § 7.)
- 4) Holds that the state constitution's express right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.)
- 5) Establishes the Reproductive Privacy Act and provides that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions and, therefore, it is the public policy of the State of California that:
  - a) every individual has the fundamental right to choose or refuse birth control;
  - b) every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions; and
  - c) the state shall not deny or interfere with a person's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted (Health & Saf. Code § 123460 et. seq., § 123462.)
- 6) Provides that the state may not deny or interfere with a person's right to choose or obtain an abortion prior to viability of the fetus or when the abortion is necessary to protect the life or health of the person. (Health & Safe. Code § 123466.)
- 7) Provides that a law of another state that authorizes a person to bring a civil action against a person or entity who does any of the following is contrary to the public policy of this state:
  - a) receives or seeks an abortion;
  - b) performs or induces an abortion;
  - c) knowingly engages in conduct that aids or abets the performance or inducement of an abortion; or
  - d) attempts or intends to engage in the conduct described in a) through c). (Health & Safe. Code § 123467.5(a).)
- 8) Provides various safeguards against the enforcement of other states' laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California. (Civ. Code § 56.109, Code of Civ. Proc. § 2029.300 & 2029.350, Fam. Code § 3421, 3424, 3427, 3428, and 3453.5.)
- 9) 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 of Civ. Proc. § 410.10.)

- a) Requires a court to grant a stay of enforcement under certain circumstances including any circumstance that exists where the interests of justice require a stay of enforcement. (Code of Civ. Proc. § 1710.50.)
- 10) Establishes the California Consumer Privacy Act (CCPA), as amended by Proposition 24 (2020), which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)

This bill:

- 1) States that California law governs in any action, whether civil, administrative, or criminal, against any person who provides, receives, aids or abets in providing or receiving, or attempts to provide or receive, by any means, including telehealth, reproductive health care services and gender-affirming health care services, including gender-affirming mental health care services if the care was legal in the state in which it was provided at the time of the challenged conduct.
- 2) Declares that access to reproductive health care services and gender-affirming health care services is a right secured by the Constitution and laws of California and that interference with this right, whether or not under the color of law, is against the public policy of California.
- 3) Provides that it is abusive litigation to litigate or take other legal action to deter, prevent, sanction, or punish a person engaging in legally protected health care activity by either of the following:
  - a) filing or prosecuting an action in a state other than California where liability, in whole or part, directly or indirectly, is based on a legally protected health care activity that was legal in the state in which it occurred, including an action in which liability is based on a theory of vicarious, joint, or several liability; or
  - b) attempting to enforce an order or judgment issued in connection with an action described in (b) above by a party to the action or a person acting on behalf of a party to the action. A lawsuit is to be considered to be based on conduct that was legal in the state in which it occurred if a part of an act or omission involved in the course of conduct that forms the basis for liability in the lawsuit occurs or is initiated in a state in which the health care was legal, whether or not the act or omission is alleged or included in a pleading or other filing in the lawsuit.
- 4) Defines “legally protected health care activity” to mean any of the following:

- a) the exercise and enjoyment, or attempted exercise and enjoyment, by a person of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services secured by the Constitution or laws of California or the provision of insurance coverage for such services;
  - b) an act or omission undertaken to aid or encourage, or attempt to aid or encourage, a person in the exercise and enjoyment or attempted exercise and enjoyment of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services secured by the Constitution or laws of California; or
  - c) the provision of the health care services by a person duly licensed under the laws of California and the provision of insurance coverage for the services, if the service is permitted under the laws of California, regardless of the patient's location.
- 5) Specifies that "legally protected health care activity" does not include a service rendered below the applicable professional standard of care or that would violate antidiscrimination laws of California.
  - 6) Defines "reproductive health care services" to mean and includes all services, care, or products of a medical, surgical, psychiatric, therapeutic, diagnostic, mental health, behavioral health, preventative, rehabilitative, supportive, consultative, referral, prescribing, or dispensing nature relating to the human reproductive system provided in accordance with the constitution and laws of this state, whether provided in person or by means of telehealth services which includes, but is not limited to, all services, care, and products relating to pregnancy, assisted reproduction, contraception, miscarriage management, the termination of a pregnancy, or self-managed terminations.
  - 7) Provides that "gender-affirming health care services" and "gender-affirming mental health care services" have the same meaning as defined in paragraph (3) of subdivision (b) of Section 16010.2 of the Welfare and Institutions Code.
  - 8) States that a public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, authorizes a person to bring a civil action against, or otherwise interferes with a person, provider, or other entity in California that seeks, receives, causes, aids in access to, aids, abets, provides, or attempts or intends to seek, receive, cause, aid in access to, aid, abet, or provide, reproductive health care services or gender-affirming health care services shall be an interference with the exercise and enjoyment of the rights secured by the Constitution and laws of California and shall be a violation of the public policy of California.
  - 9) States that if a person, including a plaintiff, prosecutor, attorney, or law firm, whether or not acting under color of law, engages or attempts to engage in abusive

litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, then an aggrieved person, provider, carrier, or other entity, including a defendant in the abusive litigation, may institute and prosecute a civil action for injunctive, monetary, or other appropriate relief within three years after the cause of action accrues.

- 10) States that an aggrieved person, provider, or other entity, including a defendant in abusive litigation, may move to modify or quash a subpoena issued in connection with abusive litigation on the grounds that the subpoena is unreasonable, oppressive, or inconsistent with the public policy of California.
- 11) Provides that if the court finds for the petitioner in a civil action for abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, recovery is to be in the amount of three times the amount of actual damages, which includes damages for the amount of a judgment issued in connection with an abusive litigation, and any other expenses, costs, or reasonable attorney's fees incurred in connection with the abusive litigation.
- 12) Authorizes a court to exercise jurisdiction over a person in a civil action for abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity if any of the following apply:
  - a) personal jurisdiction is found;
  - b) the person has commenced an action in a court in California and, during the pendency of that action or an appeal therefrom, a summons and complaint is served on the person or the attorney appearing on the person's behalf in that action or as otherwise permitted by law; or
  - c) the exercise of jurisdiction is permitted under the Constitution of the United States.
- 13) Specifies that the above provisions do not apply to a lawsuit or judgment entered in another state that is based on conduct for which a cause of action exists under the laws of California, including a contract, tort, common law, or statutory claims.
- 14) States that notwithstanding any other law, the laws of California shall govern in a case or controversy heard in California related to reproductive health care services or gender-affirming health care services, except as may be required by federal law.
- 15) Specifies that these provisions are not to be construed to provide jurisdiction over a California resident in an out-of-state forum when the California resident has not availed themselves of that forum.
- 16) Requires a court to grant a stay of enforcement when a money judgment or lien on real property was obtained against a person or entity for exercising a right

guaranteed under the United States Constitution as interpreted by the United States Supreme Court precedent at the time the right was exercised, or a right guaranteed under the California Constitution, or against a person or entity for aiding and abetting the exercise of said rights.

- 17) Prohibits a business that tracks, uses, collects, or stores geographic location data from tracking, using, storing, or selling data that contains the personally identifying information of a person physically located in or in close proximity to a family planning center, as defined. Authorizes an aggrieved person or entity, including a family planning center, to institute and prosecute a civil action against any person or business who violates this prohibition for injunctive and monetary relief and attorney's fees within three years of discovery of the violation.
- 18) Provides that notwithstanding any other law, a licensing board under the Department of Consumer Affairs cannot suspend or revoke the license of a person solely because that person provided a legally protected health care activity, as defined.
- 19) Provides that performance, recommendation, or provision of a legally protected health care activity by a health care practitioner acting within their scope of practice for a patient who resides in a state in which the performance, recommendation, or provision of that legally protected health care activity is illegal, does not, by itself, constitute professional misconduct, upon which discipline or other penalty may be taken.
- 20) Expands the exemption to the definition of murder to include a mother who committed the act that resulted in the death of the fetus and makes other technical changes.
- 21) States that notwithstanding any law, and except as required by federal law, a demand for the extradition of a person charged with any legally protected health care activity shall not be recognized by the Governor unless in accordance with Penal Code section 1548.2 including the requirement that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter the person fled from that state.
- 22) Replaces the term "unborn children" and "unborn person" to "fetus" in various provisions including, among others, defining low-risk pregnancy conditions for determining the scope of authorization of a certificate to practice nurse-midwifery, defining active labor for health facility licensing provisions, and defining spouse for California State Teachers' Retirement System benefits
- 23) Replaces the term "unborn person" to "unborn beneficiary" in various sections of the Probate Code.

- 24) Contains a severability clause so that if any provision of this bill or its application is held invalid, that invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application.

## COMMENTS

### 1) Stated need for the bill

The author writes:

Since *Roe* was overturned last year, California has significantly strengthened and expanded access to reproductive health care and abortion services including legal protections to patients and providers and offered assistance and protection to patients who come to California. We have also protected and affirmed the right to gender-affirming care. But as the assault on essential healthcare accelerates, new challenges are emerging especially to health care providers who are extending a lifeline to their patients who may be in a state where medically safe and effective treatments are now illegal. SB 345 is needed to ensure that California healthcare practitioners are able to provide essential reproductive and gender affirming care to all of their patients, regardless of their patient's location, knowing that California is doing everything it can to protect them against the draconian laws of other states.

### 2) Reproductive rights

*Roe v. Wade* was the landmark U.S. Supreme Court decision that held the implied constitutional right to privacy extended to a person's decision whether to terminate a pregnancy, while allowing that some state regulation of abortion access could be permissible. ((1973) 410 U.S. 113; overruled by *Dobbs v. Jackson Women's Health* (2022) 142 S. Ct. 2228.) *Roe* has been one of the most debated U.S. Supreme Court decisions and its application and validity have been challenged numerous times, but its fundamental holding had continuously been upheld by the Court until June 2022. On June 24, 2022 the Court published its official opinion in *Dobbs* and voted 6-3 to overturn the holding in *Roe*.<sup>1</sup> The case involved a Mississippi law enacted in 2018 that banned most abortions after the first 15 weeks of pregnancy, which is before what is generally accepted as the period of viability. (see Miss. Code Ann. §41-41-191.) The majority opinion upholds the Mississippi law finding that, contrary to almost 50 years of precedent, there is no fundamental constitutional right to have an abortion. The opinion further provides that states should be allowed to decide how to regulate abortion and that a strong presumption of validity should be afforded to those state laws.<sup>2</sup>

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<sup>1</sup> *Dobbs v. Jackson Women's Health* (2022) 597 U.S. \_ (142 S. Ct. 2228) at p. 5, available at [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf).

<sup>2</sup> *Id.* at 77.



*a. Out-of-state statutes denying or chilling access to reproductive health care*

Texas perniciously enacted a law with an enforcement scheme that was designed to avoid judicial scrutiny of the law's clearly unconstitutional, at the time of enactment, provisions under the holding of *Roe* and *Casey*.<sup>3</sup> Texas abortion providers filed a case in an attempt to stop the law before it took effect seeking pre-enforcement review of the law and an injunction barring its enforcement. On certiorari from the Fifth Circuit, the U.S. Supreme Court held that a pre-enforcement challenge to the law under the U.S. Constitution may only proceed against certain defendants but not others.<sup>4</sup> The court did not address whether the law was constitutionally sound. However, the court's ruling essentially insulated the private enforcement of the law from challenge, allowing the law to remain in effect. The inability to challenge the law pre-enforcement allows it to stand as an ominous threat to all persons seeking or performing an abortion. This Texas law may very well be found to be constitutional under the holding of *Dobbs*.

The Texas law prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child, as specified, or failed to perform a test to detect a fetal heartbeat. (Tex. Health & Safety Code § 171.201 et seq. (enacted through Texas Senate Bill 8).) This law essentially places a near-categorical ban on abortions beginning six weeks after a person's last menstrual period, which is before many people even realize they are pregnant and occurs months before fetal viability.<sup>5</sup> The Texas law has far reaching implications, not solely for the person receiving an abortion or performing abortion services. This is evidenced in the provisions that prohibit anyone from "aiding and abetting" a person in obtaining an abortion, which could implicate and impose significant civil liability upon a person providing transportation to or from an abortion clinic, a person donating to a fund to assist individuals receiving an abortion, or even a person who simply discusses getting an abortion with someone. (Tex. Health & Safety Code § 171.208.) The Texas law provides that any person, other than an officer or employee of a state or local governmental entity in Texas, may bring a civil action to enforce its provisions, which includes liability of \$10,000 plus costs and fees if a plaintiff prevails while a defendant is prohibited from recovering their own costs and fees if they prevail. (*Id.* at § 171.201(b) & (i).) Other states have already followed suit.

Additionally, many abortion bans target providers of abortions through criminal and administrative penalties, in addition to civil liability. For example, in Texas it is a felony

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<sup>3</sup> See *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, at 543 (conc. opn. Roberts, C.J., Breyer, Sotomayor, & Kagan) that states Texas has passed a law that is contrary to *Roe* and *Casey* because it has "the effect of denying the exercise of what we have held is a right protected under the Federal Constitution" and was "designed to shield its unconstitutional law from judicial review." (footnote omitted).

<sup>4</sup> *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 530.

<sup>5</sup> See *Whole Woman's Health v. Jackson* (2021) 141 S. Ct. 2494, at 24998 (dis. opn. Sotomayor, Breyer, & Kagan).

to perform an abortion, unless it is needed to save the life of the patient, and provides for civil liability and licensure revocation. (Tex. Health & Safety Code § 171.201 et. seq.) In six states with abortion bans – Arkansas, Georgia, Idaho, Missouri, North Dakota, and Tennessee – prosecutors can criminally prosecute health care professionals for performing abortions and providers are only allowed to offer evidence that the procedure was necessary to save the patient until after they are charged.<sup>6</sup> These laws put providers in extremely difficult positions where they have to make legal and ethical judgments about treating a patient whose health or life may be in jeopardy while facing the very real potential of being held criminally or civilly liable or having their medical license threatened.

*b. California is a Reproductive Freedom State*

The California Supreme Court held in 1969 that the state constitution's implied right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.) This was the first time an individual's right to abortion was upheld in a court. In 1972 the California voters passed a constitutional amendment that explicitly provided for the right to privacy in the state constitution. (Prop. 11, Nov. 7, 1972 gen. elec.) California statutory law provides, under the Reproductive Privacy Act, that the Legislature finds and declares every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy; therefore, it is the public policy of the State of California that every individual has the fundamental right to choose or refuse birth control, and every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion. (Health & Saf. Code § 123462.) In 2019 Governor Newsom issued a proclamation reaffirming California's commitment to making reproductive freedom a fundamental right in response to the numerous attacks on reproductive rights across the nation.<sup>7</sup> In September 2021, more than 40 organizations came together to form the California Future Abortion Council (CA FAB) to identify barriers to accessing abortion services and to recommend policy proposals to support equitable and affordable access for not only Californians but all who seek care in the state.

In response to the *Dobbs* decision, California enacted a comprehensive package of legislation expanding, protecting, and strengthening access to reproductive health care, including abortions, for all Californians and people seeking such care in our state.<sup>8</sup> One such law, AB 1666 (Bauer-Kahan, Ch. 42, Stats. 2022) provided that a law of another

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<sup>6</sup> Christine Vestal, *Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, Pew Trusts (Sept. 1, 2022), available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies>.

<sup>7</sup> California Proclamation on Reproductive Freedom (May 31, 2019) available at <https://www.gov.ca.gov/wp-content/uploads/2019/05/Proclamation-on-Reproductive-Freedom.pdf>.

<sup>8</sup> Kristen Hwang, *Newsom signs abortion protections into law*, CalMatters (Sept. 27, 2022), available at <https://calmatters.org/health/2022/09/california-abortion-bills/>.

state that authorizes a person to bring a civil action against a person or entity who receives, seeks, performs, or induces an abortion, or knowingly engages in conduct that aids or abets the performance or inducement of an abortion, or attempts or intends to engage in such conduct, is contrary to the public policy of this state (Gov. Code § 123467.5.) Additionally, the voters overwhelmingly approved Proposition 1 (Nov. 8, 2022 gen. elec.), and enacted an express constitutional right in the state constitution that prohibits the state from interfering with an individual's reproductive freedom in their most intimate decisions.

3) Out of state bans on gender-affirming care and California policies to protect patients receiving such care

As California and other states have implemented policies to ensure that transgender individuals are not discriminated against and can obtain gender-affirming care, other states have targeted transgender individuals and providers of gender affirming care. 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.<sup>9</sup> Many states have been enacting statutes that potentially impose 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.<sup>10</sup> Arkansas prohibits a physician or other healthcare provider from providing or referring certain types of gender-affirming care for a minor; a violation or "threatened violation" can be punished through a professional board or a civil action.<sup>11</sup> SB 107 (Wiener, 2022; Ch. 810, Stats. 2022), among other things, prohibits the sharing of medical records regarding the receipt of gender-affirming care, the enforcement of out-of-state subpoenas seeking information regarding the receipt of gender-affirming medical care in California, and the enforcement of laws of another state that authorize the removal of a child from their parent or guardian and enforcement of out-of-state criminal laws related to gender-affirming health care. On September 29, 2022, Governor Newsom issued a signing statement for SB 107 that said "[i]n California we believe in equality and acceptance. We believe that no one should be prosecuted or persecuted for getting care they need – including gender-affirming care."<sup>12</sup>

4) Bill furthers the public policy of the State of California

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<sup>9</sup> 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).

<sup>10</sup> See Al. Code, § 26-26-4.

<sup>11</sup> Ark. Stats. §§ 20-9-1502 & 20-9-1504.

<sup>12</sup> Governor's signing statement on Sen. Bill 107 (2021-22 Reg. Sess.), available at <https://www.gov.ca.gov/wp-content/uploads/2022/09/SB-107-SIGNING.pdf?emrc=1a80c5>.

This bill seeks make additional changes to civil and criminal laws to protect patients and health care providers who provide patients with a legally protected health care activity and others who may aid or assist them. According to the background information provided by the author, “approximately 53% of abortions are done through medication rather than surgery, and 64% of abortions before the 10th week of gestation are done through medication rather than surgery. Medication abortion ends a pregnancy in its early stages. The medications are generally administered up to 10 weeks into a pregnancy, using a safe and effective two-drug protocol, mifepristone and misoprostol. The first drug, mifepristone, also known as ‘Mifeprex’ or ‘RU-486,’ blocks the action of the natural hormone progesterone on the uterus. This causes the lining of the uterus to shed, as it does during a period, and stops the growth of the pregnancy. This medication can be administered in the clinic, mailed to a patient’s location, or sent home with a patient. The second drug, misoprostol, causes the uterus to contract and initiates bleeding and cramping, Misoprostol is taken by the patient 6 to 72 hours after taking the first medication, mifepristone. Misoprostol completes the abortion.”

The author and sponsors note that because medication abortion necessarily involves a time lapse between when the patient interacts with the medical professional to receive the pills and two phases of medication, it is possible for people who travel to California to receive such services to also be present in another state over the course of the treatment, potentially opening them and the provided up for criminal prosecution or civil liability in that state.

This bill addresses this issue in multiple ways. The provisions of the bill that fall within the jurisdiction of this committee are:

- Allowing medical providers to provide abortion medication that is legal in California to a patient regardless of where the patient is located.
- Prohibiting the sharing of information that is sought through subpoenas or a warrant for an out-of-state prosecution or law suit when the information is related to legally protect health care activity.
- Authorizing a new cause of action in California that can be brought against a person who engages in abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity.
- Requiring a court to stay the enforcement of a money judgment or lien on real property that was obtained against a person or entity for exercising a right guaranteed under the United States Constitution as interpreted by the United States Supreme Court precedent at the time the right was exercised, or a right guaranteed under the California Constitution, or against a person or entity for aiding and abetting the exercise of said rights.
- Prohibiting a business from tracking, using, storing, or selling geographic location data of a person physically located in or in close proximity to a family planning center.

- Affirmatively stating that reproductive health care services and gender-affirming health care services is a right secured by the Constitution and laws of California, and that interference with this right, whether or not under the color of law, is against the public policy of California.

5) New cause of action and provisions related to limiting the enforcement of out-of-state statutes that infringe on or interferes with a legally protected health care activity

The bill provides that if a person, whether or not acting under color of law, engages or attempts to engage in abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, then an aggrieved person, provider, carrier, or other entity, including a defendant in the abusive litigation, may institute and prosecute a civil action for injunctive, monetary, or other appropriate relief within three years after the cause of action accrues. An aggrieved person may move to modify or quash a subpoena issued in connection with abusive litigation on the grounds that the subpoena is unreasonable, oppressive, or inconsistent with the public policy of California. The bill provides that a court may exercise jurisdiction over a person under this new cause of action if personal jurisdiction is found under California's long-arm statute, as permitted under the federal constitution, or the person has commenced an action in a court in California and, during the pendency of that action or an appeal therefrom, a summons and complaint is served on the person or the attorney appearing on the person's behalf in that action or as otherwise permitted by law. Under the new cause of action, a plaintiff can receive treble damages.

It is a bit unclear who exactly can bring this new cause of action in this state and what jurisdictional ties, if any they need to have with California. The author may wish to amend the bill to define an aggrieved person, provider, carrier, or other entity to specify who can be a plaintiff in this new cause of action. Additionally, the author may wish to make some technical amendments to these provisions to clarify some provisions and ensure consistency throughout by including the defined term gender-affirming mental health care services after every instance of gender-affirming health care services. The specific amendments can be found below.

In order to ensure this bill is limited to those situations where an out-of-state law is seeking to infringe on or interfere with, or attempt to infringe on or interfere with, a legally protected health care activity, the bill specifies that these provisions do not apply to a lawsuit or judgment entered in another state that is based on conduct for which a cause of action exists under the laws of California, including a contract, tort, common law, or statutory claim. It also provides that the laws of California are to govern in a case or controversy heard in California related to reproductive health care services or gender-affirming health care services, except as may be required by federal law. The bill also provides that a court is to grant a stay of enforcement where a money judgment or lien on real property was obtained against a person or entity for exercising a right

guaranteed under the United States Constitution as interpreted by the United States Supreme Court precedent at the time the right was exercised, or a right guaranteed under the California Constitution, or against a person or entity for aiding and abetting the exercise of said rights.

#### 6) Full Faith and Credit Clause

Article IV, Section 1 of the U. S. Constitution, known as the Full Faith and Credit Clause, requires every state to give full faith and credit to the public acts (statutes), records, and judicial proceedings of every other state. As the bill requires certain laws and judgments of other states to not be enforced in California, it potentially implicates the Full Faith and Credit Clause. Current legal scholarship regarding the Full Faith and Credit Clause posits that the clause applies differently to public acts (statutes), records, and judicial proceedings.<sup>13</sup> The current jurisprudence seems to provide that determinative judicial proceedings should be enforced in another jurisdiction as evidenced by the Court in *Baker v. General Motors Corp.* stating “for claim and issue preclusion purposes...the judgement of the rendering state gains nationwide force.” ((1998) 522 U.S. 222, 233; *see also Mills v. Duryee* (1813) 7 Cranch 481, 484-485 holding that the judgment of a court of one of the states was conclusive evidence in every court within the United States.) Public acts or statutes and state records; however, may not need to be as strictly enforced. (*see Alaska Packers Association v. Industrial Accident Comm.* (1935) 294 U.S. 532; *Adar v. Smith* (5th Cir. 2011) 639 F.3d 146.) The U.S. Supreme Court provides some guidance:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. “In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” 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 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. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.<sup>14</sup>

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<sup>13</sup> Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records* (2013) 62 Emory L.J. 639.

<sup>14</sup> *Baker v. GMC* (1998) 522 U.S. 222, 232-33 (internal citations omitted).

*a. Public policy exception for public acts*

The Court upheld the application of California law to settle a dispute of conflicting workers compensation statutes holding “[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.” (*Alaska Packers Association supra.* at 547.) The Court further stated: “Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.” (*Id.* at 547-48.) A few years later, the Court noted that “the Full Faith and Credit Clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders...” (*Pink v. AAA Highway Express, Inc.* (1941) 314 U.S. 201,210.) These cases seem to indicate that states can uphold their public policy and apply their laws when a conflict of laws arises in a forum in that state and not run afoul of the Full Faith and Credit Clause.

The bill provides that a public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, authorizes a person to bring a civil action against, or otherwise interferes with a person, provider, or other entity in California that seeks, receives, causes, aids in access to, aids, abets, provides, or attempts or intends to seek, receive, cause, aid in access to, aid, abet, or provide, reproductive health care services or gender-affirming health care services shall be an interference with the exercise and enjoyment of the rights secured by the Constitution and laws of California and shall be a violation of the public policy of California. Under current jurisprudence, these provisions may very well not run afoul of the Full Faith and Credit Clause as they could fall within the public policy exception for public acts. If California was compelled to enforce such an out-of-state law, it would require California to deny individuals their fundamental rights under state constitutional and statutory law. This would clearly lead to an “absurd result” as described by the Court in *Alaska Packers Association* and deprive individuals from exercising their fundamental rights.

*b. Civil Penal Actions*

The bill’s provisions that prohibit the enforcement of a civil judgment rendered under an out-of-state law that imposes civil liability related to an abusive litigation more directly implicates the Full Faith and Credit Clause because it prohibits the enforcement of a determinative judicial proceeding of another state. The Court has generally held, dating back to 1813, that states must recognize and enforce the judicial determinations of another state. (*Mills v. Duryee* (1813) 7 Cranch 481, 484-485.) However, the Court has intimated that there may be exceptions to this general rule, stating that states are not automatically required to enforce civil judgments of another state that are based on that

state's civil statutes when the goal or purpose of the civil statute is punishing a person for an offence against the "public justice." (*Huntington v Attrill* (1892) 146 U.S. 657, 673-674.) The *Huntington* court explained that whether or not a law [was] considered penal, and thus could not be enforced in the court of another jurisdiction, "depends on the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." (*Huntington v Attrill, supra*, 146 U.S. 657, 673-674.) Although the *Huntington* court held that the New York statute in question was not penal, as it related to compensating a victim of a fraud, the Supreme Court has continued to examine Full Faith and Credit Clause claims using the penal exception standard. (See *Milwaukee County v. M. E. White Company* (1935) 296 U.S. 268.)<sup>15</sup> The Supreme Court also continues to apply the *Huntington* analysis of whether a statute is penal in nature to this day. (See *Kokesh v. Securities & Exchange Commission* (2017) 137 S. Ct. 1635, 1642.) The bill's provisions may all within the civil penal action exception of the Full Faith and Credit Clause.

#### 7) Data privacy protection

This bill amends the CCPA to provide that a business that tracks, uses, collects, or stores geographic location data shall not track, use, store, or sell data that contains the personally identifying information of a person physically located in or in close proximity to a family planning center. A family planning center is defined as a business categorized as a family planning center by the North American Industry Classification System adopted by the United States Census Bureau, including, but not limited to, an abortion clinic, birth control clinic, pregnancy counseling center, or reproductive health services center. A person who is aggrieved by a violation of this prohibition can bring a cause of action for injunctive and monetary relief, including attorney's fees, within three years of discovery of the violation.

This provision of the bill, as currently drafted, is not as clear and straight forward as it could be. As such the author may wish to amend the bill to simply prohibit a person or business from tracking, using, storing, or selling geographic data that contains the personally identifying information of a person physically located in or in close proximity to a family planning center. Additionally, the author may wish to amend the definition of "family planning" center to more closely track the provisions of the bill and specify that it includes a clinic or center that provides reproductive health care services, as defined. The specific amendments can be found below.

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<sup>15</sup> Asm. Judiciary Comm. Analysis of Asm. Bill 1666 (2021-2022 Reg. Sess.) as amended March 24, 2022, pp. 8-9.



8) Proposed amendments

A mock-up of the amendments in context to address the issues set forth in the Comments, above, is attached to this analysis.<sup>16</sup>

9) Statements in support

Equality California writes in support stating:

Following the U.S. Supreme Court decision in *Dobbs v. Jackson*, the Legislature passed and the Governor signed a package of bills making California a sanctuary state for abortion services and gender-affirming care. In addition, in the November election, California voters enacted a constitutional amendment guaranteeing the right to abortion and contraception.

Meanwhile, a growing number of states have been passing laws putting residents who seek essential gender-affirming care and reproductive health care services at risk of being prosecuted. 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 lifesaving 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.

SB 345 will help ensure the availability of such care by providing additional protections to providers who prescribe or dispense medication abortion, provide other reproductive health care services, or provide gender-affirming care.

10) Statements in opposition

The Right to Life League writes in opposition stating:

As currently drafted, SB 345 is unconstitutional on its face, ignoring and even criminalizing [sic] the enforcement of valid, out-of-state laws in violation of Article Full Faith and Credit Clause. Its sweeping language evinces a special 'policy of hostility' towards other states. It is a blatant attempt to supplant the clear and unambiguous ruling of the Supreme Court in *Dobbs* which specifically left the matter of abortion regulation to the states.

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<sup>16</sup> The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel as well as the addition of co-authors.

The Supreme Court has interpreted the full Faith and Credit Clause to require states to open their courts to claims based on other states' laws under various circumstances. Furthermore, in *Franchise Tax Board v. Hyatt (Franchise Tax Board II)*, the Court explained that the Full Faith and Credit Clause forbids states from applying a special rule of law that evinces a 'policy of hostility' towards other states.

### **SUPPORT**

ACCESS Reproductive Justice (sponsor)  
Black Women for Wellness Action Project (sponsor)  
NARAL Pro-Choice California (sponsor)  
Training in Early Abortion for Comprehensive Healthcare (sponsor)  
Aria Medical Clinic  
Black Women Lawyers Association of Los Angeles, Inc.  
Board of Registered Nursing  
California Association of Black Lawyers  
California Legislative Women's Caucus  
California Nurse Midwives Association  
Center for Reproductive Rights  
Choix Inc.  
Conference of California Bar Associations  
Health Care Workers  
John M. Langston Bar Association  
Mya Network  
NCJW of Kansas City  
Plan C  
Reproductive Health Access Project  
Senator Shelley B. Mayer, Deputy Majority Leader, 37<sup>th</sup> District of the State of New York  
Tia, Inc.  
6 individuals

### **OPPOSITION**

Frederick Douglass Foundation of California  
Right to Life League  
1 individual

### **RELATED LEGISLATION**

#### **Pending Legislation:**

SB 36 (Skinner, 2023) prohibits the issuance of warrants for those whose offense pursuant to the laws of another state is related to abortion, contraception, reproductive

care, and gender-affirming care legally protected in California. This bill is currently pending in the Senate Appropriations Committee.

AB 1707 (Pacheco, 2023) prohibits a healing arts board under the Department of Consumer Affairs from denying an application for a license or imposing discipline upon a licensee on the basis of a civil judgment, criminal conviction, or disciplinary action in another state that is based on the application of another state's law that interferes with a person's right to receive sensitive services, as defined. This bill is currently pending in the Assembly Appropriations Committee.

Prior Legislation:

SR 9 (Skinner, Stats. 2023) urges the President of the United States and the United States Congress to enact federal legislation that guarantees the right to reproductive freedom, including abortion and contraception.

SB 107 (Wiener, Ch. 810, Stats. 2022) enacted various safeguards against the enforcement of other states' laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California.

AB 1666 (Bauer-Kahan, Ch. 42, Stats. 2022) prohibited the enforcement in this state of out-of-state laws authorizing 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 and declares those out-of-state laws to be contrary to the public policy of this state.

AB 2091 (Mia Bonta, Ch. 628, Stats. 2022), among other things, prohibited compelling a person to identify or provide information that would identify an individual who has sought or obtained an abortion in a state, county, city, or other local criminal, administrative, legislative, or other proceeding if the information is being requested based on another state's laws that interfere with a person's right to choose or obtain an abortion or a foreign penal civil action.

AB 2223 (Wicks, Ch. 629, Stats. 2022), among other things, authorized a party aggrieved by a violation of the Reproductive Privacy Act to bring a civil action against an offending state actor, as specified, and provides that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

**PRIOR VOTES:**

Senate Committee on Public Safety (4 Ayes, 0 Noes)

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## MOCK-UP OF PROPOSED AMENDMENTS TO SEC. 3 AND SEC. 4 OF THE BILL

**SEC. 3.** Title 1.81.49 (commencing with Section 1798.99.90) is added to Part 4 of Division 3 of the Civil Code, to read:

### TITLE 1.81.49. Family Planning Center Location Data

**1798.99.90.** (a) A ~~business that tracks, uses, collects, or stores geographic location data~~ *person or business* shall not track, use, store, or sell *geographic* data that contains the personally identifying information of a person physically located in or in close proximity to a family planning center.

(b) For purposes of this section, “family planning center” means a business categorized as a family planning center by the North American Industry Classification System adopted by the United States Census Bureau, including, but not limited to, ~~an abortion clinic, birth control clinic, pregnancy counseling center, or reproductive health services center.~~ *a clinic or center that provides reproductive health care services, as defined pursuant to Section 1798.300 of the Civil Code.*

(c) An aggrieved person or entity, including a family planning center, may institute and prosecute a civil action against any person or business who violates this section for injunctive and monetary relief and attorney’s fees within three years of discovery of the violation.

**SEC. 4.** Title 1.81.7 (commencing with Section 1798.300) is added to Part 4 of Division 3 of the Civil Code, to read:

### TITLE 1.81.7. Reproductive and Gender-Affirming Health Care Services

**1798.300.** As used in this title, the following definitions apply:

(a) “Abusive litigation” means litigation or other legal action to deter, prevent, sanction, or punish a person engaging in legally protected health care activity by either of the following:

(1) Filing or prosecuting an action in a state other than California where liability, in whole or part, directly or indirectly, is based on a legally protected health care activity that was legal in the state in which it occurred, including an action in which liability is based on a theory of vicarious, joint, or several liability.

(2) Attempting to enforce an order or judgment issued in connection with an action described in paragraph (1) by a party to ~~the that~~ action or a person acting on behalf of a party to ~~the that~~-action. ~~A lawsuit~~ *An action* shall be considered to be based on conduct that was legal in the state in which it occurred if a part of an act or omission involved in

the course of conduct that forms the basis for liability in the ~~lawsuit~~ *action* occurs or is initiated in a state in which the health care was legal, whether or not the act or omission is alleged or included in a pleading or other filing in the lawsuit.

*(b) "Aggrieved person, provider, or other entity" includes, but is not limited to, a person who resides in California, a business or entity doing business in the state or located in the state, a person or entity that provided a legally protected health care activity in California, a person who received a legally protected health care activity from a provider licensed in California, a person or entity that is licensed in California to provide a legally protected health care activity, including a provider, clinic, or insurance company, or a person who assisted a person or entity that received or provided a legally protected health care activity in California.*

~~(b)~~ *(c)* "Gender-affirming health care services" and "gender-affirming mental health care services" have the same meaning as defined in paragraph (3) of subdivision (b) of Section 16010.2 of the Welfare and Institutions Code.

~~(c)~~ *(d)*(1) "Legally protected health care activity" means any of the following:

(A) The exercise and enjoyment, or attempted exercise and enjoyment, by a person of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services secured by the Constitution or laws of California or the provision of insurance coverage for such services.

(B) An act or omission undertaken to aid or encourage, or attempt to aid or encourage, a person in the exercise and enjoyment or attempted exercise and enjoyment of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services secured by the Constitution or laws of California.

(C) The provision of ~~the health care services~~ *reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services* by a person duly licensed under the laws of California and the provision of insurance coverage for ~~the~~ *such* services, if the service is permitted under the laws of California, regardless of the patient's location.

(2) "Legally protected health care activity" does not include a service rendered below the applicable professional standard of care or that would violate antidiscrimination laws of California.

~~(d)~~ *(e)* "Reproductive health care services" means and includes all services, care, or products of a medical, surgical, psychiatric, therapeutic, diagnostic, mental health, behavioral health, preventative, rehabilitative, supportive, consultative, referral, prescribing, or dispensing nature relating to the human reproductive system provided in accordance with the constitution and laws of this state, whether provided in person or by means of telehealth services which includes, but is not limited to, all services, care,

and products relating to pregnancy, assisted reproduction, contraception, miscarriage management, the termination of a pregnancy, or self-managed terminations.

**1798.301.** ~~Access to reproductive~~ *Reproductive* health care services and gender-affirming health care services is a right secured by the Constitution and laws of California. Interference with this right, whether or not under the color of law, is against the public policy of California.

**1798.302.** A public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, authorizes a person to bring a civil action against, or otherwise interferes with a person, provider, or other entity in California that seeks, receives, causes, aids in access to, aids, abets, provides, or attempts or intends to seek, receive, cause, aid in access to, aid, abet, or provide, reproductive health care ~~services or~~ *services*, gender-affirming health care *services, or gender-affirming health care* services shall be an interference with the exercise and enjoyment of the rights secured by the Constitution and laws of California and shall be a violation of the public policy of California.

**1798.303.** If a ~~person, including a plaintiff, prosecutor, attorney, or law firm,~~ *person* whether or not acting under color of law, engages or attempts to engage in abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, then an aggrieved person, provider, carrier, or other entity, including a defendant in the abusive litigation, may institute ~~and prosecute~~ a civil action for injunctive, monetary, or other appropriate relief within three years after the cause of action accrues.

**1798.304.** An aggrieved person, provider, or other entity, including a defendant in abusive litigation, may move to modify or quash a subpoena issued in connection with abusive litigation on the grounds that the subpoena is unreasonable, oppressive, or inconsistent with the public policy of California.

**1798.305.** If the court finds for the petitioner in an action authorized by Section 1798.303, recovery shall be in the amount of three times the amount of actual damages, which shall include damages for the amount of a judgment issued in connection with an abusive litigation, and any other expenses, costs, or reasonable attorney's fees incurred in connection with the abusive litigation.

**1798.306.** (a) A court may exercise jurisdiction over a person in an action authorized by Section 1798.303 if any of the following apply:

(1) Personal jurisdiction is found under Section 410.10 of the Code of Civil Procedure.

(2) The person has commenced an action in a court in California and, during the pendency of that action or an appeal therefrom, a summons and complaint is served on

the person or the attorney appearing on the person's behalf in that action or as otherwise permitted by law.

(3) The exercise of jurisdiction is permitted under the Constitution of the United States.

(b) This section does not apply to a lawsuit or judgment entered in another state that is based on conduct for which a cause of action exists under the laws of California, including a contract, tort, common law, or statutory claims.

**1798.307.** Notwithstanding any other law, the laws of California shall govern in a case or controversy heard in California related to reproductive health care ~~services or~~ *services*, gender-affirming health services, *or gender-affirming health care services*, except as may be required by federal law.

**1798.308.** This title shall not be construed to provide jurisdiction over a California resident in an out-of-state forum when the California resident has not availed themselves of that forum.