SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 642 (Kamlager)
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Fiscal: Yes
Urgency: No
AWM

SUBJECT

Health care: facilities: medical privileges

DIGEST

This bill imposes limits on how a corporate entity or other unlicensed person may limit a medical professional's treatment recommendations to patients, and requires the Attorney General to consider, as part of deciding whether to consent to the transfer of control of a nonprofit health care facility, whether the transfer would reduce the availability of care to persons based on their membership in a protected class or to the community based on improper motives, such as profit or cost.

EXECUTIVE SUMMARY

Under current law, corporations are generally prohibited from practicing medicine, and medical care professionals are generally free to recommend treatment or procedures to their patients based on their best medical opinion without considering nonmedical factors such as cost or reimbursement. This bill strengthens and enhances the prohibition on corporate interference in medical decisions by prohibiting a health care facility from requiring a physician or surgeon to agree to comply with rules that directly or indirectly limit the physician or surgeon to provide a particular medical treatment or service unless the hospital lacks the equipment to provide the medical treatment or service, and prohibits nonmedical persons from taking over control of a medical corporation. The bill further requires the Attorney General, in deciding whether to consent to a change in control over a nonprofit health care facility, to consider whether the change in control would result in a reduction in access to care for persons based on their membership in a protected class or result in undue interference in patients' access to medical care due to improper or unlawful motives, including profit or cost control.

This bill is sponsored by the author and supported by a number of medical practitioner and health care access groups. The bill is opposed by the Alliance of Catholic Health Care and the California Hospital Association. Should this bill pass out of this Committee, the bill will go to the Rules Committee to determine further referrals.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the California Medical Practice Act, which establishes the Medical Board of California (Board) and makes the protection of the public the Board's highest priority. (Bus. & Prof. Code, div. 2, ch. 5, §§ 2000 et seq.)

2) Prohibits the unlicensed practice of medicine, including diagnosing any ailment or prescribing any treatment. Unlicensed practice of medicine is punishable by a $10,000 fine, imprisonment pursuant to Section 1170 of the Penal Code or in a county jail for not more than one year, or both a fine and imprisonment. (Bus. & Prof. Code, § 2052.)

3) Prohibits corporations and other artificial legal entities, subject to exceptions, from practicing medicine, but provides that the Board may adopt regulations that approve of the employment of physicians and surgeons, on a salary basis, by a licensed charitable institution, foundation, or clinic, if no charge for professional services rendered to patients is made by the institution, foundation, or clinic. (Bus. & Prof. Code, § 2400.)

4) Authorizes physicians to conduct their medical practices in the form of a medical corporation, group, or partnership as long as the shareholders or partners and the employees rendering professional services are themselves licensed. (Bus. & Prof. Code, §§ 2402, 2406, 2415, 2416; Corp. Code, §§ 13401, 13405.)
    a) Each shareholder, director, and officer of a medical corporation must be licensed to practice medicine, except that up to 49 percent of the shares may be held by specified other persons in the medical field, including licensed psychologists, registered nurses, and licensed clinical social workers. (Bus & Prof. Code, § 2408; Corp. Code, § 13401.5.)

5) Exempts the following corporate entities from the prohibition on corporate practice of medicine:
    a) A clinic operated primarily for the purpose of medical education by a public or private nonprofit university medical school, subject to certain conditions.
    b) A nonprofit clinic organized and operated exclusively for scientific and charitable purposes and meeting multiple criteria, including conducting research since before 1982, receiving grants and contracts from the National Institutes of Health and holding and licensing patents on medical technology, provided that the clinic shall not interfere with, control, or otherwise direct the professional judgment of a surgeon in a manner that violates existing law.
    c) A narcotic treatment program regulated by the State Department of Health Care Services, provided that the clinic shall not interfere with, control, or otherwise direct the professional judgment of a surgeon in a manner that violates existing law.

   d) A hospital owned and operated by a licensed charitable operation that offers only pediatric subspecialty care and meets certain other criteria, provided that the hospital shall not interfere with, control, or otherwise direct the professional judgment of a surgeon in a manner that violates existing law.
   e) Until January 1, 2024, a federally certified critical access hospital, subject to certain criteria, provided that the hospital shall not interfere with, control, or otherwise direct the professional judgment of a surgeon in a manner that violates existing law. (Bus. & Prof. Code, § 2401.)
   f) A county hospital. (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 206.)

6) Requires every hospital to have a governing body responsible for adopting bylaws for the administration of the hospital and formal organization with the medical staff, providing appropriate physical resources and personnel required to meet the needs of patients, taking all reasonable steps to conform to applicable laws and regulations, and providing for the control and use of the physical and financial resources of the hospital. (Cal. Code Regs., tit. 22, § 70701.)

7) Requires every hospital to have an organized medical staff responsible to the governing body for the adequacy and quality of the care rendered to patients. (Cal. Code Regs., tit. 22, § 70703.)

8) Requires a hospital with a medical staff of five or more physicians and/or surgeons to have rules established by the hospital's board of directors, which must include the following:
   a) Provisions for the organizations of physicians and surgeons licensed to practice in the state who are permitted to practice in the hospital into a formal medical staff with appropriate officers and bylaws and with staff appointments on an annual or biennial basis.
   b) Provisions that membership on the medical staff shall be restricted to physicians and surgeons and other licensed practitioners competent in their respective fields and worth in professional ethics.
   c) Provisions that the medical staff shall be self-governing with respect to the professional work performed in the hospital; that the medical staff shall meet periodically and review and analyze at regular intervals their clinical experience; and that the medical records of patients shall be the basis for such review and analysis.
   d) Provisions that adequate and accurate medical records be prepared and maintained for all patients. (Bus. & Prof. Code, § 2282.)

9) Provides that a hospital medical staff has a right to self-governance, which includes, but is not limited to:
   a) Establishing, in medical staff bylaws, rules, or regulations, criteria and standards for medical staff membership and privileges, and enforcing those criteria and standards.

b) Establishing, in medical staff bylaws, rules, or regulations, clinical criteria and standards to oversee and manage quality assurance, utilization review, and other medical staff activities including, but not limited to, periodic meetings of the medical staff and its committees and departments and review and analysis of patient medical records.
c) Selecting and removing medical staff officers.
d) Assessing medical staff dues and utilizing the medical staff dues as appropriate for the purposes of the medical staff.
e) The ability to retain and be represented by independent legal counsel at the expense of the medical staff.
f) Initiating, developing, and adopting medical staff bylaws, rules, and regulations, and amendments thereto, subject to the approval of the hospital governing board, which approval shall not be unreasonably withheld. (Bus. & Prof. Code, § 2282.5(a).)

10) Prohibits terminating the employment or contractual relationship with, or otherwise penalizing, a physician or surgeon for the physician or surgeon's decision to advocate for medically appropriate health care for their patient. To "advocate for medically appropriate health care" includes appealing a payor's decision to deny payment for treatment and protesting a decision, policy, or practice that the physician, consistent with the applicable standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to their patients. (Bus. & Prof. Code, § 2056.)

11) Prohibits a health care service plan and its contracting entities from including provisions in their contracts that interfere with the ability of a physician, surgeon, or other health care provider to communicate with a patient regarding their health care, including treatment options, alternative plans, or coverage arrangements. (Bus. & Prof. Code, § 2056.1.)

12) Provides certain protections for persons and facilities with ethical or religious objections to abortion, except in cases of medical emergency situations and spontaneous abortions:
    a) No employer or other person shall require a physician, registered nurse, licensed vocational nurse, or any other person employed with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate. The hospital, facility, or clinic may not subject such a physician or other person to a penalty for their refusal to participate in an abortion, and no employer shall refuse to employ any physician or other person because of that refusal, unless the person would be assigned in the normal course of business to a part of the hospital, facility, or clinic where abortion patients are cared for.

b) No nonprofit hospital or other facility or clinic that is organized or operated by a religious corporation or other religious organization, or any administrative officer, employee, agent, or member of the governing board thereof, is required to perform or to permit the performance of an abortion in the facility or clinic or to provide abortion services. (Health & Saf. Code, § 123420.)

13) Provides that a nonprofit corporation, as defined, that operates or controls a health care facility must provide written notice to, and obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to sell, transfer, lease, or convey, or transfer control of, the facility to another nonprofit corporation entity or a for-profit corporation or entity. (Corp. Code, §§ 5914, 5920.)

14) Provides that, in deciding whether to consent to the transfer or other change in control of a health care facility from a nonprofit corporation to another nonprofit or a for-profit entity, the Attorney General should consider whether any of the following apply:
    a) The terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporation.
    b) The agreement or transaction will result in inurement to any private person or entity.
    c) The fair market value of the agreement or transaction.
    d) The market value has been manipulated by the actions of the parties in a manner that causes the value of the assets to decrease.
    e) The proposed use of the proceeds from the agreement or transaction is consistent with the charitable trust on which the assets are held by the health facility or by the affiliated nonprofit health system.
    f) The agreement or transaction involves or constitutes any breach of trust.
    g) The Attorney General has been provided with sufficient information and data by the nonprofit corporation to evaluate adequately the agreement or transaction or the effects thereof on the public.
    h) The agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community.
    i) The proposed agreement or transaction is in the public interest.
    j) The agreement or transaction may create a significant effect on the availability and accessibility of cultural interest provided by the facility in the affected community. (Health & Saf. Code, §§ 5917, 5913.)

This bill:

1) Establishes the Patient Medical Care Protection Act (the Act), which is intended to protect patients' medical decisions by preventing corporations and any other entity that is not licensed to practice medicine from interfering, controlling, or otherwise limiting a patient's medical care based on nonmedical reasons, and seeks to prevent undue interference in the practice of medicine due to improper motives, including

discrimination, profit or cost control, business or competition, or any other nonmedical motives.

2) Provides that a health facility licensed under Section 1265 of the Health and Safety Code is prohibited from requiring a physician or surgeon licensed pursuant to the California Medical Practice Act, as a condition of obtaining or maintaining clinical privileges, to agree to comply with criteria, rules, regulations or other policies or procedures that are not knowingly and explicitly ratified, issued, or promulgated by the medical staff, that directly or indirectly prohibit, limit, or restrict the ability of the physician or surgeon to provide a particular medical treatment of service that falls within the scope of their privileges or from requiring a physician or surgeon to obtain permission from a nonphysician or nonsurgeon to perform a particular medical treatment or service from which consent has been obtained from the patient or the patient's representative, except:
    a) Where the health facility lacks the equipment to provide the service or treatment.
    b) Where a full review of the medical evidence by members of a hospital's medical staff determines that the care is not medically appropriate.
    c) Where the health facility's criteria, rules, regulations, or procedures are required by federal or state law or regulation as a condition of licensure, receipt of federal or state funds, or participation in Medicare, Medi-Cal, or other federal or state health care programs.

3) Provides that, if a person engages in acts or practices that could constitute a violation of the physician's right to provide medically necessary treatment, the superior court may, upon application by the health facility's medical staff or an individual member of the medical staff, issue an injunction or other appropriate order restraining the conduct. Such proceedings shall be governed by the Code of Civil Procedure's provisions for general injunctive relief, set forth in Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure (§§ 525 et seq.).

4) Provides that the prohibition on limiting a physician's right to provide recommended care set forth in Part 2 shall not be construed to limit a medical staff's authority to take corrective action against medical staff members in accordance with medical staff bylaws, consistent with existing law.

5) Provides, with respect to a health facility's medical staff's right of self-governance, that health facility corporate bylaws, policies, contracts, or other institutional requirements that conflict with the above provisions shall not be applied to directly or indirectly affect a physician's clinical privileges or rights, or privileges of membership on the medical staff, except as required by federal or state law.

6) Provides that the shareholders, directors, and officers of a medical corporation shall manage and have ultimate control over the assets and business operations of the medical corporation and shall not be replaced, removed, or otherwise controlled by

any lay entity or individual, including, without limitation, through stock transfer restriction agreements or other contractual agreements and arrangements, with the meaning of "ultimate control" being consistent with the definition provided in connection with generally accepted accounting principles.

7) Provides that, when the Attorney General is determining whether to consent to the transfer or change in control of a health facility owned by a nonprofit corporation or entity to a for-profit corporation or entity, the Attorney General should consider, as one of the factors, whether the agreement or transaction may create a reduction of or limitation on the availability of the full range of health care services to any group of individuals based on their protected characteristics, as set forth in the Unruh Civil Rights Act (Civil Code, § 51).

8) Provides that, when the Attorney General is determining whether to consent to the transfer or change in control of a health facility owned by a nonprofit corporation or entity to another nonprofit corporation or entity, the Attorney General should consider, as factors, whether the agreement or transaction may create a reduction of or limitation on the availability of the full range of health care services to any group of individuals based on their protected characteristics, as set forth in the Unruh Civil Rights Act (Civil Code, § 51), and whether the agreement or transaction may result in undue interference in patients' access to medical care due to improper or unlawful motives, including, but not limited to, discrimination, profit or cost control, or unlawful or unfair competitive motives.

9) Provides that the provisions of the Act are severable, and if any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

COMMENTS

1. Author's comment

According to the author:

> The health care system has significantly changed in the past few decades. One trend that has impacted patient care is the rapid pace of mergers, affiliations and acquisitions. These transactions give companies tremendous power to dictate patient care—even if their motives are profit-driven, monopolistic, and discriminatory.
>
> For example, CEOs can impose policies that prohibit physicians from delivering evidence-based medical services to patients, even when their health facilities are equipped and staffed to deliver these services. Unfortunately, an increasing number of healthcare facilities require that licensed health care providers obtain prior approval from non-clinicians to provide care, including in urgent and

emergent cases, which delays treatment and puts patients' lives at risk. Restrictions that are not evidence-based nor grounded in medical science should have no place in our health care system.

To maximize profits, companies also often cut unprofitable medical procedures, set billing quotas, require internal referrals for medical services, and pressure providers to perform unnecessary but lucrative procedures. A 2018 study of two million cardiac patients found that those treated in consolidated hospitals were more likely to have heart attacks, visit the emergency department, be readmitted to the hospital or die. Through these strategies, mergers have increased the price of hospital services by 6-18 percent in recent years—keeping medical care out of reach for many patients and straining our health systems.

Corporations should not have unfettered authority to control patient care based on policies that conflict with the clinical decision-making of healthcare providers. California banned the corporate practice of medicine for this purpose – to ensure that those who are untrained in medicine do not interfere with the practice of medicine, the physician-patient relationship, nor prevent access to comprehensive healthcare.

A patient's decision to receive medical care falls within the ambit of the practice of medicine and is accordingly given all the respect, privileges, and protections of the profession, stemming from the physician's Hippocratic Oath. California law also extends to that decision a host of legal protections designed to prevent undue interference in the practice of medicine due to improper motives, including discrimination and profiteering. In hospitals, California also requires that policies affecting patient care involve the hospital's medical staff, which legally must be self-governing.

SB 642 will protect patients' medical decisions by strengthening existing law to prevent private equity firms, health care facilities or any other entity that is not licensed to practice medicine from interfering, controlling or otherwise limiting a patient's medical care for non-medical reasons. It will ensure that all patients can access affordable, comprehensive and inclusive medical care based on medical criteria alone. California must stop the corporate transformation of medicine and protect all patients over company motives.

2. Background: the division of control in California hospitals

California has a longstanding doctrine that corporations may not engage in the practice of professions such as law, medicine, or dentistry.[1] The doctrine is intended to ameliorate 'the evils of divided loyalty and impaired confidence' which are thought to be created when a corporation solicits medical business from the general public and

[1] *E.g.*, *People ex rel. State Board of Medical Examiners v. Pacific Health Corp.* (1981) 12 Cal.2d 156, 158.

turns it over to a special group of doctors, who are thus under lay control."[2] "Historically, in order to protect the public from possible commercial exploitation, physicians were barred from taking a salary from a for-profit corporation or other artificial legal entity. [Citations.] More recently, however, physicians have been statutorily authorized to conduct their medical practices in the *form* of a medical corporation, group, or partnership, as long as the shareholders or partners and the employees rendering professional services are themselves licensed."[3] California's ban on corporate practice now " 'most commonly refers to the employment of physicians by hospitals.' "[4] And because "for-profit and most nonprofit hospitals may *not* employ physicians, hospitals align with physicians in various ways" to continue providing care to patients.[5]

The Legislature has codified the distinction between the medical staff of a hospital—the licensed professionals charged with making medical decisions for patients—and the ownership and administration of a hospital—charged with making high-level financial, legal, and administrative decisions—by granting the medical staff the authority to make its medical decisions largely free from administrative interference.[6] The importance of allowing medical staff to provide medical care free from non-medical concerns—such as costs—is further emphasized in statutes prohibiting retaliation against medical staff for advocating for medically necessary treatments and prohibiting medical staff from being required to agree to constraints on communications with patients regarding treatment.[7]

California has also recognized the inherent tension between medical care and the financial considerations involved in that care by requiring the Attorney General to consent to the transfer of control of a nonprofit health care center to another nonprofit entity or a for-profit medical entity.[8] Before signing off on such a transfer, the Attorney General must take into account whether the transfer will be in the public interest, and in particular whether the transfer will result in the reduction in the availability or accessibility of care in the affected community.[9] These sections protect against transfers of nonprofit health care facilities that might be beneficial to the recipient but devastating for the community losing access to care.

According to the author, these existing protections against corporate or other non-medical interference into medical decisions have been insufficient to prevent intrusions into the medical care decisions that should be left to a medical care provider and their patient. This bill accordingly places additional limitations on when and how a health

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[2] *Conrad v. Medical Board* (1996) 48 Cal.App.4th 1038, 1042-1043.
[3] *Lathrop HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412 , 1420.
[4] Martin & Neville, *The Corporate Practice of Medicine in a Changing Healthcare Environment*, California Research Bureau (Apr. 2016), at p. 14.
[5] *Ibid.*
[6] *See* Bus. & Prof. Code, §§ 2282-2282.5; Cal. Code Regs., tit. 22, §§ 70701, 70703.
[7] Bus. & Prof. Code, §§ 2056-2056.1.
[8] Corp. Code, §§ 5014, 5020.
[9] *Id.*, §§ 5017, 5023.

care facility or other nonmedical persons may restrict or limit medical treatment recommended by a medical care professional and consented to by a patient. The bill further adds factors that the Attorney General must consider before consenting to the transfer of a nonprofit health care facility: whether the transfer will create a reduction or limitation on the available care to any group of persons based on their membership in a protected class, and, for transfers to other nonprofit corporations, whether the transfer will result in undue interference in patients' access to medical care due to improper or unlawful motives, including, but not limited to, discrimination, profit or cost control, or unlawful or unfair competitive motives.

It is outside the jurisdiction of this committee to address the health-related policy implications of this bill, including the proper balance of control between a hospital's medical staff and its governing board. If this bill passes out of this committee, the Senate Rules Committee will determine whether the bill should be referred to any additional policy committees.

3. This bill imposes a general law of neutral applicability that does not currently violate the First Amendment rights of religious hospitals

Bill opponent Alliance of Catholic Health Care has argued that, by removing their discretion to prohibit physicians from engaging in treatment based on nonmedical considerations, the bill will violate religiously affiliated hospitals' First Amendment right to practice their religion without government interference. Specifically, they voice concern that this bill will allow physicians to override religiously affiliated hospitals' Ethical & Religious Directives (ERDs)—which set forth religiously based limits on treatment—and make treatment decisions based on their medical expertise. The opponents call out specific treatments such as abortion and gender-affirming surgery as objectionable regardless of whether a physician believes it is the medically sound treatment for a patient.

At the outset, it should be noted that the range of procedures that could be conducted over the objections of a religious hospital is constrained by existing law. The bill contains a provision stating that a health care facility may impose limits that are consistent with requirements of state and federal law, when those limits are conditions of a health care facility obtaining licensure or funding. Federal law further conditions the receipt of various public funds on a state not requiring any entity to make its facilities or personnel available for sterilization or abortion procedures.[10] The bill's exemption for religiously based treatment limitations permitted under state and federal law should, therefore, operate to prevent religiously affiliated hospitals from allowing abortion and sterilization procedures over their religious objections.

[10] 42 U.S.C. §§238n, 300a-7. Existing state law provides that a health care facility need not permit aid-in-dying procedures at its facilities and prohibits requiring any religiously affiliated nonprofit hospital or other health facility from requiring to permit the performance of an abortion in that facility, except in cases of emergency. (Health & Saf. Code, §§ 4413.15, 123420(c).) It appears that, because these exemptions are not conditions of licensure or receipt of funds, the bill would effectively nullify these provisions.

With respect to whether the bill would violate religiously affiliated entities' free exercise rights, the answer is likely not, under current case law. The First Amendment to the United States Constitution guarantees the free exercise of religion,[11] but it does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[12] Under this principle, the California Supreme Court has repeatedly held that general laws of neutral applicability do not require carve-outs for religiously affiliated entities that object to the laws on religious grounds.[13] At least one Court of Appeal has held that a plaintiff stated a claim for discrimination under state law against a religiously affiliated hospital that prohibited the plaintiff's doctor from performing a gender-affirming medical procedure, even though the hospital permitted the procedure when performed on patients who did not suffer from gender dysphoria.[14] This bill's general restriction on hospitals' interference with physicians' medical treatment recommendations appears, therefore, to be consistent with the current state of the case law.

The United States Supreme Court has not yet addressed the issue of religiously affiliated medical entities' objections to neutral state laws of general applicability.[15] The Court has, however recently suggested that its approach to general laws of neutral applicability might be in flux,[16] and there is at least one case pending before the Supreme Court that could have relevance to the question of when and how a state may impose neutral regulations on religiously affiliated institutions.[17] It is therefore unclear whether the state of the law will remain favorable to this bill.

Finally, this bill also requires the Attorney General, in connection with determining whether to consent to the transfer of a nonprofit hospital to another entity, to consider whether the transfer would result in a decrease in the availability or accessibility of care

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[11] U.S. Const., 1st Amend.
[12] *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 879.
[13] *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1156-1157; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 543.
[14] *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155, 1165-1166. The defendants petitioned the United States Supreme Court for review after the California Supreme Court declined to hear the case; the petition has been pending in the Court without a response since March 13, 2020. (*See Dignity Health v. Minton*, Case No. 19-1135, https://www.supremecourt.gov/docket/docketfiles/html/public/19-1135.html [last visited Apr. 13, 2021].)
[15] The *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. 682, case, which addressed a corporation's religious objections to providing birth control, was analyzed under the test mandated for federal laws that implicate religious beliefs, the Religious Freedom Restoration Act of 1993 (RFRA). (*Id.* at pp. 688-689.) Because RFRA does not apply to the states, its analysis is not applicable to the question of state regulations that apply equally to religiously affiliated and secular hospitals. (*See City of Boerne v. Flores* (1997) 521 U.S. 507, 536.)
[16] *E.g.*, *Tandon v. Newsom* (Apr. 9, 2021) __ U.S. __, Case No. 20A151.
[17] *See Fulton v. City of Philadelphia*, Case No. 19-123. The case was argued before the Supreme Court on November 4, 2020, but the Court has yet to issue its opinion. (*See* Supreme Court Docket, Case No. 19-123, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-123.html [last visited Apr. 13, 2021].)

for classes of persons protected from discrimination under the Unruh Civil Rights Act.[18] The bill also requires the Attorney General, when determining whether to consent to the transfer of a nonprofit hospital to another nonprofit entity, whether the transfer would result in undue interference in patients' access to medical care for improper reasons, including discriminatory and profit-based reasons. This Committee has not received any opposition suggesting that the state cannot permissibly take into account whether a change in control in a hospital would result in reduced care to the affected community or any portion thereof, nor does there appear to be any basis to so constrain the state's power to protect its residents from losing access to medical care.

4. The author is continuing to work on language of the bill that may affect liability

Existing law provides that a hospital may be liable "for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility."[19] As currently drafted, the bill provides a broad grant of discretion to physicians or surgeons to provide medical services or treatment that the physician or surgeon, in their professional judgment, deems appropriate. While the language does not expressly extend to, e.g., nonstandard treatments or treatments performed below the standard of care, the breadth of the language could be interpreted to limit a hospital's or a hospital staff's independent duties to ensure that physicians or surgeons are performing their medically recommended procedures in a medically responsible manner. It is therefore unclear what effect this bill could have on the existing duties of care owed by health facilities and medical practitioners, or health facilities' and medical practitioners' liability for patients' injuries.

The author is continuing to work with stakeholders on language to ensure that existing patient liability protections are not inadvertently altered by the bill.

5. Arguments in support

According to bill supporter California Medical Association:

> Given the level of consolidation and amount of acquisitions taking place in California and the impact they have on patient care outcomes and cost, SB 642 is a timely and much[-]needed bill that will modernize existing state law and ensure that patients' needs are at the center of care decisions and are free from interference from non-medical lay entities such as private equity firms and health care facilities.
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> The bill achieves this goal by protecting the authority and autonomy of medical staffs in hospitals. After a merger and acquisition of a hospital or a health entity takes place, the lay entity will force changes to the independent medical staffs'

[18] Civ. Code, § 51.
[19] *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1143.

> bylaws that insert provisions that are driven by considerations not associated with delivering quality care to patients. These are often profit[-]driven policies such as cutting unprofitable procedures, setting billing quotas on physicians, only requiring internal referrals for medical services, and pressuring providers to offer unnecessary but lucrative medical procedures. SB 642 would prohibit lay entities from forcing or coercing medical staffs to adopt these policies through disciplinary action, by threatening removal of admitting privileges, etc. The bill would update the current protections afforded to physicians and surgeons under existing law and would allow them to determine the best course of care without interference or fear or disciplinary action.

According to bill supporter California Academy of Family Physicians:

> The hospital industry has consolidated and changed during the past few decades. One trend that has impacted patient care is hospital mergers and affiliations. By acquiring all of the health care practices in a certain region, corporations create monopolies in which they are the *only* option for patients seeking medical care. This allows them to charge exorbitant prices and deny certain types of medical care based on non-clinical criteria, such as shareholder profits and religious doctrine.
>
> Corporations should not have unfettered authority to deny patients care based on policies that conflict with the clinical decision-making of healthcare providers. California banned the corporate practice of medicine for this purpose—to ensure that those who are untrained in medicine do not interfere with the practice of medicine, the physician-patient relationship, nor prevent access to comprehensive healthcare.
>
> SB 642 ensures that patients have access to necessary, affordable, comprehensive medical care—and in the midst of a pandemic, advocating for patients has never been more important than it is now.

6. Arguments in opposition

According to bill opponent Alliance of Catholic Health Care:

> SB 642 (Kamlager) is rife with profound legal and Constitutional defects. Among other things, it would give physicians sweeping authority over hospital decision-making that is contrary to fundamental principles of sound hospital governance and administration, and decades of state and federal regulations and case law. In so doing, SB 642 would expose hospital patients to the threat of serious harm from incompetent physicians and inadequate resources. Moreover, while the bill does not expressly mention religion, the author's original fact sheets and requests for Assembly co-sponsors make it abundantly clear that its specific, albeit veiled, intent is to target Catholic health care and prohibit Catholic health care facilities

> from operating in accordance with their faith-based beliefs. Thus, SB 642 also violates the Free Exercise Clause of the First Amendment to the U.S. Constitution because it infringes the basic right of faith-based institutions to exercise and operate in accordance with their religious and moral beliefs…
>
> The fact that the bill does not mention religion or Catholic health care, but instead focuses on the issue of medical staff independence from "corporate" influence, indicates that the bill's drafters are attempting to avoid challenges to the Free Exercise Clause of the First Amendment of the United States Constitution by making the law appear neutral and generally applicable so as to fall within the scope of *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). In *Smith*, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." However, the Supreme Court in *Smith* also recognized that its holding would not apply to laws that are "directed at" or target a particular religious practice. *Id*. at 878.
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> Indeed, over the thirty years since *Smith* was decided, the Supreme Court has taken care to ensure that states not discriminate against religious institutions in violation of the Free Exercise Clause. The Court has repeatedly declined to apply *Smith* in cases involving free exercise challenges to laws or government acts that were either express or thinly veiled attempts to penalize religious practice.

According to bill opponent California Hospital Association:

> This bill would strip from a hospital's governing body its legal obligation, responsibility, and right to govern fundamental aspects of the operation of the hospital in accordance with their fiduciary duties. Instead, it would vest in the hospital's medical staff and each individual physician that chooses to practice at the hospital the right to make decisions about the services to be provided there, unconstrained by such fiduciary obligations.
>
> SB 642 would prohibit a hospital or other health facility from requiring a physician to comply with hospital rules, regulations, procedures, or policies (collectively "policies") that directly or even indirectly limit the physician's ability to provide a particular medical treatment or service unless, with limited exceptions, those policies have been "knowingly and explicitly ratified, issues, or promulgated by the medical staff."

SUPPORT

American Association of University Women CA
American College of Obstetricians and Gynecologists District IX
American Medical Women's Association
California Academy of Family Physicians

California Medical Association
California Podiatric Medical Association
California Women's Law Center
Indivisible CA-33
National Women's Political Caucus
Planned Parenthood Affiliates of California
Stonewall Young Democrats
University of California Graduate & Professional Council

OPPOSITION

Alliance of Catholic Health Care
California Hospital Association

RELATED LEGISLATION

Pending Legislation: AB 1132 (Wood, 2021) prohibits a contract issued, amended, or renewed on or after January 1, 2022, between a health care service plan or health insurer and a health care provider or health facility from containing terms that, among other things, restrict the plan or insurer from steering an enrollee or insured to another provider or facility or require the plan or insurer to contract with other affiliated providers or facilities AB 1132 is pending before the Assembly Health Committee.

Prior Legislation:

SB 977 (Monning, 2020) would have required a health care system, as defined, private equity group, or hedge fund to provide written notice to, and obtain the written consent of, the Attorney General prior to a change of control, and authorized the Attorney General to deny consent to a change of control unless the health care system, private equity group, or hedge fund demonstrated that the change of control or acquisition would result in a substantial likelihood of clinical integration, a substantial likelihood of increasing or maintaining the availability and access of services to an underserved population, or both. SB 977 died in the Assembly.

AB 2036 (Muratsuchi, 2020) would have provided that, when the Attorney General consents to the transfer of a nonprofit hospital subject to certain conditions, those conditions shall remain in effect for the entire period of time specified by the Attorney General, regardless of whether the health facility is subject to an additional or subsequent sale, transfer, purchase, lease, exchange, option, conveyance, or other disposition of assets. AB 2036 died in the Assembly Health Committee.

SB 687 (Skinner, 2017) would have added expanded the requirement to obtain the Attorney General's consent to the transfer of control over nonprofit health care facilities to include the elimination of emergency services by a nonprofit health care facility. SB 687 was vetoed by Governor Brown, who stated that removing a hospital's discretion to

eliminate emergency services would not eliminate the underlying financial problems that led to the decision and could have unintended negative effects.

SB 487 (Pan, 2017) would have expand the provisions for medical staff self-governance at a hospital to include a provision that the award or maintenance of hospital or clinical privileges, or both, shall not be contingent on participation in a program for maintenance of certification, and, in the case of a public hospital, a provision that physicians and surgeons providing substantial direct patient care may limit hospital committee voting rights on issues affecting patient care to those physicians and surgeons providing substantial direct patient care. SB 427 died in the Senate Business, Professions, and Economic Development Committee.

AB 651 (Muratsuchi Ch. 782, Stats. 2017) revised the procedures for obtaining Attorney General consent to a chance in control of a nonprofit health care facility, including by requiring the Attorney General to consider whether the agreement or transaction may create a significant effect on the availability and accessibility of cultural interests provided by the facility in the affected community.

AB 2024 (Wood, Ch. 426, 2016) created an exception to the rule against physicians being directly employed by corporations, until January 1, 2024, for federally certified critical access hospitals if the medical staff concur by an affirmative vote that the professional's employment is in the best interest of the communities served by the hospital and the hospital does not direct or interfere with the professional judgment of a physician and surgeon, as specified.

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