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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

OUR WATCH WITH TIM THOMPSON, a California Non-Profit Organization, Plaintiff, **v.** **ROB BONTA, the Attorney General of California,** Defendant.	Case No. 2:23-cv-00422-DAD-DB **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(1) & (6)]** Date: June 20, 2023 Time: 1:30 p.m. Dept: Courtroom 4 Judge: Hon. Dale A. Drozd Date Filed: 4/13/2023

INTRODUCTION

Since January 2023, ten states have banned gender-affirming care for teenagers, and bans have passed in at least one legislative chamber in another seven states.[1] California enacted Senate Bill (SB) 107 to provide legal protections for families targeted by this ever-growing list. *See*

[1] *See* Francesca Paris, *Bans on Transition Care For Young People Spread Across U.S.*, N.Y. TIMES, last updated on April 17, 2023, available at https://www.nytimes.com/2023/04/15/upshot/bans-transgender-teenagers.html (last viewed on May 16, 2023).

S.B. 107, 2021-2022 Reg. Sess. (Cal. 2022) (SB 107). These families choose to come to California to obtain gender-affirming health care that is medically necessary and consistent with the highest standards of care (which includes informed consent by patients and their parents). SB 107's protections become more important with each passing day.

Plaintiff Our Watch with Tim Thompson (Plaintiff), an advocacy group, seeks to invalidate SB 107 on its face. But SB 107 does not harm Plaintiff in any way. Nor has Plaintiff identified *anyone* actually harmed by SB 107's provisions. In fact, Plaintiff has not even articulated a plausible hypothetical application of SB 107 that would result in a constitutional violation. This lawsuit is premised on sheer conjecture that cannot be reconciled with the plain statutory text and the broader statutory scheme. Plaintiff lacks standing, has failed to state a claim, and cannot meet the high bar required to strike down a statute on its face. The Court should dismiss the First Amended Complaint (FAC) with prejudice.

ARGUMENT

I. PLAINTIFF HAS NOT STATED A CLAIM THAT IS PLAUSIBLE ON ITS FACE

Although the Court accepts well-pled allegations of material fact as true, the Court is not required to "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See* ECF No. 12 at 9 (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). Plaintiff claims that the pleading standard "is especially liberal when applied to the constitutional claims alleged in this action." ECF No. 15 at 9 (citing *Countrywide Home Loans, Inc. v. U.S. ex rel. I.R.S.*, 2005 WL 1355440 (E.D. Cal. 2005). But the pleading requirements do not loosen merely because constitutional causes of action are alleged. *Countrywide Home Loans*, moreover, is an unpublished decision that relies on the pre-*Iqbal* pleading standard.

Under *Iqbal*, every complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). The "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* And the Court "need not assume the truth of legal conclusions cast in the form of factual allegations." *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638,

643 n.2; *see also BASF Corp. v. Cesare's Collision Repair & Towing, Inc.*, 364 F.Supp.3d 1115, 1118 (E.D. Cal. 2019) ("the court will not assume the truth of legal conclusions cast in the form of factual allegations"). The Court can read SB 107 and conclude that Plaintiff's allegations are not plausible because they are completely untethered to the actual language of the statute and ignore the broader statutory scheme. *See, e.g.*, *United States v. Somnia, Inc.*, 339 F.Supp.3d 947, 956 n.4 (E.D. Cal. 2018) (granting motion to dismiss several causes of action based on a plain reading of the Medicare Claims Processing Manual since the "requirements of the Manual are legal rather than factual questions"). Determining what SB 107 requires or permits is a legal question that the Court should address at the pleading stage. *Id*.

II. PLAINTIFF LACKS ARTICLE III AND PRUDENTIAL STANDING

Plaintiff has not met the requirements for organizational standing because it has not identified any actual injury—in the form of a real-world impediment to Plaintiff's activities—caused by SB 107. *See* ECF No. 12 at 10-13. And Plaintiff cannot create Article III standing by voluntarily spending money opposing a statute that does not "perceptively impair" its services, functions, funding, or operations. *Id*.

Plaintiff claims that "[b]ecause SB 107 frustrates Our Watch's mission, and because it has diverted resources as a result, Plaintiff has standing to challenge [SB 107]." ECF No. 15 at 12. But that argument overlooks the preliminary step in the legal analysis. An organizational plaintiff cannot merely allege that it diverted resources out of frustration. It "must instead show that it would have suffered some other injury if it had *not* diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (emphasis added) (hereinafter *La Asociacion*). In other words, "an organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id*. at n.4. Plaintiff's cases agree. *See* ECF No. 15 at 9-12 (citing *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (hereinafter *Valle del Sol*) (organization cannot spend money fixing a problem that does not affect it and "must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem"); *Fair Housing Council of San Fernando Valley v. Roommate.com*

LLC, 666 F.3d 1216, 1219 (an organization "cannot manufacture an injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all"); *Animal Legal Def. Fund v. U.S. Dep't. of Agriculture*, 223 F.Supp.3d 1008, 1016-17 (C.D. Cal. 2016) (an organization "must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.")).

Plaintiff lacks Article III standing because it has not answered this key question: what harm would SB 107 have caused Plaintiff if it had *not* diverted resources? *See, e.g., La Clinica de la Raza v. Trump*, 2020 WL 6940934, at *4 (N.D. Cal. 2020) (plaintiff must "demonstrate that they will be injured by the Rule if they do nothing"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (challenged action must "perceptibly impair[]" the "organization's activities"). If organizations could skip this first step in demonstrating organizational harm, any organization could "start[] a new campaign against someone who frustrates its general mission" which "would effectively nullify the constitutional requirements for standing." *In Defense of Animals, et al. v. Sanderson Farms, Inc.*, 2021 WL 4243391, at *4 (N.D. Cal. 2021). Organizations could easily circumvent the constitutional limitations of Article III by simply declaring that a law frustrates their mission and spending money opposing it. *Id*. But the law is not so lenient. When an organization starts a new campaign against someone who frustrates the organization's mission, "the plaintiff's own choice causes the injury." *Id*. In this case, Plaintiff's diversion of resources is an entirely self-inflicted injury. Allowing that voluntary choice to create standing would permit an end-run around Article III.

Plaintiff's own cases underscore why their standing claims fall short. In *Valle del Sol*, for example, the plaintiff organizations' "core activities" involved "the transportation and/or provision of shelter" to undocumented immigrants. *Valle del Sol*, 732 F.3d at 1018. Arizona passed a law making it a crime to transport or harbor undocumented immigrants. *Id*. at 1012-13. Because the plaintiff organizations' staff were likely to "be subject to investigation or prosecution under the statute and may be deterred from conducting these functions," the Arizona law perceptibly impaired the organizations' activities. *Id*. at 1018. In response, the organizations were "forced to divert staff and resources to educating their members" about how to comply with the

law. *Id*. Here, in contrast, Plaintiff has not identified any "core activity" (or any activity at all) that SB 107 made it harder for Plaintiff to carry out. Nor is there any reason why SB 107 would hamper Plaintiff's education, advocacy, and mobilization efforts. *See* FAC ¶ 11. Without plausible allegations describing how SB 107 impaired its organizational activities before it diverted resources, Plaintiff is "simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Valle del Sol*, 732 F.3d at 1018. Because Plaintiff has not demonstrated that SB 107 caused it organizational harm *before* it chose to divert resources, it lacks Article III standing. *Id*.

The Court should also dismiss this lawsuit on prudential standing grounds. Plaintiff cannot assert the legal rights of out-of-state parents and other states because Plaintiff lacks a close relationship with those third parties, and because there is no hindrance to those third parties protecting their own interests. *See* ECF No. 12 at 13-15.

Plaintiff claims that because it has demonstrated organizational harm (which it has not), it "does not have to satisfy the third party standing test." *See* ECF No. 15 at 13. Not so. In *Warth v. Seldin*, 422 U.S. 490, 499 (1975), the Supreme Court explained that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *See also Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (the standing inquiry involves "both constitutional limitations on federal-court jurisdiction *and* prudential limitations on its exercise") (emphasis added); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.")

In *Kowalski*, for example, the Supreme Court assumed that the criminal defense attorney plaintiffs satisfied Article III's standing requirements before concluding that they lacked prudential standing. *Kowalski*, 543 U.S. at 131-32. The Court did not allow criminal defense attorneys to assert the constitutional rights of unidentified future clients because they lacked a close relationship with their hypothetical future clients, and because there was no hindrance to

indigent criminal defendants asserting their own constitutional rights. *Id*. For exactly the same reasons, Plaintiff lacks prudential standing here. Plaintiff states that SB 107 "does affect the rights of out-of-state parents and other states," ECF No. 15. at 13, but Plaintiff does not even attempt to meet the "close relationship" and "hindrance" criteria established by the Supreme Court.[2] *Kowalski,* 543 U.S. at 130. Plaintiff has failed to demonstrate that it can appropriately litigate third parties' legal interests. Prudential standing limitations independently bar this lawsuit.

III. PLAINTIFF'S CONSTITUTIONAL CLAIMS FAIL AS A MATTER OF LAW

A. Plaintiff's Due Process and Familial Association Causes of Action Fail to State a Claim

Plaintiff's due process and familial association claims fail as a matter of law. As a preliminary matter, these claims may properly be raised only by parents and children; they do not extend to third parties like Plaintiff. *See* ECF No. 14 at 14-15 n.16 (citing *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991); *Lee v. City of L.A.*, 250 F.3d 668, 685 (9th Cir. 2001)). SB 107, moreover, does not violate parental rights. The plain language of the statute does not alter existing parental consent laws in California, modify the ability of parents to access their children's medical records, supplant the "home state" jurisdiction of any other state's courts, or allow California courts to ignore other states' custody determinations. *See* ECF No. 12 at 15-20.

Plaintiff's responses to these points are unpersuasive for many reasons. At the outset, Plaintiff fails to acknowledge—let alone distinguish—Defendant's authorities holding that only parents and children can assert familial association claims under the First and Fourteenth Amendments. *See* ECF No. 12 at 14-15 n.16; cf. ECF No. 15. The Court can dismiss Plaintiff's due process and familial association claims under *Ward* and *Lee*, which limit the assertion of such claims to parents and children. *See* ECF No. 14 at 14-15 n.16.

[2] Plaintiff also argues that Defendant "conflates organizational standing with third-party standing." *See* ECF No. 15 at 12. (citing *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 664 (9th Cir. 2021).) But there is no conflation; as just discussed, both Article III standing (in the form of organizational harm) *and* prudential standing (in the form of third party standing) must be met. *See, e.g., Kowalski*, 543 U.S. at 128; *Warth*, 422 U.S. at 499. Plaintiff has not met either basis for standing, much less both.

Even if Plaintiff could assert familial association claims that are reserved for parents and children (and they cannot), all of their contentions about SB 107 are contradicted by the plain text of the statute and the broader statutory framework. Plaintiff first claims that SB 107 labels gender-affirming care an "emergency, such that emergency treatment may then be provided to the minor without parental consent, or the court may place the minor in foster care or with a guardian who can then consent to medical treatment for the minor." *See* ECF No. 15 at 13. But Plaintiff conflates emergency jurisdiction in a court with emergency treatment in a hospital. SB 107 allows California courts to assert temporary emergency jurisdiction over a minor who has been unable to obtain gender-affirming health care, but that does not authorize any form of medical treatment or require the removal of a child from a parent who does not consent to such care. *See* SB 107 § 5; Cal. Fam. Code § 3424(a). SB 107 does not change parental consent laws (as Plaintiff admits, FAC ¶ 54 n.16), nor does it address the substantive legal standards for making custody determinations. *See* ECF No. 12 at 4-8, 17-20.

Plaintiff also makes a series of complaints about the process that unfolds when a court asserts temporary emergency jurisdiction, including that temporary orders remain in effect until another court with jurisdiction (typically the home state) issues an order, and that temporary custody can (in limited circumstances) "ripen into a permanent determination."[3] *See* ECF No. 15 at 14 (citing Cal. Fam. Code § 3424(b)-(d)). But SB 107 did not change these subdivisions; all of those provisions are straight from the UCCJEA and incorporated into California's Family Code. UCCJEA, § 204; cf. Cal. Fam. Code § 3424. SB 107 only amended subdivisions (a) and (e) to, respectively, add the inability to obtain gender-affirming care and cases involving domestic violence as bases for temporary emergency jurisdiction. SB 107 § 5; Cal. Fam. Code § 3424. Because SB 107 did not change any of the procedural and communication requirements in subdivisions (b)-(d), invalidating the statute would not remedy Plaintiff's complaints about how

[3] Under the UCCJEA, a temporary emergency order can become a final determination only if: (1) no other state has commenced a child custody proceeding or made a child custody determination; (2) no other state makes such an order after a parent in that state receives notice of the temporary order; (3) the temporary order provides that it will become a final determination; and (4) the state that issued the emergency order becomes the home state of the child. UCCJEA, § 204(b). SB 107 did not change this provision. *See* Cal. Fam. Code § 3424(b).

these subdivisions operate. *Id*. Plaintiff's grievances about these requirements are not redressable in this lawsuit.

Plaintiff asserts once again that SB 107 "explicitly grants minors—not their parents—the authority to define what medical interventions are appropriate for them." *See* ECF No. 15 at 16. It does not. SB 107 adopts the pre-existing definitions of "gender-affirming health care" and "gender-affirming mental health care" found in California Welfare and Institutions Code section 16010.2. SB 107 § 1. In relevant part, that section defines "gender-affirming health care" as "medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient," and provides examples of medical interventions. Cal. Welf. & Inst. Code §16010.2(b)(3)(A). This definition gives patients the right to define their "*gender identity*." *Id*. It does not give them the right to define what is "*medically necessary*." *Id*. Medical necessity is determined by clinical standards for treating gender dysphoria. Those standards, which follow the recommendations of major medical organizations, were not changed by SB 107.[4] *See* ECF No. 14 at 16-17.

Plaintiff's own cases underscore why Plaintiff's due process and familial association claims fail as a matter of law. In *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) (*see* ECF No. 15 at 15-19), two young children and their parents sued the City of Escondido for violating their rights to due process and familial association. In that case, Escondido police officers seized the children, ages 2 and 5, without a court order and placed them in a county-run institution. *Id*. at 1131. Several days later, without judicial authorization or notifying their parents, police officers took the children to a hospital where they were subjected to highly intrusive anal and vaginal examinations. *Id*. The city kept the children from their parents for a total of two and a half months. *Id*. The Ninth Circuit held that the state may not remove children from their parents' custody without a court order unless there is reasonable cause to believe that a child is in

[4] Major medical organizations such as the American Medical Association and the American Academy of Pediatrics oppose state laws that prohibit gender-affirming health care for minors. *See, e.g.*, https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children and https://www.aap.org/en/news-room/news-releases/aap/2022/statement-from-the-american-academy-of-pediatrics-and-the-oklahoma-chapter-of-the-american-academy-of-pediatrics-on-gender-affirming-care.

imminent danger of abuse. *Id*. at 1138. The Ninth Circuit further held that the state must notify parents and receive judicial approval before children are subjected to invasive physical examinations. *Id*. at 1141-42. But nothing in the Ninth Circuit's opinion suggests that these constitutional rights can be asserted by anyone other than parents and children. And more importantly, nothing in SB 107 permits California to take children from their parents without a court order or allows the state to subject children to medical procedures without parental consent or judicial oversight. *Wallis* does not remotely resemble this case.

Plaintiff's reliance on *Troxel v. Granville*, 530 U.S. 57 (2000) is also misplaced. *See* ECF No. 15 at 1, 14, 17-18. In that case, the Supreme Court invalidated a Washington statute (as applied to the petitioners) which allowed any person at any time to petition a court for visitation rights with a child. *Troxel*, 530 U.S. at 61. The statute permitted a court to "disregard and overturn *any* decision by a fit custodial parent concerning visitation . . . based solely on the judge's determination of the child's best interests." *Id*. at 67. The plurality opinion explained that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id*. at 66. The application of Washington's statute in this case violated that fundamental parental right by giving no weight at all to the view of the mother (a fit custodial parent), who wished to limit visitation between her daughters and their paternal grandparents. *Id*. at 67-69.

Plaintiff claims that SB 107 "is even less defensible than the law struck down in *Troxel*" because it "treats any parent denying their child gender-affirming care as unfit." ECF No. 15 at 17-18. But SB 107 says nothing of the sort. It does not speak to the legal standards for making custody determinations, parental fitness, parental consent, or medical decision-making. Plaintiff cannot point to *any* statutory language purporting to address these topics. Plaintiff's reliance on *Wallis*, *Troxel*, and similar authorities is misplaced because those cases bear no factual resemblance to this one.

B. Plaintiff's Full Faith and Credit Clause Claim Fails as a Matter of Law

Plaintiff's Full Faith and Credit Clause claim fails as a matter of law because SB 107 permissibly furthers California's public policy within its own borders and does not require California to ignore final judgments from other states. *See* ECF No. 12 at 20-23.

Plaintiff's responses are not persuasive. First, Plaintiff insists that SB 107 ignores the "judgments of other states." *See* ECF No. 15 at 19. But SB 107 does not mention judgments at all, nor does it amend numerous Family Code provisions requiring California to recognize child custody determinations from other states. *See* Cal. Fam. Code §§ 3443; 3446; 3453. The argument that a statutory scheme that literally requires California courts to "accord full faith and credit to an order issued by another state" somehow violates the Full Faith and Credit Clause is meritless. Cal. Fam. Code § 3453.

Second, Plaintiff contends that SB 107 overrides the rightful jurisdiction of a family's home state. *See* ECF No. 15 at 20. But SB 107 did not change the standard for home state jurisdiction or alter the home state priority established by the statutory scheme. *See* Cal. Fam. Code § 3421(a)(1); SB 107 § 4. Section 4 merely amended the requirements for "significant connection" jurisdiction, which is only relevant when there is no home state or the home state has declined to exercise jurisdiction. *See* Cal. Fam. Code § 3421(a)(2). None of the other bases for jurisdiction—home state, more appropriate forum, or vacuum jurisdiction—were changed by SB 107. *Id*. at § 3421(a)(1), (a)(3), (a)(4). Plaintiff does not—and cannot—point to any language in SB 107 that purports to override home state jurisdiction.

Third, Plaintiff contends that SB 107 "prohibits California courts from enforcing subpoenas seeking information about gender-affirming care issued by out-of-state courts." *See* ECF No. 15 at 21 (citing SB 107 §§ 1, 2). These statutory provisions are actually much narrower than Plaintiff's characterization; they only prohibit compliance with foreign subpoenas that are based on another state's law that criminalizes or penalizes gender-affirming care. SB 107 §§ 1, 2. But more importantly, subpoenas are not considered final judgments under the Full Faith and Credit Clause. *See* ECF No. 12 at 20-21 (citing *Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 198 (N.Y. Supr. Ct. App. Div. 2013) ("the subpoenas are not judgments of the California courts to

which full faith and credit must be granted," particularly where "the propriety of the subpoenas was never determined by the courts of California"). Plaintiff cites no authority to the contrary.

Fourth, Plaintiff continues to rely on *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) for the proposition that California cannot "interfere with or prohibit the enforcement of the custody determinations" of other states. *See* ECF No. 15 at 20-21. But as previously discussed, SB 107 does not alter California's obligations to recognize and enforce custody determinations made by other states. *See* Cal. Fam. Code § 3443 ("A court of this state shall recognize and enforce a child custody determination of a court of another state"); *see also id.* § 3453 (California courts "shall accord full faith and credit to an order issued by another state"). Section 8 merely prohibits a California court—in a California court proceeding—from applying another state's *law* (not an order or final judgment) authorizing the removal of a child from a parent for allowing their child to receive gender-affirming care. SB 107, § 8. A long line of Supreme Court precedent permits states to apply their own laws in their own courts. *See* ECF No. 12 at 20-23 (citing cases). Nothing in *Finstuen* suggests otherwise. *See Finstuen*, 496 F.3d at 1152 (The Full Faith and Credit Clause "applies unequivocally to the judgments of sister states, [but] it applies with less force to their statutory laws.")

Fifth, Plaintiff contends that SB 107 was passed as a policy of hostility towards states that have criminalized gender-affirming care. *See* ECF No. 15 at 22 (citing statements by Senator Scott Wiener and Governor Gavin Newsom). Plaintiff cites no authority for the notion that legislator statements referring to other states' laws or policies are relevant to the legal analysis. *Id.*

In any event, courts have found a policy of hostility when a state: (1) applies a "special and discriminatory rule" towards a specific sister state; (2) treats similar claims differently, depending on which state is asserting the claim; or (3) bars an action arising under another state's law while permitting similar actions under its own laws. *See* ECF No. 14 at 22-23 (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171 (2016); *Broderick v. Rosner*, 294 U.S. 629 (1935); *Hughes v. Fetter*, 341 U.S. 609 (1951).) None of those situations are present here. California has not singled out any particular state and treated that state in a discriminatory fashion (*Hyatt*). Nor has California allowed a civil action against a person permitting gender-affirming care under

California law, while closing its courts to an identical action under another state's law (which would be the parallel to *Broderick* or *Hughes*). On the contrary, California has consistently permitted gender-affirming care for minors, and SB 107 merely creates legal safeguards for transgender teenagers and their families who come to California for such care, without regard to where those families come from.[5]

Because SB 107 furthers California's legitimate public policy and does not impact California's recognition of final judgments from other states, Plaintiff's Full Faith and Credit Clause claim fails as a matter of law.

IV. PLAINTIFF'S FACIAL CHALLENGE FAILS AS A MATTER OF LAW

Plaintiff's facial challenge to SB 107 should also be dismissed because Plaintiff cannot meet the "heavy burden" of establishing that "no set of circumstances exists under which the Act would be valid." *See* ECF No. 12 at 23-24 (citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiff claims that "it is unclear whether Salerno's 'no set of circumstances' test is valid law." *See* ECF No. 15 at 24. But Plaintiff acknowledges that in 2008, the Supreme Court cited *Salerno* for the proposition that to strike a law down on its face, it must be unconstitutional "in all of its applications." *See* ECF No. 15 at 25 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).)[6] The *Salerno*/*Washington State Grange* formulation continues to be the proper standard for a facial challenge, aside from challenges involving free speech and abortion, neither of which are relevant here. *See, e.g., Almerico v. Denney*, 378 F.Supp.3d 920, 924-25 (D. Idaho 2019) (discussing free speech and abortion claims as the only two exceptions recognized by the Ninth Circuit). Here, Plaintiff is unable to point to a single unconstitutional application of SB 107, much less show that it is unconstitutional in all of its applications.

[5] Plaintiff also avers that "SB 107 will allow California doctors to provide gender reassignment treatments to minors who still live in another state." ECF No. 15 at 22. Plaintiff does not cite any provision in SB 107 on this point.

[6] In *Washington State Grange*, the Supreme Court acknowledged that "[w]hile some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where a statute has a plainly legitimate sweep." *Id.* (internal citations omitted). Even under that formulation, SB 107 easily survives a facial challenge. SB 107 offers legal protection to parents who choose to bring their children to California for gender-affirming care, and to the medical providers treating them. Plaintiff never explains why this "plainly legitimate sweep" would pose any constitutional problem.

There are sound policy reasons why facial challenges are disfavored. This case epitomizes the "speculation" and "risk of premature interpretation of statutes on the basis of factually barebones records" underlying the courts' reluctance to invalidate statutes on their face. *Wash. St. Grange*, 552 U.S. at 450 (internal citations omitted). Plaintiff's allegations are based on hypothetical fears and conjecture that are entirely disconnected from the text of SB 107. Plaintiff has not identified any actual person harmed by SB 107, or even a plausible hypothetical circumstance in which parental rights would be violated. That is flatly insufficient for invalidating a statute on its face. *Id*. at 449. The Court can—and should—dismiss on this basis as well. *See, e.g., Nguyen v. City of Buena Park*, 2020 WL 5991616, at *7 (C.D. Cal. Aug. 18, 2020) (granting motion to dismiss equal protection and due process claims because "Plaintiffs cannot allege that no set of circumstances exists under which the Ordinances would be valid" among other reasons).

CONCLUSION

Plaintiff has already amended its Complaint once, and it failed once again to establish standing, state a claim, or carry its burden on a facial challenge to a statute. The Court should therefore dismiss the First Amended Complaint with prejudice.

Dated: May 22, 2023

Respectfully submitted,

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