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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 SECOND AMENDED COMPLAINT [Fed. R. Civ. P. 12(b)(1) & (6)]** Date: October 17, 2023 Time: 1:30 p.m. Dept: Courtroom 4 Judge: Hon. Dale A. Drozd Date Filed: 4/13/2023

INTRODUCTION

California enacted Senate Bill (SB) 107 to provide legal protections for families targeted by the ever-growing list of states (22 states and counting) that have restricted or banned gender-affirming care for teenagers. *See* 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,

as transgender teenagers and their families all across the country are forced to travel out-of-state to continue taking medications that treat their gender dysphoria.[1]

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. In the final analysis, Plaintiff lacks constitutional and prudential 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 Second Amended Complaint (SAC) without leave to amend.

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. 28 at 10 (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. 29 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. *Countrywide Home Loans*, 2005 WL1355440, at *3.

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

[1] *See* Arleigh Rodgers and Michael Goldberg, New State Laws Force Families With Trans Kids to Seek Care Elsewhere, July 10, 2023, available at https://www.pbs.org/newshour/nation/new-state-laws-force-families-with-trans-kids-to-seek-gender-affirming-care-elsewhere.

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 STANDING

To establish standing, an organizational plaintiff must demonstrate that the defendant's conduct: (1) frustrated its mission; and (2) caused it to divert resources in response to that frustration of purpose. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). Plaintiff has not met either of these requirements for a simple reason: it has not explained how its services, functions, funding, operations, or activities have been impaired in any way by SB 107. *See* ECF No. 28 at 10-14. And it is well-established that an organization cannot create standing by voluntarily spending money opposing a law that does not impede its operations. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1087–88 (9th Cir. 2010) (*La Asociacion*). Plaintiff's arguments to the contrary lack merit.

A. Plaintiff Has Not Concretely Demonstrated Frustration of Its Mission

Plaintiff once again asserts that its mission is "restoring Christian-Judeo values in government and education" and that "it does so through legislative advocacy, research, education of California citizens, and mobilization of California citizens to get involved in community events." ECF No. 29 at 11. But Plaintiff does not claim that it cannot advocate, research, educate, or mobilize because of SB 107. *Id*. Instead, Plaintiff alleges that "SB 107 impaired Our Watch's mission by allowing the State of California to remove children from parental custody in violation

of the rights Our Watch seeks to protect." *Id*. But even if that statement was accurate (and it is not), that is precisely the type of *abstract* harm that is insufficient to confer standing. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982) (organizations must allege more than "simply a setback to the organization's abstract social interests"; a "concrete and demonstrable injury to the organization's activities" is required); *see also In Def. of Animals, et al. v. Sanderson Farms, Inc.*, Case No. 20-cv-05293-RS, 2021 WL 4243391, at *5 (N.D. Cal. 2021) ("[Plaintiff] only pleads facts showing the abstract interests it fights for have been set back by [defendant's conduct] . . . and asserts its mission has been frustrated. This is not enough"). As the Court noted previously, Plaintiff has "fail[ed] to identify any restrictions on its ability to perform the core activities—such as meetings, lectures, and general organizing" through which it pursues its mission. ECF No. 22 at 12. Plaintiff cannot demonstrate frustration of its mission because it is unable to point to any tangible, concrete impediment to its organizational activities caused by SB 107.[2]

B. Plaintiff Has Not Shown That It Was Forced to Divert Resources

Plaintiff avers (as it did previously) that it "has diverted resources, such as staff time and money, from its local issues to address the nationwide effects of SB 107." ECF No. 29 at 11. Plaintiff further claims that the passage of SB 107 "prompted the organization to educate parents about how they can protect their children from the danger imposed by SB 107." *Id*. at 12. But like last time, these allegations provide "no basis upon which to conclude that its alleged diversion of resources was in any way 'forced.'" ECF No. 22 at 13. In the Ninth Circuit, to demonstrate that an action was truly forced, an organization must show that "it would have suffered *some other injury* if it had not diverted resources to counteracting the problem." *La Asociacion*, 624 F.3d at 1088 (emphasis added); *Valle del Sol*, 732 F.3d at 1018 (same); *see also 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"). Plaintiff once again simply ignores this binding

[2] Plaintiff also claims that "[c]ourts have consistently granted organizational standing to advocacy organizations." ECF No. 29 at 10. But Plaintiff does not cite any Ninth Circuit case supporting that proposition. In any event, every organization must show that the challenged conduct "harm[s] the organization's activities specifically," *In Def. of Animals*, 2021 WL 4243391, at *4, and Plaintiff has not done that.

precedent. Plaintiff has not—and cannot—point to any harm that it would have suffered from SB 107 had it not voluntarily chosen to divert its resources.

As this Court noted previously, it is true that some Ninth Circuit cases do not expressly state that an organizational plaintiff must show that it would have suffered "some other injury" if it had not diverted resources. ECF No. 22 at 18 n.10 (citing *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012)); *see also Smith v. Pac. Props. and Dev. Corp.*, 358 F.3d 1097 (9th Cir. 2004). But that does not undermine the continued applicability of the "some other injury" requirement for at least two reasons. First, as this Court previously explained, the Ninth Circuit's failure to articulate this part of the legal standard in those matters likely suggests that the plaintiffs there easily met this requirement (and not that the Ninth Circuit abandoned it). ECF No. 22 at 18 n.10. This conclusion is bolstered by the fact that more recent Ninth Circuit decisions, such as *Valle del Sol* and *East Bay Sanctuary*, have explicitly reiterated the "some other injury" requirement. *Valle del Sol*, 732 F.3d at 1018; *E. Bay Sanctuary*, 993 F.3d at 663.

Second, *Smith* and *Fair Housing Council* presented a particular type of organizational harm—which is not present here—that flows directly from the Supreme Court's decision in *Havens Realty*. In *Havens Realty*, the plaintiff organization provided housing counseling and referral services for low-income individuals. 455 U.S. at 379. The organization had Article III standing because defendant's discriminatory practices forced it to devote significant resources to identify and counteract the housing discrimination faced by the people it served. *Id.*[3] *Smith* and *Fair Housing Council* involved similar fact patterns. *See Smith*, 358 F.3d at 1105 (holding that organizational plaintiff had standing because it worked to eliminate housing discrimination against individuals with disabilities and diverted resources from its regular activities to combat the defendant's discriminatory housing design and construction); *Fair Hous. Council*, 666 F.3d at

[3] Currently pending before the U.S. Supreme Court is *Acheson Hotels, LLC v. Laufer* (No. 22-429). That case presents the question of whether and under what circumstances an individual has standing to challenge the failure by a place of public accommodation to provide disability accessibility information on its website. *See Acheson Hotels* Pet. Br. on Writ of Cert., 2023 WL 3903833. In addressing that question, the parties in that case discuss the validity and breadth of *Havens Realty*—but focus on that case's analysis of the standing of individual plaintiffs (455 U.S. at 373-378), and not on the organizational standing issue (455 U.S. at 378-379) addressed above.

1219 (nonprofit organization combatting housing discrimination investigated defendant's discriminatory roommate advertising and created new education and outreach programs to combat that discrimination).

Here, in contrast, Plaintiff does not provide services at all, let alone serve individuals who have allegedly suffered discrimination on account of SB 107. Nor did SB 107 force Plaintiff to modify its usual activities to identify and counteract discrimination faced by Plaintiff's clients. In other words, unlike *Havens Realty*, *Smith*, and *Fair Housing Council*, Plaintiff's diversion of resources is an entirely voluntary attempt by Plaintiff to spend its way into standing (as opposed to a necessary response to discrimination faced by the people it served). This case is simply not a situation where "the organization was *forced* to choose between suffering an injury and diverting resources to counteract the injury." *La Asociacion*, 624 F.3d at 1088 n.4 (emphasis added).

There is good reason for the Ninth Circuit's "some other injury" requirement. Constitutional limitations do not allow a plaintiff to establish standing by simply declaring that a law or policy frustrates its mission and then spending money opposing it. If it were that easy to establish organizational standing, an "organization could establish standing by claiming to have been injured by any law or regulation touching any issue within the scope of its mission (which the organization itself can define) so long as it expends resources to oppose that law or regulation." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 173 (2d Cir. 2021); *see also Equal Means Equal*, 3 F.4th 24, 30 (1st Cir. 2021) ("Otherwise, the implication would be that any individual or organization wishing to be involved in a lawsuit could create an organization for the purpose of conferring standing, or could adopt a mission so that the organization expressed an interest in the subject matter of the case, and then spend its way into having standing") (internal citations omitted).

But that is not the law. When an organization starts a new campaign against someone who frustrates the organization's mission, "the plaintiff's own choice causes the injury." *In Def. of Animals*, 2021 WL 4243391, at *4. In this case, Plaintiff's diversion of resources is an entirely self-inflicted injury. 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. Allowing that voluntary

choice to create standing would permit an end-run around Article III.[4] This Court should grant Defendant's Fed. R. Civ. P. 12(b)(1) motion and dismiss this lawsuit without leave to amend.

III. THE PRUDENTIAL DOCTRINE OF THIRD PARTY STANDING BARS THIS SUIT

If the Court believes that Plaintiff has Article III standing, it should dismiss this lawsuit on prudential standing grounds. Plaintiff's constitutional claims are exclusively premised on the due process, familial association, and full faith and credit rights of third parties: out-of-state parents and other states. *See* ECF No. 28 at 14-15. But Plaintiff is not entitled to represent those rights because Plaintiff lacks a close relationship with those third parties, and because there is no hindrance to those third parties protecting their own interests. *Id.* (citing *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004)). The Supreme Court recently reaffirmed that "litigants typically lack standing to assert the constitutional rights of third parties." *United States v. Hansen*, 143 S.Ct. 1932, 1939 (2023). This Court, too, has recognized "the general prohibition on a litigant raising another person's legal rights." *Frazier v. City of Fresno*, No. 1:20-cv-01069-DAD-SAB, 2022 WL 1128991, at *5 (E.D. Cal. Apr. 15, 2022). The prudential doctrine of third party standing bars this lawsuit.

Plaintiff claims that because it has demonstrated organizational standing (which it has not), third party standing "is not at issue." ECF No. 29 at 13. But third party standing is a prudential standing doctrine. By definition, prudential standing considerations only apply when a plaintiff has already *established* Article III standing (through organizational standing or otherwise). *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (explaining 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

[4] Plaintiff's own cases further underscore why Plaintiff lacks standing. 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 (let alone impossible) for Plaintiff to carry out.

on the legal rights or interests of third parties"); *see also Kowalski*, 543 U.S. at 128 (the standing inquiry involves "both constitutional limitations on federal-court jurisdiction *and* prudential limitations on its exercise") (emphasis added); *Valley Forge Christian Coll. v. Ams. 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").

Plaintiff has not even tried to demonstrate that it can appropriately litigate the constitutional rights of third parties under the principles established in *Kowalski*. Prudential standing limitations independently bar this lawsuit.

IV. 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

Even if the court advances beyond the Article III and prudential standing barriers to Plaintiff's suit, 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. 28 at 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. 28 at 16-20.

Plaintiff's responses to these points are unpersuasive for many reasons. At the outset, Plaintiff appears to concede that *Lee* limits due process and familial association claims to being brought by parents and children. *See* ECF No. 29 at 18 (quoting *Lee*, 250 F.3d at 685 for the proposition that "[t]his constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their [relationship] with their parents"). Because Plaintiff is neither a parent nor a child, the Court should dismiss Plaintiff's due process and familial association claims under *Lee* and *Ward*. *See* ECF No. 28 at 16.

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. 29 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, nor does it address the substantive legal standards for making custody determinations. *See* ECF No. 28 at 2-8, 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."[5] *See* ECF No. 29 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

[5] 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. 29 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.[6] *See* ECF No. 28 at 18 n.28.

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. 29 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

[6] 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. More importantly, nothing in SB 107 permits California to take children from their parents without a court order, or subject children to medical procedures without parental consent or judicial oversight—or take any other action remotely resembling the extreme facts of *Wallis*.

Plaintiff's reliance on *Troxel v. Granville*, 530 U.S. 57 (2000) is also misplaced. *See* ECF No. 29 at 1, 14, 17. In that case, the Supreme Court held that a Washington statute which allowed any person at any time to petition a court for visitation rights with a child was invalid as applied to the plaintiff. *Troxel*, 530 U.S. at 61. There, a mother (who was a fit custodial parent) wished to limit visitation between her daughters and their parental grandparents. *Id.* at 67-69. 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 state statute violated that fundamental right (as applied) because it allowed 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," and on the facts presented, gave no weight at all to the mother's view. *Id*. at 67.

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. 29 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. 28 at 20-24.

Plaintiff's responses are not persuasive. First, Plaintiff insists that SB 107 ignores the "judgments of other states." *See* ECF No. 29 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. *Id.* § 3453.

Second, Plaintiff contends that SB 107 overrides the rightful jurisdiction of a family's home state. *See* ECF No. 29 at 19-20. 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 medical care issued by out-of-state courts." *See* ECF No. 29 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. 28 at 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. 29 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. 28 at 22-24 (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 toward states that have criminalized gender-affirming care. *See* ECF No. 29 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. 28 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 for discrimination (*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.[7]

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.

V. 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. 28 at 24-25 (citing *Hansen*, 143 S.Ct. at 1939; *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

In response, Plaintiff first claims that "it is unclear whether *Salerno's* 'no set of circumstances' test is valid law." *See* ECF No. 29 at 24. But the Supreme Court just reaffirmed that precise language from *Salerno* earlier this year. *See Hansen*, 143 S.Ct. at 1939 (citing *Salerno* for the proposition that "litigants mounting a facial challenge to a statute normally must establish that *no set of circumstances* exists under which the statute would be valid") (internal citations omitted) (emphasis in original). *Salerno* remains the operative test for facial challenges.

Second, Plaintiff asserts that SB 107 "infringes upon constitutional guarantees in all of its applications" because under no set of circumstances "is the taking of a child away from his or her parents for experimental treatments and surgeries constitutional." ECF No. 29 at 25 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). But Plaintiff has not offered even a single example of how SB 107 could permit that result, let alone shown that *every* application of the statute would do so. SB 107 does precisely the opposite of what Plaintiff suggests. The California Assembly Judiciary Committee Analysis—which Plaintiff asks this Court to judicially notice (ECF No. 30)—confirms that SB 107 "seeks to protect . . . care that is

[7] 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. 29 at 22. Plaintiff does not cite any provision in SB 107 supporting this contention.

administered after a patient provides informed consent, is administered *with parental consent*, and is administered under the supervision of a trained medical professional." SB 107 (Wiener) Assemb. Jud. Comm. Analysis, at 10-11 (June 8, 2022) (emphasis added).

There are, moreover, sound policy reasons why facial challenges like this one 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, legislative history, and broader statutory scheme. 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 Plaintiff's facial challenge to SB 107 for failing to meet the *Salerno*/*Hansen* standard. *See, e.g., Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 444, 453 (9th Cir. 2019) (affirming district court dismissal because plaintiff could not show "that no set of circumstances exists under which the [Ordinance] would be valid"); *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 "[p]laintiffs cannot allege that no set of circumstances exists under which the Ordinances would be valid" among other reasons).

CONCLUSION

Plaintiff has already amended its original complaint twice, and it failed once again to establish standing, state a claim, or carry its heavy burden on a facial challenge to a statute. The Court should dismiss the SAC without leave to amend. *See, e.g.*, *Rich v. Shrader*, 823 F.3d 1205, 1209 (9th Cir. 2016) (the district court has "wide discretion in granting or refusing leave to amend after the first amendment, and only upon gross abuse will [its] rulings be disturbed").

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Respectfully submitted,

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