ROB BONTA
Attorney General of California
RENUKA R. GEORGE
Senior Assistant Attorney General
KATHLEEN BOERGERS, State Bar No. 213530
Supervising Deputy Attorney General
NIMROD PITSKER ELIAS, State Bar No. 251634
LILY WEAVER, State Bar No. 289038
NATALIE S. TORRES, State Bar No. 283571
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-0012
Fax: (510) 622-2270
E-mail: Nimrod.Elias@doj.ca.gov
Attorneys for Defendant Rob Bonta, Attorney General of California

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**, Attorney General of California, Defendant.	Case No. 2:23-cv-00422-DAD-DB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT [Fed. R. Civ. P. 12(b)(1) & (6)]** Hearing Date: June 20, 2023 Time: 1:30 p.m. Dept: Courtroom 4 Judge: Hon. Dale A. Drozd

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INTRODUCTION

Recently, several states have enacted (or are currently considering) laws that impose civil and criminal liability on anyone who allows or assists a minor to obtain gender-affirming health care. Doctors, parents, and youth can face investigations, felony charges, prison time, and exorbitant fines for seeking medical treatment based on well-accepted standards of care. In light of the unprecedented surge in such legislation, the California Legislature enacted Senate Bill (SB) 107. *See* S.B. 107, 2021-2022 Reg. Sess., (Cal. 2022) (SB 107). SB 107 seeks to protect families who come to California to obtain gender-affirming health care that is inaccessible where they live, as well as doctors and staff providing such care in California. SB 107 implements various safeguards against the enforcement of other states' laws that would penalize people for obtaining health care that is legal in California—and often lifesaving.

Plaintiff's challenge rests on a presumption that SB 107 allows children to be taken to California to obtain gender-affirming care against their parents' wishes. It does not. Indeed, the express aim of SB 107 is to "provide[] parents assurances that, if they come to California with their child to obtain medical care for the child, their *own parental choice* will not be subject to second-guessing by their home state." SB 107 (Wiener) Sen. Jud. Cmt. Analysis, at 11 (Aug. 29, 2022) (emphasis added). Further, SB 107 does not alter existing parental consent laws in California. Gender-affirming health care for minors such as puberty blockers, hormone replacement therapy, and surgeries generally require parental consent in California. Nothing in SB 107 changes that. Nor does SB 107 modify the ability of parents to access their children's medical records. Finally, SB 107 does not supplant the jurisdiction of any other state's courts, grant California courts any new powers to take custody of minors away from their parents, or allow California courts to ignore final custody judgments from other states. Based on the plain language of the statute, the assertions underlying the Complaint are wrong. The Court should dismiss the Complaint for a failure to state a claim.

The Court should also dismiss the Complaint because Plaintiff lacks standing. Plaintiff Our Watch with Tim Thompson (Plaintiff), a non-profit advocacy organization, lacks Article III standing because SB 107 did not injure Plaintiff in any way. SB 107 does not impede any of

Plaintiff's organizational activities or functions. Plaintiff also lacks prudential standing to assert third party claims on behalf of out-of-state parents and other states.

In sum, California acted well within its constitutional authority in seeking to ensure that transgender youth and their families can safely, and without fear of repercussion, obtain medically necessary health care in our state. This lawsuit should be dismissed.

BACKGROUND

A. SB 107 Provides Legal Safeguards for Transgender Minors and Their Parents Seeking Gender-Affirming Care in California

The California Legislature passed SB 107 against a national backdrop of proliferating state actions targeting transgender youth and their families and doctors. It enacts various safeguards to protect California residents and people traveling to our state against the enforcement of other states' laws that penalize individuals for obtaining gender-affirming care that is legal in California. *See, e.g.*, SB 107 (Wiener) Sen. Jud. Cmt. Analysis, at 11 (Aug. 29, 2022) (discussing "regressive transphobic laws and executive orders" from other states which put "parents and doctors in the position of risking sentences of up to ten years in prison for simply getting their child the medical care they need"); *see also* SB 107 (Wiener) Assembly Jud. Cmt. Analysis at 1, 6-7 (June 5, 2022). There are three main categories of legal protections enacted by SB 107: (1) barring compliance with foreign subpoenas that are based on other states' laws penalizing the provision of gender-affirming care; (2) clarifying situations when California courts retain jurisdiction over family law matters; and (3) limiting state law enforcement assistance with out-of-state criminal actions involving gender-affirming care.[1]

[1] For ease of reference, this brief generally refers to the various sections of SB 107 in shorthand and does not note the codes that were amended or added. Those sections added or amended other statutory provisions as follows. Cal. S. B. 107 § 1 (adding Cal. Civ. Code § 56.109); Cal. S. B. 107 § 2 (amending Cal. Civ. Pro. § 2029.300); Cal. S. B. 107 § 2.5 (amending Cal. Civ. Pro. § 2029.300); Cal. S. B. 107 § 3 (amending Cal. Civ. Pro § 2029.350); Cal. S. B. 107 § 3.5 (amending Cal. Civ. Pro § 2029.350); Cal. S. B. 107 § 4 (amending Cal. Fam. Code § 3421); Cal. S. B. 107 § 5 (amending Cal. Fam. Code § 3424); Cal. S. B. 107 § 6 (amending Cal. Fam. Code § 3427); Cal. S. B. 107 § 7 (amending Cal. Fam. Code § 3428); Cal. S. B. 107 § 8 (amending Cal. Fam. Code § 3453.5); Cal. S. B. 107 § 9 (adding Cal. Pen. Code § 819); Cal. S. B. 107 § 10 (amending Cal. Pen. Code § 1326).

1. SB 107 bars compliance with foreign subpoenas that are based on out-of-state laws penalizing the provision of gender-affirming care

SB 107 limits the ability of litigants in other states to obtain civil discovery from California entities to prosecute an out-of-state action that would penalize an individual for obtaining (or helping their child or patient obtain) gender-affirming health care and gender-affirming mental health care in California.[2] SB 107, §§ 1-3.5. These provisions forbid compliance with foreign subpoenas when those subpoenas are based on out-of-state laws which penalize or interfere with the provision of gender-affirming care. Section 1 states that:

> [A] provider of health care, health care service plan, or contractor shall not release medical information related to a person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to any civil action, including a foreign subpoena, based on another state's law that authorizes a person to bring a civil action against a person or entity [permitting such care].

SB 107, § 1. Sections 2 and 2.5 similarly prohibit a Superior Court clerk from issuing a subpoena in response to a foreign subpoena that "is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care." SB 107, §§ 2, 2.5. Sections 3 and 3.5 impose similar limitations on licensed California attorneys, prohibiting them from issuing subpoenas pursuant to foreign subpoenas based on out-of-state laws that interfere with the provision of gender-affirming care. SB 107, §§ 3, 3.5.

[2] SB 107 adopts the definitions of "gender-affirming health care" and "gender-affirming mental health care" found in California Welfare & Institutions Code section 16010.2. Gender-affirming health care is defined as "medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient" and may include: (1) interventions to suppress the development of endogenous secondary sex characteristics; (2) interventions to align the patient's appearance or physical body with the patient's gender identity; and (3) interventions to alleviate symptoms of clinically significant distress resulting from gender dysphoria. Cal. Welf. & Inst. Code § 16010.2(b)(3)(A). Gender-affirming mental health care is "mental health care or behavioral health care that respects the gender identity of the patient, as experienced and defined by the patient," and may include developmentally appropriate exploration and integration of identity, reduction of distress, adaptive coping, and strategies to increase family acceptance. *Id*. at § 16010.2(b)(3)(B). Unless stated otherwise, references to "gender-affirming health care" refer to both medical and mental health care.

2. SB 107 clarifies situations when California courts retain jurisdiction over family law matters

SB 107 also modifies several provisions of the Family Code that codify the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to ensure that California courts can protect families that come to California for gender-affirming care. The UCCJEA, which nearly all states including California have adopted, establishes uniform rules for handling family law matters between states. As a general matter, the UCCJEA ensures that a child's home state retains jurisdiction over family law proceedings. There are exceptions to this general rule, and SB 107 clarifies the scope of some of those exceptions.

Consistent with the UCCJEA, the California Family Code establishes that a California court has jurisdiction to make an initial child custody determination in two main scenarios. First, a California court has jurisdiction if California is the home state of the child on the date that custody proceedings commence, or was the home state of the child within six months before proceedings commenced and the child is absent from this state but a parent continues to live here. Cal. Fam. Code § 3421(a)(1). Second, if California lacks jurisdiction under that prong, California can also make an initial child custody determination if a court of another state does not have jurisdiction under the first paragraph, or a court of the home state of the child declined to exercise jurisdiction on the grounds that California is a more appropriate forum and (a) the child and the child's parents, or the child and at least one parent, have a significant connection to this state other than mere physical presence and (b) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships. *Id*. at (a)(2). SB 107 clarifies that, in the second scenario where there is no home state (or the home state declined jurisdiction), the "presence of a child in this state for the purposes of obtaining gender-affirming health care" meets the requirement of having "a significant connection with this state other than mere physical presence." SB 107, § 4.

The UCCJEA also recognizes the need to protect children in emergency situations, no matter where they are located when the emergency arises. The UCCJEA gives courts temporary emergency jurisdiction when a child is in the state and has been abandoned, or an emergency

makes it necessary to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse. UCCJEA § 204; *see also* Cal. Fam. Code § 3424(a). SB 107 added two emergency situations to this list: cases involving domestic violence, and cases where the child has been unable to obtain gender-affirming health care.[3] SB 107, § 5. However, any emergency order issued under this provision is temporary, and remains in effect only until a custody order is obtained from the child's home state court under section 3421. Cal. Fam. Code § 3424(b). And if the California court learns that another state has made a child custody determination, or has ongoing child custody proceedings, the California court must immediately communicate with the other court to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. *Id*. at (d). Temporary emergency jurisdiction does not—and cannot—supplant a child custody determination from a child's home state. *Id*. at (c)–(d).

As with all courts, family courts must determine if they are the appropriate forum for the matter before them. Consistent with the UCCJEA, a California court that has jurisdiction to make a child custody determination may decline to exercise that jurisdiction if it determines that it is an inconvenient forum and that another court is a more appropriate forum. Cal. Fam. Code § 3427(a). There are several factors that a family court must consider before deciding that it is an inconvenient forum. *Id*. at (b). SB 107 augments this section to include that, when gender-affirming health care for the child is an issue, "a court of this state shall not determine that it is an inconvenient forum where the law or policy of the other state that may take jurisdiction limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child." SB 107, § 6. In other words, SB 107 simply provides that, in one specific circumstance, a California court cannot decline jurisdiction on the ground that it is an inconvenient forum: when a parent's ability to obtain gender-affirming health care for their child in another state is constrained because of that state's laws (not because of a custody determination) and gender-affirming health care is an issue in the case. *Id*.

[3] The addition of domestic violence to the list of emergency situations in which the court can assert temporary jurisdiction is not at issue in this case.

The UCCJEA also requires a court to decline to exercise its jurisdiction if the person seeking to invoke the court's jurisdiction has engaged in "unjustifiable conduct." UCCJEA § 208; *see also* Cal. Fam. Code § 3428(a). Neither the UCCJEA nor the Family Code define "unjustifiable conduct." Nonetheless, even when unjustifiable conduct has occurred, courts may retain jurisdiction if: (1) the parents have acquiesced in the exercise of jurisdiction; (2) a court of a state otherwise having jurisdiction determines that California is a more appropriate forum; or (3) no court of any other state would have jurisdiction. Cal. Fam. Code § 3428(a)(1)-(3). SB 107 amends this section by stating that when making a jurisdiction determination:

> [A] court shall not consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit . . . from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner . . . or for the purposes of obtaining gender-affirming health care . . . for the child and the law or policy of the other state limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.

SB 107, § 7. In other words, SB 107 provides two examples of what is *not* unjustifiable conduct requiring a court to decline jurisdiction, one of which is bringing a child to California for gender-affirming care when a parent is unable to obtain such care for their child in another state.[4] *Id*. SB 107 also adds a section to the Family Code stating that "[a] law of another state that authorizes a state agency to remove a child from their parent or guardian based on the parent or guardian allowing their child to receive gender-affirming health care or gender-affirming mental health care is against the public policy of this state and shall not be enforced or applied in a case pending in a court in this state." SB 107, § 8.

3. SB 107 limits California law enforcement's ability to assist with out-of-state criminal actions involving gender-affirming care

Finally, SB 107 adds to, and amends, sections of the Penal Code to limit (and in some cases to prevent) California's law enforcement agencies from assisting other states' prosecutions of people involved in providing or seeking gender-affirming care. First, SB 107 declares that "[i]t is the public policy of the state that an out-of-state arrest warrant for an individual based on

[4] As with section 5, section 7's addition of fleeing with a child from domestic violence as an example of what does not qualify as unjustifiable conduct is not challenged in this case.

violating another state's law against providing, receiving, or allowing their child to receive gender-affirming health care or gender-affirming mental health care is the lowest law enforcement priority." SB 107, § 9. Second, "California law enforcement agencies shall not knowingly make or participate in the arrest or participate in any extradition of an individual pursuant to an out-of-state arrest warrant for violation of another state's law against providing, receiving, or allowing a child to receive gender-affirming health care . . . if that care is lawful under the laws of this state, to the fullest extent permitted by federal law." *Id*. Third, "[n]o state or local law enforcement agency shall cooperate with or provide information to any individual or out-of-state agency or department regarding the provision of lawful gender-affirming health care or gender-affirming mental health care performed in this state." SB 107, § 9. Fourth, SB 107 amends the Penal Code section addressing subpoenas in criminal actions, stating that "a provider of health care, health care service plan, or contractor shall not release medical information related to a person or entity allowing a child to receive gender-affirming health care . . . in response to any foreign subpoena that is based on a violation of another state's laws authorizing a criminal action against a person or entity that allows a child to receive gender-affirming care or gender-affirming mental health care." *Id.* at § 10. SB 107 also includes a severability clause. *Id.* at § 11.

LEGAL STANDARD

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) allows a party to raise the defense that a court lacks jurisdiction over the subject matter of a claim for lack of standing. Fed. R. Civ. P. 12(b)(1). Article III standing requires a plaintiff to demonstrate: (1) an injury in fact; (2) a causal connection; and (3) redressability. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the

court.'" *Id*. "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Id*. at 561 (citations omitted).

B. Motion to Dismiss for Failure to State a Claim

A motion to dismiss tests the legal sufficiency of a claim. Fed. R. Civ. P. 12(b)(6). Dismissal should be entered where the plaintiff has failed to allege facts sufficient to support a cognizable legal theory. *Shroyer v. New Cingular Wireless, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). All material allegations in the pleadings are taken as true and construed in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The Court, however, is not required to accept as true allegations that are "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*.

ARGUMENT

I. PLAINTIFF LACKS STANDING

Plaintiff lacks Article III standing because SB 107 did not impede any of Plaintiff's organizational activities or functions. And Plaintiff lacks prudential standing to assert third party claims on behalf of out-of-state parents and other states.

A. Plaintiff Lacks Article III Standing

While the *Lujan* decision established the "irreducible constitutional minimum" for standing in the context of an individual plaintiff, the same analysis is used to determine whether an organizational plaintiff has standing. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378 (1982). An organization suing on its own behalf can establish an injury when it has suffered "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1087–88 (9th Cir. 2010) (internal citation omitted) (hereinafter *La Asociacion*). "Frustration of mission cannot be just a setback to an organization's values or interests, it must result in an actual impediment to the organization's real

world efforts on behalf of such principles." *In Defense of Animals, et al. v. Sanderson Farms, Inc.*, 2021 WL 4243391, at *3 (N.D. Cal. 2021). And 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. In other words, an organization has standing to sue if it "could not avoid suffering one injury or the other." *Id*.

Importantly, an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion*, 624 F.3d at 1088 (internal citation omitted).[5] "An organization may sue only if it was *forced* to choose between suffering an injury and diverting resources to counteract the injury." *Id.* at 1088 n. 4 (emphasis added); *see also Rodriguez v. City of San Jose*, 930 F.3d 1123, 1136 (9th Cir. 2019) (organizations representing gun owners and providing them with legal advice lacked standing because they were not required to divert resources to oppose the city's refusal to return confiscated guns to their owner). Put differently, the "challenged conduct must harm the organization's activities specifically, not merely frustrate their mission in a general sense." *In Defense of Animals*, 2021 WL 4243391, at *4.

In this case, 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. Plaintiff alleges that it is a California-based 501(c)(3) organization "dedicated to protecting family and parental rights in California." Compl. ¶ 8. Plaintiff alleges that it furthers "its mission through legislative advocacy, education of California citizens, and mobilization of California citizens to get involved in community events." *Id*. ¶ 11. Although Plaintiff asserts that SB 107 has caused it to "divert[] resources from other focus areas like critical race theory and abortion rights," that puts the cart before the horse. *Id*. ¶ 13. Plaintiff must first "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); *see also La*

[5] It is well-accepted that "standing must be established independent of the lawsuit filed by the plaintiff." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 943 (9th Cir. 2011) (internal citations omitted).

Clinica de la Raza v. Trump, No. 19-CV-04980-PJH, 2020 WL 6940934, at *4 (N.D. Cal. Nov. 25, 2020) (plaintiff must "demonstrate that they will be injured by the Rule if they do nothing"). Yet the Complaint provides no details describing how SB 107 impeded Plaintiff's existing activities. Plaintiff does not offer a single example describing how its pre-existing advocacy, education, and mobilization efforts were hindered by SB 107. *See, e.g., Havens*, 455 U.S. at 379 (challenged conduct must "have perceptively impaired" the "organization's activities").

In fact, the Complaint reveals just the opposite. Plaintiff states that "SB 107 was the *primary catalyst* that prompted Our Watch to focus intently on educating parents and churches on transgender issues." Compl. ¶ 15 (emphasis added). Plaintiff did not even focus on transgender issues before SB 107, which is a tacit admission that SB 107 could not have impeded its existing activities. In other words, Plaintiff has not shown—and by its own admission, cannot show—that "it was forced to choose between suffering an injury and diverting resources to counteract the injury." *La Asociacion*, 624 F.3d at 1088 n. 4. Because Plaintiff would not have been harmed by "do[ing] nothing" after SB 107 was enacted, it does not have Article III standing. *La Clinica de la Raza*, 2020 WL 6940934, at *4.

Plaintiff alleges that it implemented "new educational outreach programs outside of California." Compl. ¶ 13. But an organization cannot create standing by "simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion*, 624 F.3d at 1088; *see also In Defense of Animals*, 2021 WL 4243391, at *4 (an organization cannot "gin up standing" by "investigating conduct or starting a new campaign against someone who frustrates its general mission"). That is precisely the situation here. Plaintiff admits that it shifted its focus to transgender issues and "implemented new educational outreach programs" outside of its traditional geographic scope (California) in response to SB 107. Compl. ¶¶ 13, 15; *cf.* ¶ 8 (Plaintiff is "dedicated to protecting family and parental rights in California."). But allowing an organization to shift its focus and broaden its geographic scope to self-generate harm "would effectively nullify the constitutional requirements for standing." *In Defense of Animals*, 2021 WL 4243391, at *4.

Courts routinely deny organizational standing where, as here, the challenged policy does

not concretely impede the organization's activities. *See, e.g.*, *In Defense of Animals*, 2021 WL 4243391, at *4–6 (non-profit organizations dedicated to animal rights lacked standing to challenge a poultry processing company's allegedly fraudulent advertising because they failed to plead "any concrete way" in which their missions were frustrated, and because they spent money and staff time "trying to manufacture standing" rather than being forced to divert those resources); *Rodriguez*, 930 F.3d at 1136 (gun rights organizations lacked standing because they "offered no theory explaining their organizational harm" that purportedly required them to divert resources to oppose a city's confiscation and retention of an owner's guns).

The Ninth Circuit's decision in *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) exemplifies a challenged action that actually impeded an organization's activities. Legal services organizations that represent asylum seekers challenged a federal rule that eliminated asylum eligibility for migrants who crossed into the United States other than at a port of entry. *Id*. at 658–59. The legal services organizations had standing because the rule: (1) made 80% of their prospective clients ineligible for asylum; (2) prevented the organizations from representing migrants who were still eligible for asylum by detaining those migrants at ports of entry, which were hundreds of miles away from the organizations' offices; and (3) decreased the funding that the organizations rely upon to represent asylum seekers. *Id*. at 663–64. That fundamental impairment of the organizations' core activities stands in stark contrast to this case.[6]

Unlike the plaintiff organizations in *E. Bay Sanctuary Covenant*, Plaintiff has not described how any of its services, activities, functions, or funding would have been hampered by SB 107 had it done nothing in response. Plaintiff has not suffered any injury and therefore lacks Article III standing. The Court should dismiss.

B. The Doctrine of Third Party Standing Independently Bars Plaintiff's Suit

Even assuming that Plaintiff can establish Article III standing, prudential limitations on third party standing bar this lawsuit. The Supreme Court has held that a plaintiff generally must

[6] Because organizational standing requires showing an actual impediment to an organization's activities, some courts have suggested that it is "easier for service organizations to show standing," as opposed to advocacy organizations like plaintiff. *See, e.g.*, *In Defense of Animals*, 2021 WL 4243391, at *4 n. 4.

assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (internal citations omitted). Prudential limitations on third party standing represent a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed . . . the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (internal citations omitted) (holding that criminal defense attorneys lacked third party standing to challenge the constitutionality of a statute denying appellate counsel to criminal defendants who pled guilty).

Although the bar on third party standing is not absolute, a party invoking the legal rights of others must demonstrate that: (1) "the party asserting the right has a close relationship with the person who possesses the right"; and (2) "there is a hindrance to the possessor's ability to protect his own interests." *Kowalski*, 543 U.S. at 129–30 (internal citations omitted). In *Kowalski*, for example, the Supreme Court concluded that the criminal defense attorney plaintiffs did not have standing to assert the constitutional rights of unidentified future clients because they lacked a close relationship with their hypothetical future clients, and there was no hindrance to indigent criminal defendants asserting their own constitutional rights. *Id*. at 131–32.

This is precisely the type of lawsuit which is properly barred by the third party standing rule. Plaintiff's due process, familial association, and full faith and credit constitutional claims rest entirely on the premise that SB 107 violates the rights of: (1) hypothetical out-of-state parents; and (2) other states in the union. But Plaintiff has no relationship with other sovereign states, nor does it have a close relationship with out-of-state parents. Plaintiff's organizational mission centers on "protecting family and parental rights in California." Compl. ¶ 8. Merely creating educational programs directed at out-of-state parents does not establish a close relationship with those parents, especially where the organization's pre-SB 107 focus was the education and mobilization of "California citizens." *See* Compl. ¶¶ 11, 13–14. More importantly, Plaintiff has not identified any "hindrance" to out-of-state parents or other states protecting their

own interests. *Kowalski*, 543 U.S. at 129–130. There is no reason at all—let alone a compelling one—to permit a non-profit, California-based advocacy organization to assert the constitutional rights of out-of-state parents or states that have banned gender-affirming health care. Constitutional claims should be raised by the "one at whom the constitutional protection is aimed."[7] *Kowalski*, 543 U.S. at 129. That is not this Plaintiff.

Constitutional and prudential standing limitations bar this lawsuit. The Court should dismiss the Complaint. Fed. R. Civ. P. 12(b)(1).

II. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR RELIEF UNDER ANY OF ITS CONSTITUTIONAL THEORIES

The Court should also dismiss the Complaint because Plaintiff has failed to allege facts sufficient to support a cognizable legal theory. *Shroyer,* 622 F.3d at 1041. Plaintiff's due process and familial association claims fail because they are based on inaccurate allegations that SB 107 changes laws involving parental consent to medical procedures, undermines parents' right to access their children's medical records, and strips parents of custody over their children. Plaintiff's Full Faith and Credit Clause claim fails because SB 107 permissibly furthers California's legitimate public policy, and nothing in SB 107 "overrides" the jurisdiction of a child's home state courts. Lastly, Plaintiff's facial challenge to SB 107 cannot succeed because Plaintiff does not remotely demonstrate that SB 107 is unconstitutional "in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). The Court should dismiss.

[7] Plaintiff's due process and familial association claims may properly be raised only by parents and children; they do not even extend to siblings, let alone to third parties. *See, e.g.*, *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991) (holding that only parents and children, but not siblings, could assert a "constitutionally protected liberty interest in the companionship and society of his or her child"). Plaintiff's authorities are in agreement. *See, e.g.*, Compl. ¶ 58 (citing *Lee v. City of L.A.*, 250 F.3d 668, 685 (9th Cir. 2001) ("It is well established that a *parent* has a fundamental liberty interest in the companionship and society of his or her child" and this constitutional interest "extends to protect *children* from unwarranted state interference with their relationships with their parents") (emphases added) (internal citations omitted).

A. Plaintiff's Due Process and Familial Association Claims Fail as a Matter of Law

1. SB 107 does not deny parents access to medical records, change parental consent laws, or strip parents of custody over their children

Plaintiff's constitutional due process and familial association claims are based on several assertions that bear little resemblance to the actual language of SB 107. Plaintiff avers that SB 107: (1) "denies parents the right to access their child's medical information"; (2) "prevents parents from seeking court intervention to gain access to their child's medical records"; (3) "allows the 'taking of the child' away from his or her parents to California to obtain gender transition procedures"; and (4) permits California courts to exercise emergency jurisdiction over a child seeking gender-affirming care, "overriding the jurisdiction of the family's home state." Compl. ¶¶ 41, 43, 51, 52 (citing SB 107, §§ 1, 2, 5, and 7). None of these assertions are accurate. *See Sprewell*, 266 F.3d at 988 (the Court need not accept as true allegations that are "unwarranted deductions of fact, or unreasonable inferences.").

First, SB 107 does not change California law regarding the right of parents to access their child's medical records. In California, parents are generally entitled to their child's medical records and they do not need a subpoena to obtain them. Cal. Health & Saf. Code §§ 123105 & 123110; *see also* Cal. Civ. Code § 56.10(b)(7).[8] Nothing in SB 107 changes that. Section 1 of SB 107 addresses an entirely different situation: when medical information is sought from a medical provider "based on another state's law that authorizes a person to bring a civil action" against the person or entity that allowed or provided gender-affirming care. SB 107, § 1. Section 1 only prevents a provider from releasing medical information in one narrow circumstance: when the request is based on out-of-state laws authorizing a civil action against a person or entity that provided gender-affirming care. *Id*. This limitation is unrelated to a parent's right to access their child's medical records.

[8] There are exceptions to this rule, such as when "the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being." Cal. Health & Saf. Code § 123115(a)(2). These exceptions predate SB 107 and are not an issue in this lawsuit.

Similarly, section 2 does not "prevent parents from seeking court intervention to gain access to their child's medical records." Compl. ¶ 51. Section 2 does not alter a parent's legal right to access their child's medical records in any way. It merely prevents the clerk of a superior court from issuing a subpoena in the same limited situation: when the foreign subpoena "is based on another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care." SB 107, § 2. Even if a parent needed a subpoena to access their child's medical records (which is generally not the case), courts can issue such a subpoena in all circumstances except one: where the subpoena is based on another's state's law that interferes with gender-affirming care. *Id*.

Plaintiff's assertion that SB 107 allows a child to be brought to California to obtain gender transition procedures without parental consent is equally unfounded. As a preliminary matter, SB 107 does not change parental consent laws surrounding gender-affirming health care. In California, a minor is defined as a person under 18 years of age.[9] With limited exceptions, minors need parental consent for medical care.[10] Parental or legal guardian consent is required for most medical care, including surgery, hormone therapy, puberty blockers, and non-mental health related medical interventions to treat gender dysphoria.[11] In line with California's parental consent laws, health care providers, such as the UCLA Gender Health Program, require parental consent for

[9] Cal. Code Regs. Tit. 9, § 782.14 ("Client means a person, 18 years of age or older, admitted to a mental health rehabilitation center for evaluation, observation, diagnosis, rehabilitation and treatment.").

[10] Cal. Code Regs. Tit. 9, § 784.29(a) (Medical providers must obtain informed consent from a client to provide medical treatment); Cal. Fam. Code § 6910 ("The parent, guardian, or caregiver of a minor who is a relative of the minor and who may authorize medical care and dental care under Section 6550, may authorize in writing an adult into whose care a minor has been entrusted to consent to medical care or dental care, or both, for the minor."); *see also Am. Acad. of Pediatrics v. Lungren*, 16 Cal.4th 307, 315 (1997) ("The requirement that medical care be provided to a minor only with the consent of the minor's parent or guardian remains the general rule, both in California and throughout the United States.").

[11] In California, emancipated minors at least 15 years of age and financially independent minors living apart from their parents may consent to their own medical care. Cal. Fam. Code §§ 7050(e)(1); 6922 (a).

gender-affirming medical treatment.[12] Nothing in SB 107 addresses—let alone modifies—longstanding parental consent requirements in this state.[13]

Moreover, the intent of SB 107 is to empower (not undermine) out-of-state parents seeking medically recommended gender-affirming health care for their child. SB 107 "provides parents assurances that, if they come to California with their child to obtain medical care for the child, their *own parental choice* will not be subject to second-guessing by their home state." SB 107 (Wiener) Sen. Jud. Comm. Analysis, at 11 (Aug. 29, 2022) (emphasis added). Far from undermining parental rights, SB 107 enables parents to pursue gender-affirming health care for their child in California without fear of criminal and civil liability in other states.

Nor does SB 107 legalize "taking away custody of children from their own parents." Compl. ¶ 9. As discussed above, section 7 does not address custody at all. SB 107, § 7. It only addresses a court's jurisdiction, and even then with an exceedingly narrow scope. It merely states that when a family court evaluates whether a petitioner engaged in "unjustifiable conduct"—which would require the court to decline jurisdiction—the court cannot consider the act of bringing a child to California for gender-affirming care when a parent is unable to obtain such care for their child in another state as unjustifiable conduct. SB 107, § 7. In other words, it provides one example of conduct that does not legally qualify as unjustifiable conduct, in light of the fact that "unjustifiable conduct" is not defined in the statute. *Id*. Notably, before SB 107 became law, California family courts were free to conclude that bringing a child to the state for

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[12] *See* UCLA Gender Health Program, *Health Insurance FAQ*, UCLA (2023), https://www.uclahealth.org/medical-services/gender-health/patient-resources/health-insurance-faq. ("Due to California state law, our primary care team cannot provide gender affirming medical treatments without parent/legal caregiver consent. If a patient is legally emancipated or turns 18, they can consent to their own care without parent consent.") (last visited March 29, 2023).

[13] California law allows minors to consent to their own mental health care in certain circumstances, none of which were affected by SB 107. *See* Cal. Fam. Code § 6924(b) (a minor who is 12 years or older may consent to mental health treatment or counseling on an outpatient basis if: (1) the minor, in the opinion of the attending professional person, is mature enough to participate intelligently in the outpatient services and (2) the minor would present a danger of serious physical or mental harm to self or to others without the mental health treatment or counseling or is the alleged victim of incest or child abuse); *see also* Cal. Health & Saf. Code § 124260(b)(1).

gender-affirming care did not qualify as such conduct. Moreover, section 7 does not affect any other state's jurisdiction (as a home state or otherwise). *Id*. SB 107 does not take custody of children away from their parents.

Lastly, there is no merit to Plaintiff's claim that SB 107's emergency jurisdiction provisions "overrid[e] the jurisdiction of the family's home state." Compl. ¶ 43. As discussed above, family courts in nearly every state have temporary emergency jurisdiction when a child in their state has been abandoned, abused, or mistreated. UCCJEA § 204. SB 107 simply added two more emergency situations to that list: cases involving domestic violence, and cases where the child has been unable to obtain gender-affirming health care. SB 107, § 5. Emergency jurisdiction is, by definition, temporary. *Id*. It does not displace home state jurisdiction. *Id.* And any emergency order issued under this provision remains in effect only until a custody order is obtained from the child's home state court. Cal. Fam. Code § 3424(b). Moreover, when invoking emergency jurisdiction, a California court must immediately communicate with the home state court to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. *Id*. at (d). Temporary emergency jurisdiction does not—and cannot—supplant a child custody determination from a child's home state. *Id*. at (c)–(d); *see also* Cal. Fam. Code § 3423 (aside from emergency jurisdiction, as a general matter, "a court of this state may not modify a child custody determination made by a court of another state").

SB 107 does not violate the right to due process or familial association. The Court should dismiss these claims.

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

Plaintiff's assertion that SB 107 violates the Full Faith and Credit Clause also fails as a matter of law. According to Plaintiff, SB 107 violates the Full Faith and Credit Clause for two reasons: (1) it "was passed as a direct 'policy of hostility' towards statutes passed in other states"; and (2) it "state[s] that the presence of a child in California for the purpose of obtaining gender-affirming health care is sufficient for California courts to exercise jurisdiction over custody decisions for the child." Compl. ¶¶ 69, 72. Both claims lack merit.

1. SB 107 permissibly furthers California's legitimate public policy

The Constitution's Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1. Congress implemented the Full Faith and Credit Clause in 28 United States Code section 1738. Supreme Court jurisprudence "differentiates the credit owed to laws (legislative measures and common law) and to judgments" under the Full Faith and Credit Clause. *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998). With respect to judgments, "the full faith and credit obligation is exacting. A final judgment in one State . . . qualifies for recognition throughout the land."[14] *Id.* at 233. SB 107, however, does not even use the word judgment, let alone require California to ignore a final judgment from a sister state.

States, however, have more flexibility when it comes to recognizing out-of-state statutes. The Full Faith and Credit Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 176 (2016). States need not "apply another State's law that violates its '"own legitimate public policy."'" *Id.* at 177. This is known as the public policy exception. The public policy exception is well established in Supreme Court jurisprudence. *Id; see also Alaska Packers Ass'n v. Indus. Acc. Comm'n of Cal.*, 294 U.S. 532, 549–50 (1935) (acknowledging the importance of a state's public policy and holding that "[n]o persuasive reason is shown for denying to California the right to enforce its own laws in its own courts" and that "the full faith and credit clause does not require that the statutes of Alaska" trump California's laws). SB 107 properly establishes California's public policy of protecting transgender youth and their families receiving medically necessary (and lawful) health care in our

[14] Subpoenas are not considered final judgments under the Full Faith and Credit Clause. *See, e.g.*, *Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 198 (N.Y. Supr. Ct. App. Div. 2013) (holding that "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").

state.

One limit to the public policy exception is that states may not evince "a policy of hostility toward" another state. *Hyatt*, 578 U.S. at 176 (cleaned up). In *Hyatt*, for example, the Nevada Supreme Court applied a "special and discriminatory rule" by awarding $1 million dollars in damages to a Nevada taxpayer in a lawsuit against a California agency. *Id*. at 175, 178. That award far exceeded the maximum damages of $50,000 that could have been awarded in similar circumstances against a Nevada agency, and the ruling ignored both Nevada's and California's rules for immunity. *Id*. at 178. Because the Nevada Supreme Court treated a California agency differently than it would have treated a Nevada agency in similar circumstances, Nevada exhibited a "policy of hostility" towards California. *Id*. at 176; *see also Broderick v. Rosner*, 294 U.S. 629, 642–43 (1935) (finding a policy of hostility when a state statute would permit enforcement of certain claims in that state but deny enforcement of similar, valid claims under a sister state's law).

SB 107 does not resemble *Hyatt* or *Broderick*. It does not create a "special and discriminatory rule" towards a specific sister state while simultaneously disregarding California's own legal standards. Nor does it treat similar claims differently, depending on which state is asserting the claim. On the contrary, California has consistently permitted gender-affirming care for minors, and SB 107 merely creates legal safeguards for transgender youth and their families who choose to come to California to obtain care that is legal here. SB 107 establishes California's public policy of protecting individuals within our borders from being penalized or prosecuted by other states for providing or receiving gender-affirming health care. The California Legislature's considered determination is well within the Full Faith and Credit Clause's public policy exception. *See, e.g.*, *Pink v. A.A.A. Highway Exp.*, 314 U.S. 201, 210 (1941) (The Full Faith and Credit Clause is not a "means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others.").

2. SB 107 does not take away other states' jurisdiction when a child visits California for gender-affirming care

Plaintiff also asserts that SB 107 violates the Full Faith and Credit Clause "by taking away other states' rightful jurisdiction for any child visiting California who seeks" gender-affirming care. Compl. ¶ 71. Once again, this mischaracterizes what SB 107 does. When making an initial child custody determination, a California court has jurisdiction if California is the child's home state. Cal. Fam. Code § 3421(a)(1). Only if no other state is a home state, or the home state declines to exercise jurisdiction, can California assert jurisdiction. *Id*. at (a)(2). And even then, California can only do so if the child and at least one parent is in California, *and* they have a significant connection to this state other than their physical presence here. *Id*. SB 107 clarifies that—only in this secondary scenario—the presence of a child in California for the purpose of obtaining gender-affirming health care qualifies as a significant connection to California. SB 107, § 4. That does not infringe on any other state's jurisdiction because it only arises when no other state has claimed home state jurisdiction in the first place. And if Plaintiff is referring to emergency jurisdiction, once again, emergency jurisdiction is concurrent jurisdiction; it is available in nearly every state, it is temporary, and it does not "take away" the jurisdiction of a child's home state. SB 107, § 5. There is no merit to the claim that SB 107 eliminates any other state's rightful jurisdiction. Plaintiff has failed to state a claim under the Full Faith and Credit Clause.

C. Plaintiff's Facial Challenge to SB 107 Fails as a Matter of Law

As a final matter, Plaintiff's facial challenge to SB 107 should be dismissed. Plaintiff "seeks declaratory relief holding SB 107 unconstitutional . . ." Compl. ¶ 10; *see also* Prayer for Relief (requesting "an order declaring SB 107 unconstitutional"). But Plaintiff cannot meet the high bar for invalidating a statute on its face. "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The fact that a law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id*. "Facial challenges are

disfavored" because they "often rest on speculation" and "they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange*, 552 U.S. at 450.

Plaintiff speculates that SB 107 will result in children fleeing (or being taken) to California to obtain gender-affirming care that their parents oppose. For the many reasons outlined above, this fear is unjustified, implausible, and entirely unmoored from the actual statutory language. Such unfounded speculation is also legally insufficient to strike down SB 107 in its entirety. In this facial challenge, Plaintiff must establish that SB 107 "is unconstitutional in all of its applications." *Washington State Grange*, 552 U.S. at 449. Plaintiff does not come close to such a showing. The Court 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

The Court should dismiss the Complaint.

Dated: March 30, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
KATHLEEN BOERGERS
Supervising Deputy Attorney General

/s/ Nimrod Pitsker Elias
NIMROD PITSKER ELIAS
LILY WEAVER
NATALIE TORRES
Deputy Attorneys General
Attorneys for Defendant Rob Bonta, Attorney General of California

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EXHIBIT 1

Senate Bill No. 107

CHAPTER 810

An act to add Section 56.109 to the Civil Code, to amend Sections 2029.300 and 2029.350 of the Code of Civil Procedure, to amend Sections 3421, 3424, 3427, and 3428 of, and to add Section 3453.5 to, the Family Code, and to amend Section 1326 of, and to add Section 819 to, the Penal Code, relating to health care.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SB 107, Wiener. Gender-affirming health care.

(1) The United States Constitution generally requires a state to give full faith and credit to the public acts, records, and judicial proceedings of every other state. Existing law authorizes, upon the demand made by another state, the extradition of a person charged with committing an act in this state that results in a crime in the demanding state, as specified. Existing law sets forth procedures by which a person may enforce a judgment for the payment of money and child custody orders issued by the court of a state other than California. Existing law authorizes a California court or attorney to issue a subpoena if a foreign subpoena has been sought in this state. Existing law generally prohibits a provider of health care, a health care service plan, or a contractor from disclosing medical information regarding a patient, enrollee, or subscriber without first obtaining an authorization, unless a specified exception applies, including that the disclosure is in response to a subpoena.

This bill would prohibit a provider of health care, a health care service plan, or a contractor from releasing medical information related to a person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to a criminal or civil action, including a foreign subpoena, based on another state's law that authorizes a person to bring a civil or criminal action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care. The bill additionally would prohibit law enforcement agencies from knowingly making or participating in the arrest or extradition of an individual pursuant to an out-of-state arrest warrant based on another state's law against providing, receiving, or allowing a child to receive gender-affirming health care or gender-affirming mental health care in this state, as specified.

(2) Existing law, known as the Uniform Child Custody Jurisdiction and Enforcement Act, provides the state exclusive jurisdictional basis for making an initial child custody determination, and permits a California court to

assume temporary emergency jurisdiction in specified circumstances. Existing law permits a court to decline to exercise its jurisdiction if it determines that it is an inconvenient forum and a court in another state is a more appropriate forum.

Existing law permits a California court to decline to exercise its jurisdiction if the petitioner has wrongfully taken the child from another state or engaged in similar reprehensible conduct, except as specified. Existing law prohibits a court from considering the taking or retention of a child from a person who has legal custody of the child if there is evidence that the taking or retention was a result of domestic violence.

The bill would prohibit the enforcement of an order based on another state's law authorizing a child to be removed from their parent or guardian based on that parent or guardian allowing their child to receive gender-affirming health care or gender-affirming mental health care. The bill would prohibit a court from finding that it is an inconvenient forum where the law or policy of another state that may take jurisdiction limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care, as defined, and the provision of such care is at issue in the case before the court. The bill would authorize a court to take temporary jurisdiction because a child has been unable to obtain gender-affirming health care. The bill would additionally prohibit a court from considering the taking or retention of a child from a person who has legal custody of the child, if the taking or retention was for obtaining gender-affirming health care or mental health care. The bill would declare its provisions to be severable.

(3) This bill would incorporate additional changes to Sections 2029.300 and 2029.350 of the Code of Civil Procedure proposed by AB 2091 to be operative only if this bill and AB 2091 are enacted and this bill is enacted last.

The people of the State of California do enact as follows:

SECTION 1. Section 56.109 is added to the Civil Code, to read:

56.109. (a) Notwithstanding subdivision (b) of Section 56.10, a provider of health care, health care service plan, or contractor shall not release medical information related to a person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to any civil action, including a foreign subpoena, based on another state's law that authorizes a person to bring a civil action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care.

(b) Notwithstanding subdivision (c) of Section 56.10, a provider of health care, health care service plan, or contractor shall not release medical information to persons or entities who have requested that information and who are authorized by law to receive that information pursuant to subdivision (c) of Section 56.10, if the information is related to a person or entity

allowing a child to receive gender-affirming health care or gender-affirming mental health care, and the information is being requested pursuant to another state's law that authorizes a person to bring a civil action against a person or entity who allows a child to receive gender-affirming health care or gender-affirming mental health care.

(c) For the purposes of this section, "person" means an individual or governmental subdivision, agency, or instrumentality.

(d) For the purpose of this section, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

SEC. 2. Section 2029.300 of the Code of Civil Procedure is amended to read:

2029.300. (a) To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the court that issues it.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

(e) (1) Notwithstanding subdivision (a), no subpoena shall be issued pursuant to this section if the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care.

(2) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

SEC. 2.5. Section 2029.300 of the Code of Civil Procedure is amended to read:

2029.300. (a) To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the court that issues it.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

(e) Notwithstanding subdivision (a), a subpoena shall not be issued pursuant to this section in any of the following circumstances:

(1) If the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care. For the purpose of this paragraph, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

(2) If the submitted foreign subpoena relates to a foreign penal civil action and would require disclosure of information related to sensitive services. For purposes of this paragraph, "sensitive services" has the same meaning as defined in Section 791.02 of the Insurance Code.

SEC. 3. Section 2029.350 of the Code of Civil Procedure is amended to read:

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that

attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena under this article.

(b) (1) Notwithstanding subdivision (a), an authorized attorney shall not issue a subpoena pursuant to subdivision (a) if the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care.

(2) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

(c) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

SEC. 3.5. Section 2029.350 of the Code of Civil Procedure is amended to read:

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena under this article.

(b) (1) Notwithstanding subdivision (a), an authorized attorney shall not issue a subpoena pursuant to subdivision (a) if the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care.

(2) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

(c) Notwithstanding subdivision (a), an attorney shall not issue a subpoena under this article based on a foreign subpoena that relates to a foreign penal civil action and that would require disclosure of information related to sensitive services. For purposes of this subdivision, "sensitive services" has the same meaning as defined in Section 791.02 of the Insurance Code.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

SEC. 4. Section 3421 of the Family Code is amended to read:

3421. (a) Except as otherwise provided in Section 3424, a court of this state has jurisdiction to make an initial child custody determination only if any of the following are true:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under Section 3427 or 3428, and both of the following are true:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 3427 or 3428.

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(b) Subdivision (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

(d) The presence of a child in this state for the purpose of obtaining gender-affirming health care or gender-affirming mental health care, as defined by Section 16010.2 of the Welfare and Institutions Code, is sufficient to meet the requirements of paragraph (2) of subdivision (a).

SEC. 5. Section 3424 of the Family Code is amended to read:

3424. (a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse, or because the child has been unable to obtain gender-affirming

health care or gender-affirming mental health care, as defined by Section 16010.2 of the Welfare and Institutions Code.

(b) If there is no previous child custody determination that is entitled to be enforced under this part and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 3421 to 3423, inclusive. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(c) If there is a previous child custody determination that is entitled to be enforced under this part, or a child custody proceeding has been commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 3421 to 3423, inclusive. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Sections 3421 to 3423, inclusive, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

(e) It is the intent of the Legislature in enacting subdivision (a) that the grounds on which a court may exercise temporary emergency jurisdiction be expanded. It is further the intent of the Legislature that these grounds include those that existed under Section 3403 of the Family Code as that section read on December 31, 1999, particularly including cases involving domestic violence.

SEC. 6. Section 3427 of the Family Code is amended to read:

3427. (a) A court of this state that has jurisdiction under this part to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.

(2) The length of time the child has resided outside this state.

(3) The distance between the court in this state and the court in the state that would assume jurisdiction.

(4) The degree of financial hardship to the parties in litigating in one forum over the other.

(5) Any agreement of the parties as to which state should assume jurisdiction.

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this state may decline to exercise its jurisdiction under this part if a child custody determination is incidental to an action for dissolution of marriage or another proceeding while still retaining jurisdiction over the dissolution of marriage or other proceeding.

(e) If it appears to the court that it is clearly an inappropriate forum, the court may require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in this state, necessary travel and other expenses, including attorney's fees, incurred by the other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(f) (1) In a case where the provision of gender-affirming health care or gender-affirming mental health care to the child is at issue, a court of this state shall not determine that it is an inconvenient forum where the law or policy of the other state that may take jurisdiction limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.

(2) For the purposes of this section, "gender-affirming health care" and "gender-affirming mental health care" have the same meaning as defined by Section 16010.2 of the Welfare and Institutions Code.

SEC. 7. Section 3428 of the Family Code is amended to read:

3428. (a) Except as otherwise provided in Section 3424 or by any other law of this state, if a court of this state has jurisdiction under this part because a person seeking to invoke its jurisdiction has engaged in unjustifiable

conduct, the court shall decline to exercise its jurisdiction unless one of the following are true:

(1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.

(2) A court of the state otherwise having jurisdiction under Sections 3421 to 3423, inclusive, determines that this state is a more appropriate forum under Section 3427.

(3) No court of any other state would have jurisdiction under the criteria specified in Sections 3421 to 3423, inclusive.

(b) If a court of this state declines to exercise its jurisdiction pursuant to subdivision (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 3421 to 3423, inclusive.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subdivision (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this part.

(d) In making a determination under this section, a court shall not consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner, as defined in Section 6211, or for the purposes of obtaining gender-affirming health care or gender-affirming mental health care, as defined by Section 16010.2 of the Welfare and Institutions Code, for the child and the law or policy of the other state limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.

SEC. 8. Section 3453.5 is added to the Family Code, to read:

3453.5. (a) A law of another state that authorizes a state agency to remove a child from their parent or guardian based on the parent or guardian allowing their child to receive gender-affirming health care or gender-affirming mental health care is against the public policy of this state and shall not be enforced or applied in a case pending in a court in this state.

(b) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

SEC. 9. Section 819 is added to the Penal Code, to read:

819. (a) It is the public policy of the state that an out-of-state arrest warrant for an individual based on violating another state's law against providing, receiving, or allowing their child to receive gender-affirming

health care or gender-affirming mental health care is the lowest law enforcement priority.

(b) California law enforcement agencies shall not knowingly make or participate in the arrest or participate in any extradition of an individual pursuant to an out-of-state arrest warrant for violation of another state's law against providing, receiving, or allowing a child to receive gender-affirming health care and gender-affirming mental health care in this state, if that care is lawful under the laws of this state, to the fullest extent permitted by federal law.

(c) No state or local law enforcement agency shall cooperate with or provide information to any individual or out-of-state agency or department regarding the provision of lawful gender-affirming health care or gender-affirming mental health care performed in this state.

(d) Nothing in this section shall prohibit the investigation of any criminal activity in this state which may involve the performance of gender-affirming health care or gender-affirming mental health care provided that no information relating to any medical procedure performed on a specific individual may be shared with an out-of-state agency or any other individual.

(e) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

SEC. 10. Section 1326 of the Penal Code is amended to read:

1326. (a) The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by any of the following:

(1) A magistrate before whom a complaint is laid or their clerk, the district attorney or their investigator, or the public defender or their investigator, for witnesses in the state.

(2) The district attorney, their investigator, or, upon request of the grand jury, any judge of the superior court, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried.

(3) The district attorney or their investigator, the public defender or their investigator, or the clerk of the court in which a criminal action is to be tried. The clerk shall, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by them, for witnesses in the state, as the defendant may require.

(4) The attorney of record for the defendant.

(b) A subpoena issued in a criminal action that commands the custodian of records or other qualified witness of a business to produce books, papers, documents, or records shall direct that those items be delivered by the custodian or qualified witness in the manner specified in subdivision (b) of Section 1560 of the Evidence Code. Subdivision (e) of Section 1560 of the Evidence Code shall not apply to criminal cases.

(c) (1) Notwithstanding subdivision (b), a provider of health care, health care service plan, or contractor shall not release medical information related to a person or entity allowing a child to receive gender-affirming health

care or gender-affirming mental health care in response to any foreign subpoena that is based on a violation of another state's laws authorizing a criminal action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care.

(2) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

(d) In a criminal action, no party, or attorney or representative of a party, may issue a subpoena commanding the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies thereof, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in subdivision (b) of Section 1560 of the Evidence Code. When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents. The court may not order the documents disclosed to the prosecution except as required by Section 1054.3.

(e) This section shall not be construed to prohibit obtaining books, papers, documents, or records with the consent of the person to whom the books, papers, documents, or records relate.

SEC. 11. The provisions of this act are severable. 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.

SEC. 12. (a) Section 2.5 of this bill incorporates amendments to Section 2029.300 of the Code of Civil Procedure proposed by this bill and Assembly Bill 2091. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2023, (2) each bill amends Section 2029.300 of the Code of Civil Procedure, and (3) this bill is enacted after Assembly Bill 2091, in which case Section 2029.300 of the Code of Civil Procedure, as amended by Assembly Bill 2091, shall remain operative only until the operative date of this bill, at which time Section 2.5 of this bill shall become operative, and Section 2 of this bill shall not become operative.

(b) Section 3.5 of this bill incorporates amendments to Section 2029.350 of the Code of Civil Procedure proposed by this bill and Assembly Bill 2091. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2023, (2) each bill amends Section 2029.350 of the Code of Civil Procedure, and (3) this bill is enacted after Assembly Bill 2091, in which case Section 2029.350 of the Code of Civil Procedure, as amended by Assembly Bill 2091, shall remain operative only until the operative date of this bill, at which time Section 3.5 of this bill shall become operative, and Section 3 of this bill shall not become operative.

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ROB BONTA
Attorney General of California
RENUKA R. GEORGE
Senior Assistant Attorney General
KATHLEEN BOERGERS, State Bar No. 213530
Supervising Deputy Attorney General
NIMROD PITSKER ELIAS, State Bar No. 251634
LILY WEAVER, State Bar No. 289038
NATALIE S. TORRES, State Bar No. 283571
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-0012
Fax: (510) 622-2270
E-mail: Nimrod.Elias@doj.ca.gov
Attorneys for Defendant Rob Bonta, Attorney General of California

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**, Attorney General of California, Defendant.	Case No. 2:23-cv-00422-DAD-DB **DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT [Fed. R. Civ. P. 12(b)(1) & (6)]** Hearing Date: June 20, 2023 Time: 1:30 p.m. Dept: Courtroom 4 Judge: Hon. Dale A. Drozd Date Filed: 3/07/2023

TO PLAINTIFF AND THE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT under Rule 12(b) of the Federal Rules of Civil Procedure, and Local Rule 230(b), on June 20, 2023, at 1:30 p.m., in Courtroom 4 of this Court located at 501 I Street, Sacramento, California, Defendant Rob Bonta, Attorney General of California, will move to dismiss this action on the basis that Plaintiff lacks standing and has failed to state a claim.

The Rule 12(b)(1) motion will be made on the grounds that Plaintiff lacks Article III

standing because Senate Bill (SB) 107 did not impede any of Plaintiff's organizational activities or functions, and therefore caused it no injury. In addition, Plaintiff lacks prudential standing to assert third party claims on behalf of out-of-state parents and other states.

The Rule 12(b)(6) motion will be made on the grounds the Complaint fails to state a valid claim for relief for the following three reasons.

1. Plaintiff's due process and familial association claims fail because SB 107 does not change any laws involving parental consent to medical procedures, parents' right to access their children's medical records, or strip parents of custody over their children.

2. Plaintiff's Full Faith and Credit Clause claim fails because SB 107 permissibly furthers California's legitimate public policy, and nothing in SB 107 "overrides" the jurisdiction of a child's home state courts.

3. Plaintiff's facial challenge to SB 107 cannot succeed because Plaintiff cannot demonstrate that SB 107 is unconstitutional "in all of its applications."

This motion is based upon this notice of motion and motion, the attached memorandum of points and authorities, the certification of Nimrod Pitsker Elias, the records and pleadings in this action, and other material that the Court deems relevant. Please note that Judge Drozd's standing order in civil cases states that law and motion hearings are held by Zoom only.

Certification of Counsel

Pursuant to Judge Drozd's pre-filing meet and confer requirement, I hereby certify as follows:

1. On Wednesday, March 29, 2023, my colleague Kathleen Boergers and I met for approximately 40 minutes with Mariah Gondeiro, Julianne Fleischer, and Bethany Onishenko of Advocates for Faith & Freedom, the law firm representing the Plaintiff in this matter.

2. During our conversation, I explained that we would be filing a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6). I provided an overview of our Article III and prudential standing arguments, including citations to key cases. I also described our arguments that the Complaint fails to state a claim upon which relief can be granted, including providing multiple statutory and regulatory citations to California law which undermine core

allegations in the Complaint. I also previewed our argument that SB 107 furthers California's legitimate public policy, and that it does not violate the Full Faith and Credit Clause. I further noted that we do not believe that the Complaint can meet the standard for facially invalidating a statute, and that our motion is based on that premise as well.

3. We also met and conferred about a hearing date for Defendant's motion to dismiss, in order to avoid scheduling it on a day when counsel is unavailable. Because of opposing counsel's unavailability, we are setting the hearing date for June 20, 2023, instead of May 16, 2023, as we had initially planned.

Dated: March 30, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
KATHLEEN BOERGERS
Supervising Deputy Attorney General

/s/ Nimrod Pitsker Elias
NIMROD PITSKER ELIAS
LILY WEAVER
NATALIE TORRES
Deputy Attorneys General
Attorneys for Defendant Rob Bonta, Attorney General of California

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