Date of Hearing: July 5, 2023

ASSEMBLY COMMITTEE ON JUDICIARY
Brian Maienschein, Chair
SB 345 (Skinner) – As Amended June 19, 2023

SENATE VOTE: 32-8

SUBJECT: HEALTH CARE SERVICES: LEGALLY PROTECTED HEALTH CARE ACTIVITIES

KEY ISSUES:

1) SHOULD THE HEALING ARTS BOARDS OF THE DEPARTMENT OF CONSUMER AFFAIRS BE PROHIBITED FROM DISCIPLINING MEDICAL PROFESSIONALS FOR COMPETENTLY PROVIDING HEALTHCARE THAT IS LEGAL IN THIS STATE BUT MAY BE UNLAWFUL IN OTHER JURISDICTIONS?

2) SHOULD CALIFORNIA COURTS BE PROHIBITED FROM ENFORCING OUT-OF-STATE COURT CASES THAT INVOLVE PUNISHING PERSONS FOR OBTAINING, ASSISTING A PERSON IN OBTAINING, OR PROVIDING AN ABORTION OR GENDER AFFIRMING CARE?

SYNOPSIS

The United States Supreme Court's decision in Dobbs v. Jackson Women's Health Org. *(2022) 141 S. Ct. 2619, represented the first time the Court has ever revoked a previously held constitutional right. In the wake of that radical decision, dozens of states have moved to prohibit abortion and enact a series of draconian measures seeking to punish those who seek safe and reliable healthcare in other states. Similarly, fueled by the never-ending need to gain an advantage in this nation's culture wars, many of those same states are passing legislation to prohibit access to gender affirming healthcare. As a result of these actions, millions of Americans cannot access needed healthcare in their own states, and therefore must travel to states like California in order to receive vital medical treatments. Even more troubling, many of these states have now adopted laws targeting doctors who provide care to their residents outside their jurisdiction or seek to punish persons assisting a person traveling to receive healthcare. As a result many states, including California, are now forced to enact legislation to protect medical providers in their states from the overreach of other jurisdictions.*

This bill is the latest in a series of measures to be heard by this Committee, seeking to protect Californians from the overreach of other jurisdictions who seek to prohibit access to family planning services and gender affirming care. This comprehensive measure seeks to accomplish this goal in several ways. First, this bill clarifies that no healthcare professional in California is to be disciplined by their regulator for simply providing care that is lawful in this state, so long as such care meets all applicable standards of care. Secondly, this bill enhances personal privacy protections for persons seeking care at a family planning center. Additionally, this measure seeks to limit the enforcement of civil actions arising from another state's laws that prohibit abortion or gendering affirming care against persons in California, and gives a person subject to such lawsuits the ability to file a counter claim in California courts. Finally, this

measure restricts the ability of law enforcement and bail bondsmen to enforce out-of-state criminal sanctions against persons in this state.

This measure is supported by a coalition of women's health advocates, civil rights organizations, healthcare providers, and legal aid organizations. The proponents highlight the sweeping nature of some out-of-state laws seeking to prohibit abortion and gender-affirming care and the corresponding need to protect Californians who provide this care in this state. This measure is opposed by several religious organizations and anti-choice groups who argue that the bill is unconstitutional and infringes upon the rights of other states. Should this bill be approved by this Committee it would be referred to the Committee on Public Safety who will evaluate the above mentioned criminal law provisions, as this analysis will largely focus on the civil law and privacy aspects of the measure.

SUMMARY: Provides for various safeguards against the enforcement of other states' laws that seek to interfere with a person, provider, or other entity in California that seeks, receives, causes, or aids in access to abortion services and gender affirming healthcare. Specifically, **this bill**:

1) Prohibits healing arts boards within the Department of Consumer Affairs from suspending or revoking the license of a healthcare professional solely because that person provided a legally protected health care activity, as specified.

2) Prohibits healing arts boards within the Department of Consumer Affairs from denying a license application, or suspending or revoking an existing license, because the healthcare professional was disciplined for or convicted of an offense in another state in which they were licensed if the suspension, revocation, or other discipline was for providing a health care activity that is legally protected in California.

3) Provides that the performance, recommendation, or provision of any legally protected health care activity, as defined, by a health care practitioner acting within their scope of practice, for a patient who resides in a state in which the performance, recommendation, or provision of that legally protected health care activity is illegal, does not, by itself, constitute professional misconduct, nor should any license, certification, or authorization of a health care practitioner be revoked, suspended, or annulled or otherwise subject to any other penalty or discipline solely on the basis that the health care practitioner performed, recommended, or provided any legally protected health care activity for a patient who resides in a state in which the performance, recommendation, or provision of that legally protected health service is illegal.

4) Prohibits a person or business from collecting, using, disclosing, or retaining the personal information of a person who is physically located at, or in close proximity to, a family planning center, except as specified in 5).

5) Permits the collection, use, disclosure, or retention of a minimal amount of personal information of a person who is physically located at, or in close proximity to, a family planning center necessary to perform the services or provide the goods requested by the person.

6) Provides that an aggrieved person or entity, including a family planning center, may institute and prosecute a civil action against any person or business who violates the disclosure

prohibition in 4) for injunctive and monetary relief and attorney's fees within three years of discovery of the violation, and may be entitled to treble damages.

7) Defines the following terms for the purposes of 4) through 6):

   a) "Collect" means buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means. This includes receiving information from the consumer, either actively or passively, or by observing the consumer's behavior;

   b) "Family planning center" means a business categorized as a family planning center by the North American Industry Classification System adopted by the United States Census Bureau, including, but not limited to, a clinic or center that provides reproductive health care services, as specified;

   c) "Personal information" means information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular person;

   d) "Sell" means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to a third party for monetary or other valuable consideration; and

   e) "Share" means sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to a third party for cross-context behavioral advertising, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged.

8) Defines the following terms for the purpose of 9) though 16):

   a) "Abusive litigation" means litigation or other legal action to deter, prevent, sanction, or punish a person engaging in legally protected health care activity by either filing or prosecuting an action in a state other than California where liability, in whole or part, directly or indirectly, is based on a legally protected health care activity that was legal in the state in which it occurred or attempting to enforce an order or judgment issued in connection with that action;

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

c) "Gender-affirming health care services" and "gender-affirming mental health care services" mean medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, and may include interventions to address a patients physical and mental health needs;

d) "Legally protected health care activity" means the exercise and enjoyment, or attempted exercise and enjoyment, by a person of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services, any act or omission undertaken to aid or encourage a person to receive health care services, or the provision of those services but does not include a service rendered below the applicable professional standard of care or that would violate antidiscrimination laws of California; and

e) "Reproductive health care services" means and includes all services, care, or products of a medical, surgical, psychiatric, therapeutic, diagnostic, mental health, behavioral health, preventative, rehabilitative, supportive, consultative, referral, prescribing, or dispensing nature relating to the human reproductive system provided in accordance with the constitution and laws of this state, whether provided in person or by means of telehealth services which includes, but is not limited to, all services, care, and products relating to pregnancy, assisted reproduction, contraception, miscarriage management, the termination of a pregnancy, or self-managed terminations.

9) Declares that reproductive health care services, gender-affirming health care services, and gender-affirming mental health care services are rights secured by the Constitution and laws of California and that interference with these rights, whether or not under the color of law, is against the public policy of California.

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

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

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

13) Provides that if the court finds for the petitioner in an action authorized by 11) recovery is to be in the amount of three times the amount of actual damages, which shall include damages

for the amount of a judgment issued in connection with an abusive litigation, and any other expenses, costs, or reasonable attorney's fees incurred in connection with the abusive litigation.

14) Provides that a California court may exercise jurisdiction over a person in an action brought pursuant to 11) if any of the following apply:

    a) Personal jurisdiction exists in accordance with the rules of the Code of Civil Procedure;

    b) The person has commenced an action in a court in California and, during the pendency of that action or an appeal therefrom, a summons and complaint is served on the person or the attorney appearing on the person's behalf in that action or as otherwise permitted by law; or

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

15) Provides that the provisions of 14) do not apply to a lawsuit or judgment entered in another state that is based on conduct for which a cause of action exists under the laws of California, including a contract, tort, common law, or statutory claim.

16) Provides that nothing in 8) though 15) is to be construed to provide jurisdiction over a California resident in an out-of-state forum when the California resident has not availed themselves of that forum.

17) Provides that a money judgment or lien on real property that was obtained against a person or entity for exercising a right guaranteed under the United States Constitution as interpreted by the United States Supreme Court precedent at the time the right was exercised, or a right guaranteed under the California Constitution, or against a person or entity for aiding and abetting the exercise of said rights is entitled to a stay of enforcement.

18) Provides that California law governs in any action in this state, whether civil, administrative, or criminal, against any person who provides, receives, aids or abets in providing or receiving, or attempts to provide or receive, by any means, including telehealth, health care services if the provider was located in this state or any other state where the care was legal at the time of the challenged conduct.

19) Clarifies that abortion falls outside of the definition of murder for the purpose of California law, as specified.

20) Prohibits a magistrate from issuing a warrant for the arrest of an individual whose alleged offense or conviction is for the violation of the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in the performance or receipt of an abortion, contraception, reproductive care, or gender-affirming care if the abortion, contraception, reproductive care, or gender-affirming care is lawful under the laws of this state, regardless of the recipient's location.

21) Provides that a bondsman or person authorized to apprehend, detain, or arrest a fugitive admitted to bail in another state who takes into custody a fugitive admitted to bail in another state whose alleged offense or conviction is for the violation of the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in

the performance or receipt of an abortion, contraception, reproductive care, or gender-affirming care if the abortion, contraception, reproductive care, or gender-affirming care is lawful under the laws of this state, regardless of the recipient's location, without a magistrate's order, is ineligible for a license in this state and must forfeit any presently held license in this state.

22) Provides that a person detained by a bail agent in contravention of the provisions of 20) may institute and prosecute a civil action for injunctive, monetary, or other appropriate relief against the bondsman and bond company within three years after the cause of action accrues.

23) Prohibits a person that is authorized to apprehend, detain, or arrest a fugitive from apprehending, detaining, or arresting a bail fugitive admitted to bail in another state whose alleged offense or conviction was for the violation of the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in the performance or receipt of an abortion, contraception, reproductive care, or gender-affirming care if the abortion, contraception, reproductive care, or gender-affirming care is lawful under the laws of this state, regardless of the recipient's location.

24) Provides that a person who violates 23) is guilty of a misdemeanor punishable by a fine of five thousand dollars ($5,000) or by imprisonment in a county jail not to exceed one year, or by both that imprisonment and fine, is ineligible for a license issued is this state, and must forfeit any licensed presently held in this state.

25) Provides that a demand for the extradition of a person charged with any legally protected health care activity shall not be recognized by the Governor, except as specified.

26) Prohibits a state or local government employee, person or entity contracted by a state or local government, or person or entity acting on behalf of a local or state government from cooperating with or providing information to any individual, including a bondsman or person authorized to apprehend, detain, or arrest a fugitive admitted to bail in another state, or out-of-state agency or department regarding any legally protected health care activity or otherwise expend or use time, moneys, facilities, property, equipment, personnel, or other resources in furtherance of any investigation or proceeding that seeks to impose civil or criminal liability or professional sanctions upon a person or entity for any legally protected health care activity that occurred in this state or that would be legal if it occurred in this state.

27) Requires any out-of-state subpoena or warrant to include an affidavit or declaration under penalty of perjury that the discovery is not in connection with an out-of-state proceeding relating to any legally protected health care activity unless the out-of-state proceeding meets all of the following requirements:

    a) Is based in tort, contract, or on statute;

    b) Is actionable, in an equivalent or similar manner, under the laws of this state; and

    c) Was brought by the patient who received a legally protected health care activity or the patient's legal representative.

28) Makes various technical and conforming changes including modifying references to unborn persons.

EXISTING LAW:

1) Establishes the Reproductive Privacy Act. (Health & Safety Code Section 123461.)

2) Declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. (Health & Safety Code Section 123462.)

3) States the following as the public policy of the State of California:

   a) Every individual has the fundamental right to choose or refuse birth control;

   b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specified; and

   c) The state will not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specified. (*Ibid.*)

4) Defines, for the purposes of the Reproductive Privacy Act, the following terms:

   a) "Abortion" means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth;

   b) "Pregnancy" means the human reproductive process, beginning with the implantation of an embryo; and

   c) "Viability" means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures. (Health & Safety Code Section 123464.)

5) Prohibits the State of California from denying or interfering with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman. (Health & Safety Code Section 123466.)

6) Provides that a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States. (Code of Civil Procedure Section 410.10.)

7) Provides that when a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court must stay or dismiss the action in whole or in part on any conditions that may be just. (Code of Civil Procedure Section 410.30.)

8) Permits a defendant, on or before the last day of their time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:

   a) To quash service of summons on the ground of lack of jurisdiction of the court over them;

   b) To stay or dismiss the action on the ground of inconvenient forum; or

c) To dismiss the action for failure to prosecute the action in a timely manner, as specified. (Code of Civil Procedure Section 418.10.)

9) Provides various safeguards against the enforcement of other states' laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California. (Civil Code Section 56.109, Code of Civil Procedure Section 2029.300 & 2029.350, Family Code Sections 3421, 3424, 3427, 3428, and 3453.5.)

10) Establishes the California Consumer Privacy Act, as amended by Proposition 24 (2020), which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civil Code Section 1798.100 *et seq*.)

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

12) Provides that records and judicial proceedings of any court of any such state, territory or possession, or copies thereof, must be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form, and that such acts, records and judicial proceedings or copies thereof, so authenticated, have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, territory or possession from which they are taken. (28 U.S.C. Section 1738.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: In the last two years, dozens of states have moved to limit or prohibit access to abortion care and gender affirming healthcare, especially for minors. Beyond simply banning certain procedures, some states have enacted draconian laws seeking to punish well-meaning friends and family of persons seeking reproductive or gender affirming care. Indeed, statutes have imposed criminal liability on persons driving a person across state lines to obtain an abortion, authorized civil lawsuits for any person who "aides and abets" a person in getting an abortion, and deemed providing one's own child with gender affirming medical care to be tantamount to child abuse.

In response to the enactment of such laws, California has stepped up and become a national haven for persons seeking access to safe and effective medical treatment. Nonetheless, other states continue to look for innovative legal tools to punish their residents who come to California for medical care, as well as the dedicated, California-based, health professionals rendering such treatment. This bill seeks to build upon the substantial efforts of the Legislature in 2022 to shield California medical professionals, patients, and their family and friends who assist out-of-state residents seeking care in California from unnecessary legal harm at the hands of another state's laws for conduct that occurred in California. In support of this bill, the author states:

In the wake of Roe being overturned last year, California strengthened and expanded access to reproductive health care and abortion services and provided many legal protections to patients and providers. California also affirmed the right to gender-affirming care. But as the assault on essential healthcare accelerates, new challenges are emerging to patients and health care providers who have extended a lifeline to patients who may be in a location where medically safe and effective abortions or gender affirming care are now illegal. SB 345 is necessary to ensure that California healthcare practitioners are legally protected when they provide essential reproductive and gender affirming care to any of their patients, regardless of their patient's location. As the CA Medical Board's letter in support notes, SB 345 "protects healthcare providers licensed in California … for performing healthcare activities within the standard of care permitted in California." Additionally SB 345 makes it unlawful for bounty hunters or others to take enforcement actions against or apprehend people in California related to violations of another state's anti-abortion or anti-gender affirming care law.

A series of draconian laws in other states seek to limit medical professional's ability to provide vital reproductive and gender-affirming healthcare. Following the United States Supreme Court's unprecedented decision to eliminate a previously held constitutional right and determine that no right to an abortion exists under the United States Constitution (*Dobbs v. Jackson Women's Health Org*. (2022) 141 S. Ct. 2619), access to abortion care is now determined on a state-by-state basis. Since *Dobbs*, 14 states have moved to effectively ban abortion; nine states have bans currently being litigated under state constitutional provisions; and another five ban the procedure between 15 and 20 weeks. (NY Times, *Tracking the States Where Abortion Is Now Banned*, (June 2023.) available at: https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.) Abortion is not the only legitimate form of health care that is being limited by some state legislatures. Eighteen states have recently enacted restrictions on gender affirming health care for minors. Two such laws are currently being litigated, and another seven state legislatures are considering restrictions on gender affirming care. (Human Rights Campaign Foundation, *Map: Attacks on Gender Affirming Care by State*, (June 2023) available at: https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map.) In several of these states, it is not the person receiving care who "violates" the law, but rather the medical professional who provides the treatment or any person who assists the patient in receiving care.

Although California has become a safe haven for persons seeking medical treatment, the fact that medical professionals are being targeted by other states can have implications in California. For example, should a California-based doctor have a license in a jurisdiction that now prohibits abortion, and a woman from that state travels to California and receives care from the doctor, the doctor may be subject to discipline from the other state's medical regulator for violating the other state's laws. Existing California law rightfully requires medical professionals to disclose to California regulators any out-of-state professional discipline or legal misconduct. Based on these disclosures, a medical professional can have their license revoked or suspended, their medical facility permissions restricted, and have difficulty in finding employment. Given that the above-described example ultimately started with a medical professional properly performing a procedure that is lawful under California law, it appears necessary to ensure that such a medical professional would not face potentially career-ending sanctions for simply doing their job in California. Similarly, a person who drives a patient to California to receive care may be subject to criminal or civil sanctions by the state in which the driver and the patient reside, even if the care obtained is wholly in California.

This bill enacts several sweeping protections to ensure that California health care providers, residents, and visitors cannot be sanctioned for providing, or assisting in obtaining medical care that is legal in this state. First, this bill prevents the healing arts boards within the Department of Consumer Affairs from suspending or revoking the license of a healthcare professional solely because that person provided a legally protected health care service. Similar protections are extended to new licensees and license renewals. This bill also clarifies that providing healthcare that is legal in this state is no grounds for professional misconduct, so long as it meets the standard of care required under California law, even if the procedure is deemed unlawful elsewhere.

Next, this bill prohibits a person or business from collecting, using, disclosing, or retaining the personal information of a person who is physically located at, or in close proximity to, a family planning center, unless such information collection is essential to providing the services offered at the family planning center. The bill would make an unlawful collection or disclosure of this data subject to civil action which would enable a person whose data is unlawfully disclosed eligible for treble damages.

Third, this measure provides that reproductive health care services, gender affirming health care services, and gender affirming mental health care services are rights secured by the Constitution and laws of California and that interference with these rights, whether or not under the color of law, is against the public policy of California. To that end, this bill also clarifies that litigation brought in an attempt to infringe on these rights, including litigation utilizing or seeking to enforce another state's laws prohibiting the conduct, is deemed abusive litigation in this state. The bill then provides defendants in this abusive litigation the ability to stay enforcement of litigation from out-of-state, quash various subpoenas related to that litigation, and the ability to file a counter suit in California courts. The bill also limits the enforcement of judgments in California if an out-of-state action was based on a protected right in California, and prohibits these judgments from being utilized as the means of obtaining a lien on property in this state.

Additionally, the bill imposes restrictions on the issuance of warrants and on the conduct of law enforcement, local governments, and bail bondsmen as it relates to out-of-state criminal actions. Finally, this bill makes numerous clarifying and technical changes to existing law. Given that the latter portions of this bill related to law enforcement and bail bondsmen is outside the jurisdiction of this Committee, and in light of the subsequent referral of this bill to the Committee on Public Safety, the remainder of this analysis will focus on the civil law and privacy aspects of this measure and defer the discussion of the criminal law aspects of the bill to the next Committee.

The legal history of the Full Faith and Credit Clause of the United States Constitution. Article IV, Section 1 of the United States Constitution, generally referred to as the Full Faith and Credit Clause, requires every state to give full faith and credit to the public acts (statutes), records, and judicial proceedings of every other state. By refusing to recognize the laws, regulatory body rulings, and judgments of another state, this bill potentially implicates the Full Faith and Credit Clause. Several legal scholars have suggested that the Full Faith and Credit Clause was originally intended to ensure that statutes, records, and judgments from one state merely be accepted as evidence in the proceedings of another state as to the proof of their existence, especially in light of how the phrase was used in English common law. (Whitten, *Full Faith and Credit for Dummies* (2005) 38 Creighton L. Rev. 465.) However, in 1813, Justice Story had other ideas and opted to significantly strengthen the effect of the clause and the corresponding

Congressional implementing statute. In ruling that the Circuit Court for the District of Columbia was incorrect for refusing to recognize a judgment debt from the State of New York the Supreme Court ruled the law "declares that the record duly authenticated shall have such faith and credit as it taken. If in such court it has the faith and credit of evidence of the highest nature…it must have the same faith and credit in every other court," and that "the constitution contemplated a power in Congress to give conclusive effect to such judgments." (*Mills v. Duryee* (1813) 7 Cranch 481, 484-485.)

Despite the seemingly bright line put forward by Justice Story, in the 200 years since the *Mills* decision, three distinct tracks have begun to develop in the jurisprudence of the Full Faith and Credit Clause. To this day, the strict application of res judicata generally applies to determinative judicial proceedings; as the Supreme Court reiterated, "for claim and issue preclusion purposes…the judgement of the rendering state gains nationwide force." (*Baker v. General Motors Corp., supra* 522 U.S. at pp. 222, 233.)

However, the law has moved well away from the strict rule when it comes to public acts or statutes. In upholding the application of California law to settle a dispute of conflicting workers compensation statutes, the Supreme Court ruled, "A rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." (*Alaska Packers Association v. Industrial Accident Commission* (1935) 294 U.S. 532, 547.) Thus, the law now acknowledges a preference to uphold the public policy of the forum state when a conflict of laws arises, recognizing that, "the Full Faith and Credit Clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders…" (*Pink v. AAA Highway Express, Inc.* (1941) 314 U.S. 201,210.).

The Supreme Court has also begun to move away from the strict ruling of *Mills* as it pertains to state records. In determining the applicability of an equity decree in Michigan that prevented a former General Motors employee from testifying against the company, to a subpoena for testimony issues in Missouri, the Supreme Court held, "we simply recognize that just as the mechanisms for enforcing a judgment do not travel with the judgment itself for the purposes of Full Faith and Credit … similarly the Michigan decree cannot determine the evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court." (*Baker v. General Motors, supra,* 522 U.S. 222 at p. 239.) The handling of records has been further expanded upon by appellate courts in a manner that mixes the approach to judgments and public policy. In 2011, the Fifth Circuit upheld the Louisiana Department of Vital Records and Statistics refusal to amend the Louisiana birth certificate of a child who was legally adopted by a non-married gay couple in New York on the grounds that it violated Louisiana's public policy. Building upon the notion that the manner of a judgment's enforcement does not travel with the judgment, the court held, "obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the Full Faith and Credit obligation of recognition." (*Adar v. Smith* (5th Cir. 2011) 639 F.3d 146,160.) It should be noted that the Supreme Court appears to endorse this view at it denied certiorari in the *Adar* case.

Thus, when looking at the case law as a whole, legal scholars are beginning to argue that the Full Faith and Credit Clause applies differently to each aspect of the Clause. The jurisprudence would seem to indicate that public acts are subject to the public policy exemption, permitting states to generally apply local laws to cases in their jurisdiction; records are subject to recognition, but not

clear enforcement; and judicial proceedings generally are required to be enforced. (Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records* (2013) 62 Emory L.J. 639.)

Full faith and credit does not require one regulator to follow the lead of another regarding discipline or California to replace its own standards of medical care with those of another jurisdiction. This first aspect of the measure to implicate the various areas of the Full Faith and Credit Clause is the provisions dealing with the Department of Consumer Affairs healing arts boards. As it pertains to this bill, because the bill implicates out-of-state court and regulatory judgments, it may appear that the strict adherence to the judgment of an out-of-state tribunal should apply. (See *Mills v. Duryee* (1813) 7 Cranch 481.) However, this bill does not touch on the *direct enforcement* of those actions. While a California court may be required to uphold a *civil judgment*, nothing in the Full Faith and Credit Clause requires this state's government to follow the lead of an out-of-state regulator and abide by its *regulatory action*. Accordingly, this bill simply clarifies existing California law as it pertains to actions by medical regulatory bodies upon receipt of a notice about an out-of-state complaint. Given that the Supreme Court has held that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of another state for its own statutes dealing with a subject matter concerning which it is competent to legislate" (*Baker v. General Motors Corp., supra* 522 U.S. at pp. 222, 233), this bill seems wholly constitutional as the Full Faith and Credit Clause does not compel the Department of Consumer Affairs to follow the lead of out-of-state regulators.

Furthermore, this bill will not stop the prosecution of legitimate actions related to medical malpractice. The existing regulatory structure for medical professionals and health care facilities is designed to protect the public from negligent or improper medical practices. Accordingly, ensuring robust oversight by the various healing arts boards within the Department of Consumer Affairs is vital for public protection. Given that this bill would, in some instances, limit the ability to discipline professionals for "misconduct" alleged by an out-of-state regulator, a proper balance must be struck. This bill strikes that balance by explicitly stating that the bill does not preclude civil actions or prosecutions for care that falls below established standards of care under California law. Thus this bill only prohibits discipline against medical professionals who provide competent care that is legal in this state.

Prohibiting California courts from applying out-of-state laws that violate the fundamental rights of Californians is a legitimate Legislative choice of law and does not violate the Full Faith and Credit Clause. This bill adopts a duel-track approach to protecting Californians from out-of-state laws restricting access to abortion and gender affirming care. The first approach holds that these out-of-state laws are against the public policy of California, thereby precluding California courts from applying those laws to cases brought in this state. To the degree that this bill prevents filing civil actions to enforce these laws in California, this bill is a public action expressing California's public policy that the courts of this state should "choose" California law when evaluating such a case. It can be argued that by adopting this measure, the Legislature would simply be avoiding the "absurd result" of this state's courts not being able to enforce their own laws as envisioned in *Alaska Packers Association*.

The opposition to this bill suggests these provisions represent what they characterize as a, "policy of hostility toward the public acts of another state," thus negating the public policy exception to the Full Faith and Credit Clause. Indeed, the opposition is correct in stating that since the 1950s, the United States Supreme Court has looked negatively at state statutes that

show hostility to the policy of another state. (*Hughes v. Fetter* (1951) 341 U.S. 609.) It is also true that California frequently benefits from this rule, given that as recently as 2019, California applied the rule against a Nevada Supreme Court ruling. (*Franchise Tax Board v. Hyatt* (2019) 139 S. Ct. 1485, citing *Franchise Tax Board v. Hyatt* (2016) 578 U.S. 171.)

However, the very case cited by the opposition highlights an important difference between this bill and the statutes under consideration in the *Hyatt* cases, and even reaffirms the validity of the public policy exception as it applies to instances like this bill. In *"Hyatt II"* the Supreme Court noted, "when a state 'seeks to exclude from its courts actions arising under a foreign statute' but permits similar actions under its own laws, the state has adopted a policy of hostility to the "public acts" of another state." (*Franchise Tax Board v. Hyatt, supra,* citing in part *Carroll v. Lanza* (349 U.S. 408, 413.) The *Hyatt* series of litigation involved questions of which state's sovereign immunity statute should apply in adjudicating the dispute, given that both states had different policies. This bill, and existing California law, explicitly make it clear that civil litigation related to abortion and gender-affirming care are *not* legitimate causes of action in California. The only time liability arises in California related to these procedures is when they are carried out in a manner falling below established standards of care in California (i.e. medical malpractice lawsuits). Given that, as discussed above, this bill explicitly exempts medical malpractice from the provisions of the bill, nothing in this precludes out-of-state causes of action that are similar to California based actions. Accordingly, this bill does not appear to adopt a "policy of hostility" toward the laws of other states.

The Supreme Court has held that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of another state for its own statutes dealing with a subject matter concerning which it is competent to legislate." (*Baker v. General Motors Corp., supra,* 522 U.S. 222, at pp. 232-233.) Thus, the bill is simply an instance where the California Legislature seeks to ensure that its California courts can uphold the public policy of this state, affirming the right for women to access reproductive healthcare or transgender persons to obtain care, others to assist them in doing so, and that the power of California courts will not be usurped by the whims of another state.

Preventing or delaying the enforcement of out-of-state judgments and the Full Faith and Credit Clause. The second aspect of this bill dealing with California courts and their treatment of out-of-state laws, relates to the provisions that delay or prohibit the enforcement of out of state judgments. It provides a new cause of action against persons who brought the original case. While this provision implicates the public policy issues discussed above, it additionally implicates the judicial proceeding and final judgment provisions of the Full Faith and Credit Clause. As noted above, US Supreme Court case law holds that states must recognize the final judgment of the courts of other states in nearly all circumstances. Legal scholars, however, have noted that Supreme Court jurisprudence has opened up several rare exceptions to the otherwise strict rule adopted in *Mills* in the 200 years since that decision. (Reynolds, *The Iron Law of Full Faith and Credit* (1994) 746 Univ. of Maryland Carey School of Law Faculty Scholarship 412.)

The two aspects of this measure are likely viewed differently under the Full Faith and Credit Clause. As it relates to the bill's creation of a counter suit when a person seeks to enforce an out-of-state judgment, these provisions are essentially a public act by the Legislature. Hundreds of provisions of existing law create causes of action whereby everyday Californians, business, or state regulators can use the cause of action to file a claim in court. As discussed above, the

Legislature may act to direct its courts to follow the laws prescribed by the Legislature by creating new causes of action such as the one created by the bill.

As it relates to efforts to prevent the enforcement of out-of-state judgments, the legal landscape becomes significantly more complicated. In order for an out-of-state court to have jurisdiction over a Californian citizen, that state's long arm statute must be able to reach that defendant. If that state cannot do so, then jurisdictional issues may arise. Furthermore, legal scholars have noted that in instances of a fraudulently obtained judgment, the Full Faith and Credit Clause may not apply. (Reynolds, *The Iron Law of Full Faith and Credit*, supra, at pp. 422-23.)

While scholars continue to write about other theories related to the Full Faith and Credit Clause, the Supreme Court has implicitly noted that certain circumstances may, in fact, render one state's judgment unenforceable in another state. (Restat. 2d of Conflict of Laws, Section 100.) One particular set of judgments that the Supreme Court appears to contend are not enforceable in another jurisdiction are so-called "penal judgments." In 1892, the Supreme Court was asked to evaluate whether a Maryland court's refusal to uphold a New York judgment was correct when the Maryland court found that the New York cause of action was "intended as a punishment for doing any acts forbidden, and was, therefore…a penalty which could not be enforced." (*Huntington v Attrill* (1892) 146 U.S. 657.) The *Huntington* court opted to examine the definition of "penal" in the "international sense" and harkened back to Chief Justice Marshall's maxim, "the courts of no country execute the penal laws of another." (*The Antelope* 10 Wheat 66, 123.) The *Huntington* court further explained that whether or not a law were considered penal, and thus could not be enforced in the court of another jurisdiction, "depends on the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." (*Huntington v Attrill, supra,* 146 U.S. 657, 673-674.) Although the *Huntington* court held that the New York statute in question was not penal, as it related to compensating a victim of a fraud, the Supreme Court has continued to examine Full Faith and Credit Clause claims using the penal exception standard. (See *Milwaukee County v. M. E. White Company* (1935) 296 U.S. 268.) The Supreme Court also continues to apply the *Huntington* analysis of whether a statute is penal in nature to this day. Thus, such an analysis would likely apply to any review of this bill. (See *Kokesh v. Securities & Exchange Commission* (2017) 137 S. Ct. 1635, 1642.)

This bill, putting aside the criminal law aspects to be discussed by the Committee on Public Safety, would appear to involve both statutes like Texas' SB 8 (see a full discussion of the "penal" aspects of that law in this Committee's analysis of AB 1666 (Bauer-Kahan) Chap. 42, Stats. 2022) as well as judgments stemming from civil actions in which actual harm may have been demonstrated. As noted above, California may be able to avail itself of the "penal judgment" theory to justify refusing to enforce another state's judgment arising from civil actions in which no individualized harms can be demonstrated. However, California may not be able to avoid enforcing private causes of action in which individual harm can be demonstrated (even if this state casts a negative view of the theory of harm put forward by another state) or a governmental action related to professional misconduct that imposes monetary penalties. To that end, *the author may wish to consider narrowing the civil judgment enforcement provisions of the bill to apply to penal civil statutes only.*

Nonetheless, the response to *Dobbs* by many states is resulting in laws being passed elsewhere that stretch the boundaries between civil and penal action and how states may legislate. Similarly, California, and other states that respect healthcare freedom, have passed a litany of

bills like this measure to protect their citizens from the overreach of other jurisdictions. Given that these statutes are all likely to be the subject of litigation in coming years, the legal landscape in this area is likely to change dramatically.

Privacy provisions of this measure are generally consistent with California's strong commitment to consumer privacy. In addition to the civil action and health professional licensing provisions of this bill, the measure also adds protections regarding patient privacy related to family planning center. The measure accomplishes this by cross-referencing several existing definitions from the state's privacy laws and applying them to data collection as it relates to family planning centers. The bill then also clarifies that, generally, only data necessary to provide vital healthcare services should be collected. These provisions are generally consistent with the state's recent push to enhance consumer privacy across all sectors of the economy. Given the sensitive nature of family planning, this provision seem entirely appropriate and prudent.

This bill is the latest in a series of measures designed to protect Californians from out-of-state laws restricting healthcare access. As noted above, this bill is one of a series of measures the Legislature has considered in the past two years dealing with out-of-state laws that curtail the right to obtain an abortion or receive gender-affirming healthcare. Several aspects of this measure overlap, in part, with some of those measures. Indeed, provisions of this bill are similar to the aforementioned AB 1666 (Bauer-Kahan) Chap. 42, Stats. 2022, as well as AB 2091 (Bonta) Chap. 628, Stats. 2022, and AB 1707 (Pacheco, 2023). *To the extent that these measures overlap, as this bill progresses, the author should ensure that this measure will not undermine or otherwise interfere with the implementation of past and pending measures.*

ARGUMENTS IN SUPPORT*:* This measure is co-sponsored by several women's health and pro-choice advocates, and is supported by a coalition of health professionals and civil rights organizations. Representative of the coalition, NARAL Pro-Choice writes in support of this bill and notes:

> Following the U.S. Supreme Court overturned Roe v. Wade in June 2022, the Legislature passed and the Governor signed a package of bills making California a sanctuary state for abortion services and gender-affirming care. In addition, in the November election, California voters enacted a constitutional amendment guaranteeing the right to abortion and contraception. Meanwhile, a growing number of states have passed legislation that these make life-saving, essential health care services a crime.
>
> SB 345 will help ensure the availability of such care by providing additional protections to providers who prescribe or dispense medication abortion, provide other reproductive health care services, or provide gender affirming care. For these reasons, NARAL Pro- Choice California is pleased to SPONSOR SB 345.

Additionally, the California Medical Board, writes:

> This bill, in general, prevents any licensing board within the Department of Consumer Affairs from denying an application for licensure or otherwise imposing discipline upon a licensee who was disciplined or convicted of a crime in another state for providing or recommending certain health care activities performed within the standard of care that are unlawful within that other state, if that activity is permitted under the law of California.

> With respect to the Board's jurisdiction, the bill laudably attempts to protect health care providers licensed in California from facing reciprocal discipline for performing health care activities within the standard of care that are permitted in California. Therefore, the Board is pleased to support SB 345.

***ARGUMENTS IN OPPOSITION**:* This measure is opposed by a group of anti-choice advocates. They contend that this bill is unconstitutional and represents overreach on the part of this state. In opposition to this bill, the Frederick Douglass Foundation of California argues:

> SB 345 is outrageous and unconscionable. An unborn beneficiary? How could a beneficiary be anything other than a person, does the bill mean an unborn corporation? An unborn business entity? This bill is a continuous attempt to dehumanize an unborn baby and deprive that baby of the right to life guaranteed under the Constitution. SB 345 seeks to destroy the meaning of a human person.
>
> Just as slaves were considered non-human and a non-person, SB 345 similarly attempts to strip a human being of all its meaning and embraces a savage barbarianism. Language shapes culture. Changing the words "unborn baby" and unborn "person" will sear the conscience to justify the killing of a human being.

The California Catholic Conference also notes:

> With this bill, the Legislature is overstepping and engaging in ideological colonization against states and citizens that do not want abortion. SB 345 circumvents Article IV, section 1 of the US Constitution, stating "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Denying the legitimate interest of other states to protect unborn children and public health is a dangerous precedent. By explicitly contravening the U.S. Constitution, this bill could prompt other states to selectively decide to ignore laws duly enacted by the California Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

ACCESS Reproductive Justice (sponsor)
Black Women for Wellness Action Project (sponsor)
California Nurse-Midwives Association (sponsor)
Equality California (sponsor)
NARAL Pro-Choice California (sponsor)
TEACH (Training in Early Abortion for Comprehensive Health Care) (sponsor)
VALOR US/VALOR CA (sponsor)
Abortion Coalition for Telemedicine Access
American Association of University Women, San Jose Branch
ARIA Medical
Black Women Lawyer's Association of Los Angeles
California Board of Registered Nursing
California Physician Assistant Board
California Medical Board
Osteopathic Medical Board of California
California Association of Black Lawyers

California Conference of Bar Associations
California Latinas for Reproductive Justice
California Public Defender's Association
California Women's Law Center
Center for Reproductive Rights
City and County of San Francisco, Department of the Status of Women
CHOIX INC
Dolores Huerta Foundation
Essential Access Health
Feminist Majority
Gender Spectrum
Honeybee Health, Inc.
Houston Women's Reproductive Center
John Burton Advocates for Youth
John M. Langston Bar Association
Kopcho Reproductive Justice Fund
MYA Network
National Council of Jewish Women, Kansas City
National Association of Social Workers, California Chapter (NASW-CA)
NextGen CA
Oakland Privacy
Physicians for Reproductive Health
Plan C
Possible Health, Inc
Queen's Bench Bar Association
QueerDoc
Reproductive Health Access Project (RHAP)
State Innovation Exchange (SiX)
TIA
Santa Barbara Women's Political Committee
USC Institute on Inequalities in Global Health

Opposition

California Catholic Conference
Frederick Douglass Foundation of California
Right to Life League

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