

# PACIFIC JUSTICE INSTITUTE – Center for Public Policy

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SUBMITTED TO ALL LEGISLATIVE OFFICES VIA EMAIL

July 8, 2022

CALIFORNIA STATE SENATORS AND ASSEMBLYMEMBERS  
State Capitol and Legislative Office Buildings  
Sacramento, California 95814

## **Re: Senate Bill 107 – Oppose**

Dear California Assemblymembers and Senators:

We are writing to you during the July recess on a matter of the utmost importance—the protection of children from abduction. Because SB 107 was amended on June 29, it has thus far escaped serious scrutiny. Defying every notion of comity, common sense, and parental authority that has heretofore existed, SB 107 proposes to condone the taking of children from other states in violation of court orders. To avoid hyperbole, we have quoted relevant portions of it below. Please accept this letter as the strenuous opposition of the Pacific Justice Institute – Center for Public Policy.

### Overview

SB 107 would exacerbate tensions with other states by disregarding certain court orders and subpoenas intended to protect children. According to the Legislative Counsel's Digest, it would do the following:

- “This bill would prohibit a provider of health care, a health care service plan, or a contractor from releasing medical information related to sensitive services or related to a person or entity allowing a child to receive gender-affirming 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.”
- “The bill additionally would prohibit law enforcement agencies from making, or intentionally participating in, the arrest 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.”
- “The bill would prohibit the extradition of an individual charged with violating another state’s law that criminalizes allowing a person to receive or provide gender-affirming health care.”
- “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.”

- “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.”

### **Summary of Arguments in Opposition**

Major constitutional and statutory provisions are implicated by SB 107. According to the Legislative Counsel’s Digest in its recognition of existing law,<sup>1</sup> these include the Full Faith and Credit Clause of the U.S. Constitution, the Uniform Criminal Extradition Act, and the Uniform Child Custody Jurisdiction and Enforcement Act. SB 107 would upend this comity with other states in the pursuit of an extreme agenda, with catastrophic consequences. Of all the implications noted above, the last (Section 7 of the Bill) is the most potent and the most egregious. This provision creates an exception to kidnapping laws that is beyond the pale even in progressive California. In its overzealousness to punish states like Texas, this Bill will instead empower predators.

### **Legal Analysis**

The twelve sections of SB 107 will not all be addressed here in-depth, but at least a summary is in order to provide context and concreteness for our concerns. Because of the extraordinary implications of this legislation, it is incumbent on each legislative office to direct additional scrutiny at each provision.

Section 1 of the Bill corresponds to the first item quoted above from the Digest and would bar health care providers and related entities from disclosing information about a child’s receipt of “sensitive services.” This provision seems to prevent even a custodial parent in another state from accessing such information.

Section 2 of SB 107 would amend the Code of Civil Procedure as to recognition of foreign subpoenas. It reads in relevant part:

(e) Notwithstanding subdivision (a), no subpoena shall be issued pursuant to this section if the foreign subpoena would require disclosure of medical information related to sensitive services or 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.<sup>2</sup>

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<sup>1</sup> The Digest’s full discussion of existing law has been omitted in this letter for the sake of conciseness.

<sup>2</sup> The definitions of gender-affirming healthcare and mental healthcare cited through SB 107 are as follows in California Welfare & Institutions Code Section 16010.2(b)(3)(A)-(B):

(A) “Gender affirming health care” means medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, and may include, but is not limited to, the following: (i) Interventions to suppress the development of endogenous secondary sex characteristics; (ii) Interventions to align the patient’s appearance or physical body with the patient’s gender identity; (iii) Interventions to alleviate symptoms of clinically significant distress resulting from gender dysphoria, as defined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition.

(B) “Gender affirming mental health care” means 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, but is not limited to, developmentally

Section 3 of SB 107 is similar to Section 2, but it places its onus on attorneys handling foreign subpoenas.

Section 4 would amend Section 3421 of the Family Code, which sets important parameters for establishing a California court's jurisdiction over a child. The new amendment reads in relevant part:

(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 paragraph (3) subdivision (b) of Section 16010.2 of the Welfare and Institutions Code, is sufficient to meet the requirements of paragraph (2) of subdivision (a).

The sections referenced in subsection (d) require, among other things, a “significant connection” between the child and California. The change appears to abrogate that requirement and allows a court for the first time to take jurisdiction over a child who has never previously been in California.

Section 5 of the Bill would expand the circumstances under which a California court may take “temporary emergency jurisdiction” over a child. SB 107 would now include circumstances in which a child is present in California and is unable to obtain gender-affirming health or mental health care in another state.

Section 6 of the Bill would amend a portion of the Family Code that gives California courts discretion to determine when they would be an inconvenient forum. Currently, our courts are to consider factors such as the location of witnesses, financial hardship to the parties, and the familiarity of a court in another state with the family's background. SB 107 would limit the court's discretion in the following manner:

(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.

Section 7, amending Family Code Section 3428, merits particular attention. Section 7 generally concerns when a California court should decline to exercise jurisdiction based on a petitioner's “unjustifiable conduct.” If SB 107 is enacted, parental kidnapping—when ostensibly done for ideological purposes—will no longer be deemed unjustifiable. To this end, subsection (d) of Sec. 3428 would be amended to read:

(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 paragraph (3) of subdivision (b) of 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.

Notably, the above does not distinguish among parents whose custody has been limited by other states due to their violent natures, their unsuitability, their substance abuse, or the many other factors that may lead a court in the first instance to grant primary custody to the other parent. Instead, SB 107 gives unsuitable and unsafe parents a new trump card—the claim that they are taking the child out of state for “gender-affirming care.”

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appropriate exploration and integration of identity, reduction of distress, adaptive coping, and strategies to increase family acceptance.

Section 8 of the Bill would add a new section to the Family Code, declaring that other states' laws allowing state agencies to remove children subjected to "gender-affirming health care" to be against California's public policy. The provision further declares that such laws "shall not be enforced or applied" in California courts.

Section 9 of SB 107 adds a new section to the Penal Code, as follows:

- (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 is the lowest law enforcement priority.
- (b) California law enforcement agencies shall not make or intentionally participate in the arrest 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.
- (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 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 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" shall have the same meaning as provided in paragraph (3) of subdivision (b) of Section 16010.2 of the Welfare and Institutions Code.

The foregoing provision appears to take no account of federal extradition laws, such as 18 U.S.C. Sec. 3182, which requires a Governor to give up a fugitive from justice upon the presentment of an indictment or affidavit authenticated by the Governor of the state from which the fugitive fled.

Section 10 of SB 107 restricts enforcement of criminal subpoenas related to states that have laws restricting access to gender-affirming care.

Section 11 of the Bill adds another new section to the Penal Code, as follows:

- (a) Notwithstanding any other provision of state law, no state or local law enforcement shall make or intentionally participate in the arrest or recognize any demand for extradition of an individual pursuant to a criminal action related to the law of another state that criminalizes allowing a person to receive or provide gender-affirming health care where that conduct would not be unlawful under the laws of this state to the fullest extent permitted by federal law.
- (b) For the purpose of this subdivision, "gender-affirming health care" shall have the same meaning as provided in paragraph (3) of subdivision (b) of Section 16010.2 of the Welfare and Institutions Code.

Lastly, Section 12 of the Bill is a severability clause.

The foregoing should provide a sufficient summary of the sweeping changes proposed by SB 107. This effort to create gaping holes in child custody, criminal investigation, and the apprehension and extradition of child abductors appears to be unprecedented. It is also patently unconstitutional and incompatible with federal law.

For nearly a century, the U.S. Supreme Court has acknowledged the fundamental rights of parents to direct and control the upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). For more than 20 years, the Supreme Court has applied its jurisprudence on fundamental parental rights to

the context of child custody. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court struck down a Washington State statute which granted visitation rights to grandparents over the objections of a fit custodial parent. The decision demonstrated broad consensus across the Court's ideological spectrum, with the lead opinion authored by Justice O'Connor and joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer. Justice Thomas, concurring in the judgment, would have gone even further to apply strict scrutiny and debunk the state's reasoning as not even advancing a legitimate interest.

SB 107 is even less defensible than the statute struck down in *Troxel*. SB 107 attempts to override child-rearing decisions by fit custodial parents, not in favor of loving grandparents, but in favor of parents who have been adjudicated as unfit or otherwise needing to be limited in their interactions with their children. Not only that, but California is seeking to vitiate the child custody decisions of courts in other states that may have had years of experience dealing with a troubled family, where California has no idea what criminal or other background the non-custodial, kidnapping parent may have when arriving in the Golden State.

Volumes could be written about the necessity of comity between states on public safety issues such as criminal extradition and the capture of kidnappers. This letter will forego an extended discussion of the UCEA and the UCCJEA mentioned in the Legislative Counsel's Digest. The impacts of these statutes and provisions are not insignificant, and they each deserve to be given in-depth treatment by this body.

A few words on the Full Faith and Credit Clause are in order. We have written earlier in this session about the dangers of running roughshod over this provision. Like some of the other anti-Texas legislation that has been proposed this year, SB 107 seems blind to the foreseeable consequences that will come back to bite California if it proceeds further to dismantle comity.

California has long depended on the Full Faith and Credit Clause both to pursue tax revenues in other states and to assert its immunity to suit in the courts of other states, to say nothing of the importance of interstate cooperation for public safety. Indeed, the Supreme Court's most recent and authoritative decision in this area directly benefited California, *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) (*Hyatt III*). There, in a decades-long dispute making its way to the Supreme Court for the third time, the Justices protected California from a significant damages award in the courts of Nevada.

As *Hyatt III* observed, Justice Breyer had earlier expounded for the Court in the same case on the meaning of the Full Faith and Credit Clause in *Franchise Tax Board v. Hyatt*, 578 U.S. 171 (2016) (*Hyatt II*). The Court explained in both instances that the Clause demands that state court judgments be accorded full effect in the courts of other states and precludes states from adopting any policy of hostility toward the public acts of another state. *Hyatt III*, 139 S. Ct. at 1497 (quoting *Hyatt II*). Indeed, the consideration of whether one state has adopted a "policy of hostility" toward another state's acts, statutes, and judgments is crucial to the Full Faith and Credit analysis. *Hyatt II*, 578 U.S. at 176.

SB 107, with its open contempt for states that protect children from medical experimentation masquerading as healthcare, is irreconcilable with this basic test.

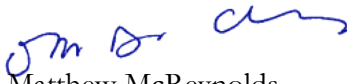
SB 107 promises an unwinnable war between state legislatures. As we have explained elsewhere, the costs to California taxpayers could be severe. But with SB 107, the costs of providing a safe haven for child abductors and predators could be unimaginable.

### **Conclusion**

SB 107 may be the most brazen assault on fundamental parental rights in the history of this state. Lawmakers who support it should fully and reasonably expect to forever be tarnished with the justly deserved labels of enabling and

supporting parental and perhaps other kidnapping. This diabolical Bill must be stopped. We therefore urge you to take every possible step to ensure its swift defeat.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Matthew McReynolds", with a stylized flourish at the end.

Matthew McReynolds

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