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To: Chair Virginia Lyons and Members of the Senate Health & Welfare Committee
From: Jessa Barnard, Vermont Medical Society, jbarnard@vtmd.org
Date: February 8, 2023
RE: Support for S. 37, An act relating to access to legally protected health care activity and regulation of health care providers

Good morning. Thank you for the invitation to testify to you this morning. My name is Jessa Barnard and I am the Executive Director of the Vermont Medical Society. I am here to testify not only on behalf of the Vermont Medical Society but also the Vermont Academy of Family Physicians, American Academy of Pediatrics Vermont Chapter, and Vermont Psychiatric Association in support of S. 37. Our organizations collectively represent approximately three thousand physicians in Vermont. Our members provide primary care and specialty health care services in hospital-based practices, Federally Qualified Health Centers and independent practices, including the full range of reproductive and gender affirming health care services.

Our members strongly support the findings of leading national medical associations that comprehensive reproductive health services, including access to contraception and abortion, and the provision of gender-affirmative care, are the standard of care in medicine.¹ Based on these evidence-based guidelines, the Vermont Medical Society has established policy positions supporting access to contraception, abortion and gender-affirmative care.²

You are well aware that such services are now under attack in a number of other states. About half of U.S. states have already or are expected (pending legislative or judicial actions) to enact abortion bans or other limits on the procedure.³ Similarly, more than a third of the 150,000 transgender youth 13 to 17 years of age in the United States live in the 15 states that have restricted or banned access to best practice medical care for transgender youth or are considering legislation to do so.⁴ These laws vary widely by state but can carry significant civil and criminal penalties for health care professionals, including decades of prison time and tens of thousands of dollars of fines. New forms of civil liability are also a reality, as exemplified by Texas' ban on abortions after 6 weeks, SB 8, which allows any private citizen to sue anyone who performs or induces an abortion or "aids and abets" the performance of an abortion.⁵ H. 89, which is just about to be considered on the House floor, addresses ways to reduce health care professional

¹ <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy>; <https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for>; see also <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>

²

https://vtmd.org/client_media/files/vms_resolutions/2019%20Codifying%20Protection%20for%20Womens%20Reproductive%20Rights_Final.pdf; <https://vermontbiz.com/news/2021/april/16/medical-leaders-call-scott-and-lawmakers-denounce-restrictions-gender-care>

³ <https://www.kff.org/other/state-indicator/abortion-policy-tracker>; see also <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>

⁴ See also <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>

⁵ <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00008F.pdf>

civil and criminal liability. However, risk of professional disciplinary action is undoubtedly higher. Any individual can file a licensing complaint, thereby requiring a licensing body to investigate. We already have an example of the Attorney General in Indiana opening an investigation into a physician who performed an abortion on a minor, alleging that the physician did not properly file a child abuse complaint.⁶ The Florida Board of Medical Practice and Board of Osteopathic Medicine are in the last stages of finalizing rules that define providing gender affirming services as against the standard of care, leading to investigations or discipline in any instances of providing care against their policy – despite this being contrary to national and international best practice guidelines for care.⁷

Given the tactics of laws like SB 8 and regulations like those in Florida, legal risks and professional discipline now attach to health care professionals caring for patients who travel for care or seek telemedicine services. Based on this, in September 2022, the VMS Board adopted a policy in support of “shield laws” that would protect Vermont health care professionals who provide reproductive or gender affirming health care services.⁸

We support the approaches being proposed in S. 37 and ask for their adoption. Of utmost importance to protecting access to care are the provisions regarding continued malpractice coverage, not taking disciplinary action based on providing legally protected health care activities, and further examining the implications of the Interstate Medical Licensing Compact.

We do have some specific language suggestions, which we look forward to reviewing with your Committee in more depth. Specifically:

- Section 1: The definition of “Legally Protected Health Care Activity” should align with amendments being made by the House Judiciary Committee;
- Section 2 (page 6, line 5): By referring to adjusting malpractice rates based on health care activity “in this state,” this definition appears to exclude telemedicine services otherwise contemplated by the definition of protected activity – this phrase should be removed;
- Section 6 and Section 7: The sections related to unprofessional conduct should also prohibit disciplinary action being taken by a Vermont board solely based on action by the licensing board of another state due to the provision of or assistance in legally protected health care activity;
- Section 11(e)(1) (page 16): We are unsure of the reason for providing immunity for dispensing emergency contraception;
- Section 14, regarding data privacy:
 - o It would clarify and assist with compliance if the definitions of applicability in (c)(1) were combined with the exceptions in (e) – as currently written, elements appear contradictory;
 - o Provisions should apply not only to a “covered entity” but also to “business associates” (e.g. electronic record vendors or the health information exchange);
 - o Section (d)(2) addressing actions against a covered entity should allow the covered entity to use the records in defense of the action generally, not just allow disclosure to the attorney or liability insurer.

Thank you for taking up this important legislation and we look forward to continuing to work with the committee as you develop S. 37. Please reach out to me at jbarnard@vtmd.org or 802-917-1460 if we can answer further questions.

⁶ <https://www.washingtonpost.com/politics/2022/07/27/abortion-doctor-girl-rape-caitlin-bernard-investigation/>

⁷ <https://wusfnews.wusf.usf.edu/health-news-florida/2023-01-09/public-hearing-scheduled-for-proposals-to-restrict-gender-affirming-care-for-minors-in-florida>

⁸ https://vtmd.org/client_media/files/2022%20Cross%20State%20Health%20Care%20Services.pdf