
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 1242 **Hearing Date:** June 28, 2022
Author: Bauer-Kahan
Version: June 21, 2022
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Reproductive rights*

HISTORY

Source: Attorney General Rob Bonta

Prior Legislation: AB 1356 (Bauer-Kahan), Ch. 191, Stats. 2021
SB 54 (de Leon), Ch. 495, Stats. 2017
SB 1770 (Padilla), Ch. 206, Stats. 2008
SB 603 (Ortiz), Ch. 481, Stats. 2006
AB 2251 (Evans), Ch. 486, Stats. 2006
SB 1301 (Kuehl), Ch. 385, Stats. 2002
SB 780 (Ortiz), Ch. 899, Stats. 2001

Support: Advancing New Standards in Reproductive Health; Planned Parenthood Affiliates of California

Opposition: None known

Assembly Floor Vote: 79 - 0

PURPOSE

The purpose of this bill is to prohibit a peace officer from arresting a person for performing or aiding in the performance of a lawful abortion or for obtaining an abortion and to prohibit law enforcement agencies from cooperating with or providing information to an individual or agency from another state regarding a lawful abortion, except as provided.

Existing law establishes the Reproductive Privacy Act which provides that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions and, therefore, it is the public policy of the State of California that:

- Every individual has the fundamental right to choose or refuse birth control;
- Every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions; and,

- The state shall not deny or interfere with a person’s fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted (Health & Saf. Code § 123460 et. seq., § 123462.)

Existing law provides that the state may not deny or interfere with a person’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 person. (Health & Safe. Code § 123462(c); 123466.)

Existing law prohibits, under the State Confidentiality of Medical Information Act (CMIA), providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient’s written authorization, subject to certain exceptions. (Civ. Code § 56 et seq.)

Existing law requires the Attorney General to carry out certain functions relating to anti-reproductive-rights crimes in consultation with the Governor, the Commission on Peace Officer Standards and Training (POST), and other subject matter experts. (Pen. Code, § 13777, subd. (b).)

Existing law requires the Attorney General to direct local law enforcement agencies to report annually to the Department of Justice specified information related to anti-reproductive-rights crimes. (Pen. Code, § 13777, subd. (a)(2).)

Existing law defines “anti-reproductive-rights crime” to mean a crime committed partly or wholly because the victim is a reproductive health services client, provider, or assistant, or a crime that is partly or wholly intended to intimidate the victim, any other person or entity, or any class of persons or entities from becoming or remaining a reproductive health services client, provider, or assistant. (Pen. Code, § 13776, subd. (a).)

Existing law requires POST to develop an interactive training course on anti-reproductive-rights crimes and make the telecourse available to all California law enforcement agencies through an online portal or platform. (Pen. Code, §13778, subd. (a).)

Existing law requires every law enforcement agency in this state to develop, adopt, and implement written policies and standards for officers’ responses to anti-reproductive-rights calls by January 1, 2023. (Pen. Code, § 13778.1.)

This bill prohibits a peace officer from arresting any person for performing or aiding in the performance of an abortion within this state, or obtaining an abortion in this state, if the abortion falls within the protections of the Reproductive Privacy Act.

This bill states that a peace officer shall not cooperate with or provide information to any individual or agency or department from another state regarding a lawful abortion protected under the Reproductive Privacy Act performed in this state.

This bill provides that the investigation of any criminal activity in this state that may involve the performance of an abortion is not prohibited, provided that information relating to any medical procedure performed on a specific individual is not shared with an agency or individual from another state for the purpose of enforcing another state’s abortion law.

This bill contains an urgency clause so that the bill will take immediate effect.

This bill provides the facts constituting the necessity are as follows: the impending United States Supreme Court decision overturning *Roe v. Wade* makes it necessary to protect California's health care providers and those seeking reproductive health care in California at the earliest time possible.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Our abortion providers are in peril. With *Roe* at risk of being overturned, our physicians are gearing up to treat an influx of patients coming from states that have banned their right to choose. These extreme measures to eliminate all access to abortion care may criminally implicate anyone who receives, provides, or even assists with an abortion here in California. If California does not act, judgements under these laws could lead to arrest and months of legal limbo for providers in our state. This is unacceptable. California law enforcement has no obligation to cooperate with these abhorrent out of state actions. AB 1242 protects our providers from the risk of arrest, as well as protecting in-state patients from any California information-sharing that would serve the brutal attacks to abortion rights.

2. Reproductive Rights in California

The California Supreme Court held in 1969 that the state constitution's express right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.) Existing California statutory law provides, under the Reproductive Privacy Act, that the Legislature finds and declares every individual possesses a fundamental right of privacy with respect to personal reproductive decisions; therefore, it is the public policy of the State of California that every individual has the fundamental right to choose or refuse birth control and the right to choose to bear a child or to choose to obtain an abortion. (Health & Safe. Code § 123462(a)-(b).) The Act further provides that it is the public policy of the state that the state shall not deny or interfere with a person's fundamental 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 pregnant person. (Health & Saf. Code, § 123462, subd. (c) & § 123466.)

In 2019, Governor Newsom issued a proclamation reaffirming California's commitment to making reproductive freedom a fundamental right in response to the numerous attacks on reproductive rights across the nation. (*California Proclamation on Reproductive Freedom* (May 31, 2019) available at: <https://www.gov.ca.gov/wp-content/uploads/2019/05/Proclamation-on-Reproductive-Freedom.pdf> [as of June 16, 2022].)

In the Legislature, several bills have been introduced this year to protect reproductive rights including this bill. AB 1666 (Bauer-Kahan) declares that a law of another state that authorizes a person to bring a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in

those actions, is contrary to the public policy of this state. This bill prohibits the state from applying that law to a case or controversy heard in state court and the enforcement or satisfaction of a civil judgment received under that law. AB 2091 (Bonta) prohibits a provider of health care, health care service plan, or contractor from releasing medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on either another state's laws that interfere with a person's rights set forth in the Reproductive Privacy Act and prohibits the issuance of a subpoena, from the Superior Court or an attorney licensed in California, based on a civil action authorized by the law of a state other than this state in which the sole purpose is to punish an offense against the public justice of that state.

This bill would prohibit a peace officer from arresting a person for performing or aiding in the performance of an abortion or for obtaining an abortion if it falls within the protections of the Reproductive Privacy Act. This bill would also prohibit law enforcement agencies from cooperating with or providing information to an individual or agency from another state regarding a lawful abortion. This bill clarifies that that the investigation of any criminal activity in this state that may involve the performance of an abortion is not prohibited, provided that information relating to any medical procedure performed on a specific individual is not shared with an agency or individual from another state for the purpose of enforcing another state's abortion law.

3. **Roe v. Wade**

Roe v. Wade, (1973) 410 U.S. 113, is the landmark U.S. Supreme Court decision holding that the implied constitutional right to privacy extends to a person's decision whether to terminate a pregnancy; while allowing that some state regulation of abortion access could be permissible. Specifically, the Court found for the first time that the constitutional right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* has been one of the most debated Supreme Court decisions, and its application and validity continue to be challenged. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, the Court reaffirmed the basic holding of *Roe*, yet also permitted states to impose restrictions on abortion as long as those restrictions do not create an undue burden on a person's right to choose to terminate a pregnancy. Most significantly is the currently pending case of *Dobbs v. Jackson Women's Health* where the court is deciding whether all pre-viability prohibitions on elective abortions are unconstitutional. (*Dobbs v. Jackson Women's Health* (2021) ___ U.S. ___ (141 S.Ct. 2619).)

On May 3, 2022, Politico reported that that the Court had voted to strike down the holding in *Roe* and *Casey* according to a leaked draft of the initial majority opinion, which was written by Justice Alito. (Josh Gerstein and Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, Politico (May, 3, 2022), available at <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [as of June 16, 2022].) The opinion has not been officially published but an official opinion in the case is expected by the end of the Court's term in June 2022. In the leaked opinion, the majority upholds the Mississippi law finding that, contrary to 50 years of precedent, there is no fundamental constitutional right to have an abortion. The opinion further provides that states should be allowed to decide how to regulate abortion and that a strong presumption of validity should be afforded to those state laws. (Leaked 1st Draft of *Dobbs v. Jackson Women's Health* (2022) _ U.S. _ (141 S.Ct. 2619) at p. 66, as reported by Politico (May 2, 2022), available at

<https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [as of June 16, 2022].)

4. Full Faith and Credit Clause

The Full Faith and Credit Clause of the United States Constitution states that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state. (U.S. Const. art. IV, sec. 1.) Because this bill prohibits law enforcement from cooperating with or providing information to another state for the purpose of enforcing another state’s laws on abortion, it potentially implicates the Full Faith and Credit Clause.

Generally, the laws of the state regulate conduct that occurs within that state. However, situations may arise where more than one state’s laws may apply such as collection of previously-owed income taxes or child support obligations from another state. The purpose of the Full Faith and Credit Clause “is to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.” (*Baker v. General Motors Co.* (1998) 522 U.S. 222, 232 citing *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268, 277.)

The Full Faith and Credit Clause may be implicated when there is a conflict between the laws of the different states. At least one court has held that any effort by a state to apply its criminal laws beyond its state borders to criminalize activity that is otherwise lawful in the other state. (*Bigelow v. Virginia* (1975) 421 U.S. 809.) *Bigelow* involved a Virginia newspaper editor who was convicted in Virginia for printing an advertisement for an abortion referral service in New York. The Supreme Court overturned this conviction stating that “[t]he Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services, or as the state conceded, prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York . . .” (*Id.* at p. 822-824.)

However, other cases do not follow such a strict prohibition on the application of one state’s laws on another state. The Supreme Court has also held that even when criminal conduct takes place outside of the state, extraterritorial jurisdiction may be property when the conduct was intended to produce or did produce harmful effects within the state. (*Strassheim v. Daily* (1911) 221 U.S. 280.)

The Supreme Court has also made a distinction between the strength of the Full Faith and Credit Clause’s applications to judgements versus state law. “The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” (*Baker v. General Motors Co.*, *supra*, 522 U.S. at 232-233.) This concept is often referred to as the “public policy exception” meaning statutes in on states is given effect only if they do not contravene the public policy of the other state. If this bill were challenged based on the Full Faith and Credit Clause, California would argue that enforcing the

anti-reproductive criminal statutes of other states is contrary to the public policy of the State, however, which is supported by case law. However, it is unclear whether the court would view this bill as ignoring another state's statutory laws versus ignoring a judgement from that state.

5. Argument in Support

According to Advancing New Standards for Reproductive Health (ANSIRH):

As more states pass restrictive abortion policies and bans, California is likely to be the destination for increasing numbers of pregnant people seeking abortion care that they cannot obtain in their own state. As a Reproductive Freedom state, we have a responsibility here in California to be part of the solution, and that is a responsibility that my fellow physician abortion providers and I take very seriously. We cannot sit by idly as we see people's rights taken away in other states—putting their health at risk—when we have the skills and tools to help them.

Patients may travel here to California to obtain abortion care here; they may travel here to receive medications to start the abortion, which will be completed in their home state; or they may seek out telehealth services to obtain a medication abortion from a California provider. All of these services are safe, effective, and consistent with medical standards of care. They are legal for California patients, and should be available to out-of-state residents, as well—especially those facing barriers to care in their home state.

If a patient in a state with severe restrictions seeks out my help to obtain safe abortion care, I would feel compelled to help them. Yet despite my good intentions, I could face a number of legal risks by providing the care I've outlined to a patient from a state that has banned abortion, including possible extradition to that state to face criminal penalties.

I should not have to fear arrest, extradition, and prosecution simply because I provided abortion care that is otherwise legal and safe here in California.

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