ASSEMBLY THIRD READING
AB 1666 (Bauer-Kahan)
As Amended May 5, 2022
2/3 vote. Urgency

SUMMARY

Prohibits the enforcement of out-of-state fetal heartbeat abortion restriction laws in California.

Major Provisions

1) Provides that a law of another state that authorizes a person to bring a civil action against a person or entity who does any of the following is contrary to the public policy of this state:

   a) Receives or seeks an abortion;

   b) Performs or induces an abortion;

   c) Knowingly engages in conduct that aids or abets the performance or inducement of an abortion;

   d) Attempts or intends to engage in the conduct described in a) through c), above.

2) Prohibits the application of an out-of-state law as described in 1), above, from being applied to a case or controversy heard in state court.

3) Prohibits the enforcement or satisfaction of a civil judgment received through an adjudication under a law described in 1) above.

4) Adopts a severability clause.

5) Adopts an urgency clause.

COMMENTS

In 2021, the State of Texas adopted a unique and menacing approach to restricting abortion access. Rather than directing state regulators or prosecutors to impose criminal or professional sanctions on persons receiving or performing an abortion, the Texas law permits the filing of a civil lawsuit against any person who performs an abortion or "aids or abets" a person receiving an abortion after a "fetal heartbeat" has been detected, after approximately six weeks of pregnancy. (Texas Health and Safety Code Section 171.208.) As of April 2022, more than one dozen other states have moved to introduce legislation to adopt their own versions of the Texas law.

The Texas law, like the copycat statutes being introduced in other states, is uniquely aggressive in several ways. First, the law imposes the shortest timeline for restricting abortion of any law adopted since the ruling in *Roe v. Wade.* Secondly, the Texas law implicates persons well beyond the person performing or receiving an abortion. The "aiding and abetting" language is so broad as to implicate and impose significant civil liability upon a person providing transportation to or from an abortion clinic, a person donating to a fund to assist women receive an abortion, or even a person who simply discusses getting an abortion with a woman. This appears to expand the

sanctions beyond traditional health and safety related criminal or professional liability statutes tied to the procedure itself or the conditions and facilities in which the procedure is performed. Finally, in order to avoid direct judicial attack, the bill prohibits any lawsuit from being brought by a state actor, including state health regulators or prosecutors. (Texas Health and Safety Code Section 171.208(a).)

In addition to providing a new means of enforcing abortion restrictions, the Texas law also is unique in that it confers standing on *any person* so long as they are not an agent of Texas state or local government. Typically in order for one private individual to bring a lawsuit against another individual, one party's conduct must be the legal cause of *harm* to another. (Restat. 2d of Torts, Section 431.) Although statutes can confer standing in various circumstances, it is rare for standing to arise when no harm or violation of individual rights were inflicted upon the party bringing the lawsuit

As more states consider adopting "fetal heartbeat" laws like those in Texas, this bill seeks to protect Californians from civil liability for exercising a fundamental right in this state. To achieve that protection this bill advances two policy goals. The first goal is to prohibit an action from being brought in California courts to enforce any out-of-state law that would impose civil liability on a person seeking, receiving, performing, inducing, or aiding a person in obtaining an abortion. The second policy goal of this bill is to prohibit the enforcement of a judgment rendered under an out-of-state "fetal heartbeat" law obtained in a non-California court. The bill also adopts a severability clause.

As noted above, this bill seeks to protect California residents from liability under out-of-state "fetal heartbeat" laws using a two-pronged approach. The first approach involves prohibiting California courts from being utilized as a venue for hearing such cases. In so much as this bill seeks to prevent "fetal heartbeat" civil actions from being filed in California courts, should this bill become law, it would essentially be 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 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, this 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 and others to assist them in doing so, and that the courts will not be usurped by the whims of another state.

The second aspect of this bill seeks to prevent in this state the enforcement of a judgment that stems from a "fetal heartbeat" law in another state. 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, court jurisprudence has held 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.)

Due to the unique nature of "fetal heartbeat" laws, several issues related to the Full Faith and Credit clause may arise. 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.)

Putting aside the jurisdiction and other exceptions to the Full Faith and Credit Clause that are also likely to apply to this bill, California can credibly argue that the Texas statute is purely penal in nature, and thus cannot be enforced in this state. The Texas law and its progeny do not require any actual showing of harm or violation of personal rights on the part of the plaintiff. Accordingly, it is unclear what private, personal injury the $10,000 penalty is actually remedying or compensating the plaintiff for. Furthermore, as evidenced by the above discussed Mississippi abortion ban, abortion laws have traditionally been enforced by criminal prosecutors and state regulatory agencies. The enforcement by state actors evidences a historic treatment of abortion as an offense against the public justice of the state, thus categorizing abortion restrictions as penal statutes. Finally, some of the strongest evidence that the Texas "fetal heartbeat" law is a penal statute masquerading as private civil action comes from the very man who drafted the bill. John Seago, the legislative director of Texas Right to Life, was a sponsor of the Texas measure. In an interview in The Atlantic magazine, Mr. Seago stated the following in response to a question about the novel legal approach employed by the bill:

> There are two main motivations. The first one is lawless district attorneys that the pro-life movement has dealt with for years. In October, district attorneys from around the country publicly signed a letter saying they will not enforce pro-life laws. They said that even if *Roe v. Wade* is overturned, they are not going to use resources holding the abortion industry to account. That shows that the best way to get a pro-life policy into effect is not by imposing criminal penalties, but civil liability." (Green, *What Texas Abortion Foes Want Next,* Sept. 2021) The Atlantic, available at: https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/.)

Mr. Seago's own acknowledgement that district attorneys, and other state actors, are the traditional enforcers of abortion laws highlights the penal nature of abortion statutes, and that the Texas statute is designed to enact a punishment, but avoid state enforcement that he perceives as too weak. Furthermore, by highlighting the perceived weakness of state officials, Mr. Seago suggests the Texas law deputizing private persons to enforce the public justice will result in greater enforcement actions against abortion providers, even if those private persons have no cognizable personal injury or suffer no violation of personal rights.

According to the Author

California must take proactive steps to protect access to and provision of abortion. Brought in partnership with the Future of Abortion Council, AB 1666 protects the California providers, supporters, and patients that face unjust legal repercussions for providing vital, legal abortion care. States across the country are targeting providers and patients with hundreds of thousands of dollars in fines. Without sufficient protection, providers in California could be ruined for providing basic, legal abortion care. The Supreme Court has chosen to abandon the spirit of Roe v. Wade and allow these blatant attacks of the pregnant people whose lives depend on their right to choose. It is no longer sufficient to permit abortion care to occur. This right is being shamelessly attacked with the broadest legal means available, AB 1666 protects abortion by providing a mechanism to defend against such attacks.

Arguments in Support

This measure is supported by a coalition of medical professionals, pro-choice organizations, and a municipality. Representative of the coalition NARAL Pro-Choice California writes:

> AB 1666 protects all those who could be sued as defendants in actions involving reproductive rights by prohibiting seizure of their financial assets here in California. Put more plainly, if a judgment or penalty goes through a California court, a patient or provider's assets here in California would be shielded from seizure. The right to an abortion is enshrined in the California constitution. This bill would declare it to be against the public policy of the state of California to infringe upon an individual's reproductive health choices. It would change the law so that the state would not vest full faith and credit in any laws by other states that prohibit reproductive choice. AB 1666 therefore makes it possible for California courts to uphold reproductive rights and protect providers.

Arguments in Opposition

This bill is opposed by two groups who argue against a woman's right to reproductive freedom. Representative of these organizations' sentiments, the Pacific Justice Institute writes:

> AB 1666, with its unabashed contempt for states that are more protective of unborn life, is irreconcilable with this basic test. Even if it somehow survived a court challenge, it is not difficult to forecast the unintended effects this legislation could produce. To begin with, proponents assume that medical providers can offer telehealth to patients across state lines, with no concern for those states' licensing or professional regulation. As other states follow California's lead, we should fully expect they will offer havens to physicians who want to flee California's exorbitant taxes and excessive regulation, with the promise that they can still offer telehealth services to Californians, free of our regulations and liability. With high-income earners and businesses already fleeing California for states like Texas, Florida, and

Arizona, to name just a few, it is hard to see how this could end well for anyone other than abortion providers.

FISCAL COMMENTS

None

VOTES

ASM JUDICIARY: 7-2-1
YES: Stone, Holden, Kalra, Maienschein, Reyes, Robert Rivas, Wicks
NO: Davies, Kiley
ABS, ABST OR NV: Cunningham

ASM HEALTH: 11-2-2
YES: Wood, Aguiar-Curry, Arambula, Carrillo, Maienschein, McCarty, Nazarian, Luz Rivas, Rodriguez, Santiago, Kalra
NO: Waldron, Flora
ABS, ABST OR NV: Bigelow, Mayes

UPDATED

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CONSULTANT: Nicholas Liedtke / JUD. / (916) 319-2334 FN: 0002332