Office of Senate Floor Analyses
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THIRD READING

Bill No: AB 1666
Author: Bauer-Kahan (D), et al.
Amended: 5/5/22 in Assembly
Vote: 27 - Urgency

SENATE JUDICIARY COMMITTEE: 9-2, 6/14/22
AYES: Umberg, Caballero, Durazo, Gonzalez, Hertzberg, Laird, Stern, Wieckowski, Wiener
NOES: Borgeas, Jones

ASSEMBLY FLOOR: 56-15, 5/23/22 - See last page for vote

SUBJECT: Abortion: civil actions

SOURCE: American College of Obstetricians & Gynecologists - District IX
Equality California

DIGEST: This bill 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. This bill provides that its provisions are severable, and declares that it is to take effect immediately as an urgency statute.

ANALYSIS: Existing federal law 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.)

Existing state law:

1) Holds 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*.)*

2) Establishes the Reproductive Privacy Act and provides that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. (Health & Saf. Code § 123460 et. seq., § 123462.)

3) 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 § 123466.)

4) 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 Civ. Proc. § 410.10.)

This bill:

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: receives or seeks an abortion; performs or induces an abortion; knowingly engages in conduct that aids or abets the performance or inducement of an abortion; or attempts or intends to engage in the conduct just described.

2) Prohibits the application of an out-of-state law described in 1) 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 an out-of-state law described in 1).

4) Provides the provisions of the bill are severable.

5) Declares that it is to take effect immediately as an urgency statute in order to protect the public from civil actions authorized under the law of another state that are contrary to the public policy of this state.

Comments

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 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 & Safe. Code § 123462(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.[1]

Roe v. Wade 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. ((1973) 410 U.S. 113.) *Roe* has been one of the most debated Supreme Court decisions, and its application and continued validity have frequently been challenged in the courts. Most significantly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, the Court reaffirmed the basic holding of *Roe v. Wade*, 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.

Currently pending at the U.S. Supreme Court is the 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.[2]

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[1] 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.

[2] **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.

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 a 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.[3]

Recently, Texas perniciously enacted a law with an enforcement scheme that was designed to avoid judicial scrutiny of its clearly unconstitutional provisions under the holding of *Roe* and *Casey*.[4] On certiorari from the Fifth Circuit, the U.S. Supreme Court held that a pre-enforcement challenge to the law under the U.S. Constitution may only proceed against certain defendants but not others.[5] The court did not address whether the law was constitutionally sound. However, the court's ruling essentially insulated the private enforcement of the law from challenge, allowing the law to remain in effect. If *Roe* is overturned by the Court, the Texas law may very well be found to be constitutional under the holding of *Dobbs*.

This law essentially places a near-categorical ban on abortions beginning six weeks after a person's last menstrual period, which is before many people even realize they are pregnant and occurs months before fetal viability.[6] The Texas law has far reaching implications, not solely for the person receiving an abortion or performing abortion services. The Texas law provides that any person, other than an officer or employee of a state or local governmental entity in Texas, may bring a civil action to enforce its provisions, which includes liability of $10,000 plus costs and fees if a plaintiff prevails. (*Id*. at § 171.201(b) & (i).) Other states are already following suit.[7]

The inability to challenge the Texas law pre-enforcement allows it to stand as an ominous threat to all persons seeking or performing an abortion, especially as more states consider enacting similar legislation. This bill seeks to provide protection from civil liability for exercising one's fundamental right in this state by

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[3] 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 4, 2022).

[4] *See Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, at 543 (conc. opn. Roberts, C.J., Breyer, Sotomayor, & Kagan) that states Texas has passed a law that is contrary to *Roe* and *Casey* because it has "the effect of denying the exercise of what we have held is a right protected under the Federal Constitution" and was "designed to shield its unconstitutional law from judicial review." (footnote omitted).

[5] *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 530.

[6] *See Whole Woman's Health v. Jackson* (2021) 141 S. Ct. 2494, at 24998 (dis. opn. Sotomayor, Breyer, & Kagan).

[7] **Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban – And These States Might Be Next,* Forbes (Mar. 23, 2022) available at** https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/?sh=340dc49425c0

prohibiting the enforcement of out-of-state laws, like the one in Texas, in California.

Article IV, Section 1 of the U. S. Constitution, known 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. As the bill requires certain laws and judgments of other states to not be enforced in California, it implicates the Full Faith and Credit Clause. Current legal scholarship regarding the Full Faith and Credit Clause posits that the clause applies differently to public acts (statutes), records, and judicial proceedings.[8] The current jurisprudence seems to provide that determinative judicial proceedings should be enforced in another jurisdiction as evidenced by the Court in *Baker v. General Motors Corp.* stating "for claim and issue preclusion purposes…the judgement of the rendering state gains nationwide force." ((1998) 522 U.S. 222, 233; *see also Mills v. Duryee* (1813) 7 Cranch 481, 484-485 holding that the judgment of a court of one of the states was conclusive evidence in every court within the United States.) Public acts or statutes and state records; however, may not need to be as strictly enforced. (*see Alaska Packers Association v. Industrial Accident Comm*. (1935) 294 U.S. 532; *Adar v. Smith* (5th Cir. 2011) 639 F.3d 146.)

The Court upheld the application of California law to settle a dispute of conflicting workers compensation statutes holding "[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 supra*. at 547.) The Court further stated: "Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." (*Id*. at 547-48.) A few years later, the Court noted 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.) These cases seem to indicate that states can uphold their public policy and apply their laws when a conflict of laws arises in a forum in that state and not run afoul of the Full Faith and Credit Clause.

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[8] **Redpath*, Between Judgment and*** *Law: Full Faith and Credit, Public Policy, and State Records* (2013) 62 Emory L.J. 639.

This bill's provisions prohibiting the state from applying an out-of-state law authorizing a civil action against a person or entity seeking, receiving, performing, inducing, or aiding a person in obtaining an abortion in an action brought in California courts may very well not run afoul of the Full Faith and Credit Clause as it would fall within the public policy exception for public acts. If California was compelled to enforce such an out-of-state law, it would require California to deny individuals their fundamental rights under state constitutional and statutory law. This would clearly lead to an "absurd result" as described by the Court in *Alaska Packers Association* and deprive individuals from exercising their fundamental rights.

This bill's provisions that prohibit the enforcement of a civil judgment rendered under an out-of-state law that imposes civil liability related to abortion more directly implicates the Full Faith and Credit Clause because it prohibits the enforcement of a determinative judicial proceeding of another state. The Court has generally held, dating back to 1813, that states must recognize and enforce the judicial determinations of another state. (*Mills v. Duryee* (1813) 7 Cranch 481, 484-485.) However, the Court has intimated that there may be exceptions to this general rule, stating that states are not automatically required to enforce civil judgments of another state that are based on that state's civil statutes when the goal or purpose of the civil statute is punishing a person for an offence against the "public justice." (*Huntington v Attrill* (1892) 146 U.S. 657, 673-674.)

It can be plausibly argued that the Texas statute, and others like it, are designed to punish an offense against the public justice. They do not require any actual harm or violation of personal rights for a plaintiff to bring a civil suit to enforce its provisions. As such, the $10,000 civil penalty cannot be intended to compensate the plaintiff for a personal injury or remedy a specific harm. Statutes regulating abortion have historically been enforced through criminal prosecutions or by state regulatory agencies as public health measures. Further evidence that the purpose of the Texas law is penal is found in statements made by John Seago, the legislative director of Texas Right to Life, which was a sponsor of the Texas bill, where he stated one motivation for enacting the law was because district attorneys publicly signed a letter stating they will not enforce laws that criminalize abortion.[9] If in-state district attorneys refuse to enforce laws to punish an offense against the public justice of that state, it seems even more absurd to require courts of another state to, especially when the out-of-state policy is diametrically opposed to the

[9] Emma Green, *What Texas Abortion Foes Want Next,* (Sep. 2021) The Atlantic, available at: https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/.

public policy of this state and would require California to undermine fundamental rights.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 6/16/22)

American College of Obstetricians & Gynecologists - District IX (co-source)
Equality California (co-source)
Lieutenant Governor Eleni Kounalakis
Access Reproductive Justice
American Association of University Women
American Atheists
California Association of Nurse Practitioners
California Latinas for Reproductive Justice
California Medical Association
California Nurse Midwives Association
California Nurses Association
California Women's Law Center
CaliforniaHealth+ Advocates
Citizens for Choice
City of Oakland
City of West Hollywood
Culver City Democratic Club
Democratic Party of Contra Costa County
Democrats of Rossmoor
Essential Access Health
Fund Her
Los Angeles County Democratic Party
NARAL Pro-Choice California
National Association of Social Workers, California Chapter
National Center for Youth Law
National Council of Jewish Women Los Angeles
National Health Law Program
National Nurses United
Oakland Privacy
Planned Parenthood Affiliates of California
Santa Barbara Women's Political Committee
The San Francisco Black & Jewish Unity Coalition
Women's Foundation California

OPPOSITION: (Verified 6/16/22)

California Family Council
Capitol Resource Institute
Concerned Women of America Legislative Action Committee
Pacific Justice Institute
Right to Life League of Southern California
4 individuals

ARGUMENTS IN SUPPORT: The author writes:

> 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.

The American College of Obstetricians and Gynecologists District IX, sponsor of the bill, writes:

> With new laws across the nation penalizing access to abortion, anyone aiding or assisting someone in obtaining an abortion, including OB/GYN's, could face devastating consequences. With more and more patients relying on California providers for telehealth-based reproductive care, California has the unique opportunity to protect providers and protect the rights of their patients.

ARGUMENTS IN OPPOSITION: The Capitol Resource Institute writes in opposition:

> AB 1666 is nothing but an attack on the pro-life laws of other states. This bill protects abortion providers and assumes California as the safe haven for abortions. Declaring that another state's law is contrary to the public policy

of California will be difficult to defend. California's lawmakers do anything to protect abortion providers and this bill is another way of protecting the abortion industry.

ASSEMBLY FLOOR: 56-15, 5/23/22
AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Bloom, Boerner Horvath, Bryan, Calderon, Carrillo, Cervantes, Cooley, Cooper, Cunningham, Daly, Mike Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gray, Grayson, Haney, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Salas, Santiago, Stone, Ting, Villapudua, Ward, Akilah Weber, Wicks, Wilson, Wood, Rendon
NOES: Bigelow, Megan Dahle, Davies, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Nguyen, Patterson, Seyarto, Smith, Voepel, Waldron
NO VOTE RECORDED: Berman, Mia Bonta, Chen, Choi, O'Donnell, Blanca Rubio, Valladares

Prepared by: Amanda Mattson / JUD. / (916) 651-4113
6/17/22 11:46:54

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