

Date of Hearing: April 20, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 814 (Levine) – As Introduced February 16, 2021

As Proposed to be Amended

SUBJECT: PERSONAL INFORMATION: CONTACT TRACING: ENFORCEMENT

KEY ISSUES:

- 1) SHOULD DATA COLLECTED, RECEIVED, OR PREPARED FOR THE PURPOSES OF CONTACT TRACING BE PROHIBITED FROM BEING USED, MAINTAINED, OR DISCLOSED FOR ANY PURPOSES OTHER THAN FACILITATING CONTACT TRACING?
- 2) SHOULD THIS DATA BE DELETED WITHIN 60 DAYS UNLESS IT IS IN THE POSSESSION OF A STATE OR LOCAL HEALTH DEPARTMENT?
- 3) SHOULD LAW ENFORCEMENT BE PROHIBITED FROM ENGAGING IN CONTACT TRACING EFFORTS?
- 4) SHOULD VIOLATIONS OF THESE PROVISIONS BE SUBJECT TO INJUNCTIVE RELIEF AND REASONABLE ATTORNEYS' FEES?

SYNOPSIS

On March 4, 2020, Governor Gavin Newsom declared a State of Emergency as a result of the COVID-19 pandemic. Since then, there have been over 3.6 million cases and over 59,000 deaths in California alone. One of the strategies being deployed to limit the transmission of COVID-19, is the use of contact tracing, which identifies COVID-19 positive individuals and those they may have been in close contact with. Those individuals are then advised to quarantine to aid in limiting the spread of the virus. Successful contact tracing requires the sharing of significant personal information, including a person's name, address, phone number and other personal identifying data. While this information is required to successfully stop the spread of the coronavirus, there is growing concern about this data potentially being used for non-healthcare related purposes.

This bill would prohibit employees of a law enforcement agency from engaging in contact tracing and place privacy protections on data collected for contact tracing to limit its use for public health purposes, increase public trust, and prevent the spread of the virus. Successfully limiting the spread of the virus will require all COVID-19 positive Californians to participate in contact tracing. However, immigrant communities and communities of color are less likely to interact with law enforcement regardless of the context. These communities have been disproportionately affected by COVID-19 and are less likely to seek medical aid. By prohibiting law enforcement from engaging in contact tracing, this bill will increase trust in contact tracing in the communities disproportionately affected by COVID-19 and facilitate greater participation to protect communities from the virus. The bill also ensures data collected for contact tracing is deleted within 60 days except for use by local and state health departments, and allows for people to seek injunctive relief for violation of the law. The author will take amendments in this Committee. Those amendments are reflected in the bill summary and discussed in the analysis. This bill is supported by a coalition of civil rights

advocates including the American Civil Liberties Union, Asian Americans Advancing Justice, and Western Center on Law & Poverty, INC. The bill is opposed, unless amended, by a coalition of organizations including the California Chamber of Commerce, the Civil Justice Association of California, and the Internet Association.

SUMMARY: Prohibits data collected, received, or prepared for purposes of contact tracing from being used, maintained, or disclosed for any purpose other than facilitating contact tracing efforts, and requires this data to be deleted within 60 days, unless it is in the possession of a state or local health department. Additionally prohibits law enforcement, from engaging in contact tracing. Specifically, **this bill:**

- 1) Prohibits any data collected, received, or prepared for purposes of contact tracing from being used, maintained, or disclosed for any purpose other than facilitating contact tracing efforts.
- 2) Requires all data collected, received, or prepared for purposes of contact tracing to be deleted within 60 days, except for data in the possession of a local or state health department.
- 3) Prohibits any officer, deputy, employee, or agent of a law enforcement agency from engaging in contact tracing.
- 4) Authorizes a person to bring a civil action seeking injunctive relief and reasonable attorneys' fees for any violation of the provisions above.
- 5) Defines "contact tracing" to mean identifying and monitoring individuals, through data collection and analysis, who may have had contact with an infectious person as a means of controlling the spread of a communicable disease.
- 6) Defines "data" to mean measurements, transactions, determinations, locations, or other information, whether or not that information can be associated with a specific natural person.
- 7) Defines "law enforcement agency" to mean any of the of the following: a police department; a sheriff's department; a district attorney; a county probation department; a transit agency police department; a school district police department; the Department of Highway Patrol; the Department of Justice; or college or university police departments, as specified.
- 8) Exempts a provider of health care or a provider's business associate from the requirements provided in 2) to the extent that the provider or business associate maintains the data in the same manner as medical information governed by the Confidentiality of Medical Information Act or protected health information governed by the Health Insurance Portability and Accountability Act of 1996.

EXISTING LAW:

- 1) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (California Constitution, Article I, Section 1.)
- 2) Establishes, pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA), privacy protections for patients' protected health information and generally provides that a covered entity, as defined (health plan, health care provider, and health care

clearing house), may not use or disclose protected health information except as specified or as authorized by the patient in writing. (45 C.F.R. Section 164.500 *et seq.*)

- 3) 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. (Civil Code Section 56 *et seq.*)
- 4) Establishes the Information Practices Act of 1977 (IPA), which declares that the right to privacy is a personal and fundamental right and that all individuals have a right of privacy in information pertaining to them. It regulates the handling of personal information in the hands of state agencies. The IPA states the following legislative findings:
 - a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.
 - b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.
 - c) Provides in order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits. (Civil Code Section 1798 *et seq.*)
- 5) Provides consumers the right to request that a business that collects a consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected. A business must provide the information upon receipt of a verifiable consumer request. (Civil Code Section 1798.100 (a), (c).)
- 6) Requires a business that collects a consumer's personal information to, at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice, as specified. (Civil Code Section 1798.100 (b).)
- 7) Provides consumers the right to request that a business delete any personal information about the consumer, which the business has collected from the consumer. (Civil Code Section 1798.105 (a).)
- 8) Provides consumers the right to request that a business that collects personal information about the consumer, or that sells that information, to disclose to the consumer certain specified details. (Civil Code Sections 1798.110 (a), 1798.115 (a).)
- 9) Provides a consumer the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. (Civil Code Sections 1798.120.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: On March 4, 2020, Governor Gavin Newsom declared a State of Emergency as a result of the COVID-19 pandemic. Since then, there have been over 3.6 million cases and over 59,000 deaths in California alone. One of the strategies deployed to limit the transmission of COVID-19, is the use of contact tracing, which identifies COVID-19 positive individuals and those they may have been in close contact with. Those individuals are then advised to quarantine to aid in limiting the spread of the virus. Successful contact tracing requires the sharing of significant personal information, including a person's name, address, phone number and other personal identifying data. While this information is required to successfully stop the spread of the coronavirus, there is growing concern about this data potentially being used for non-healthcare related purposes.

This bill would prohibit employees of a law enforcement agency from engaging in contact tracing and place privacy protections on data collected for contact tracing to limit its use for public health purposes, increase public trust, and prevent the spread of the virus. Successfully limiting the spread of the virus will require all COVID-19 positive Californians to participate in contact tracing. However, immigrant communities and communities of color are less likely to interact with law enforcement regardless of the context. These communities have been disproportionately affected by COVID-19 and are less likely to seek medical aid. By prohibiting law enforcement from engaging in contact tracing, this bill will increase trust in contact tracing in the communities disproportionately affected by COVID-19 and facilitate greater participation to protect communities from the virus. The bill also ensures data collected for contact tracing is deleted within 60 days except for use by local and state health departments, and allow for people to seek injunctive relief for violation of the law.

Author's Statement. In support of this bill, the author writes:

California is home to over 11 million immigrants including an estimated 2 million undocumented immigrants. These individuals have been disproportionally impacted by COVID-19 and are less likely to seek medical aid because of their immigration status. Immigrant and communities of color are similarly less likely to willingly interact with law enforcement officials, regardless of context. Successfully limiting the spread of the coronavirus will require all COVID-19 positive Californians to participate in contact tracing programs. AB 814 will help protect the data privacy of Californians and build public confidence in the contact tracing program needed to save the lives and protect the public from further spread of COVID-19. Specifically, AB 814 would prohibit data collected, received or prepared for purposes of contact tracing from being used, maintained or disclosed for any purpose other than contact tracing. The bill would prohibit an officer, deputy, or agent of a law enforcement agency as defined from engaging in contact tracing. The bill protects personal privacy by requiring data collected for contact tracing to be deleted within 60 days except for use of a local or state health department. The bill allows a person to bring civil action for violation of this section for injunctive relief. Together, this bill is essential to effective contact tracing and ensuring public confidence that their data will only be used in the interest of public health.

Background on the COVID-19 pandemic. COVID-19 is a viral respiratory illness caused by a new coronavirus. Coronaviruses are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats. COVID-19 was first reported in Wuhan, Hubei Province, China in November 2019. Over the next few months, the illness spread to almost every country. COVID-19 was declared a pandemic by the World Health

Organization on March 11, 2020. COVID-19 can cause mild to severe illness; most severe illness occurs in adults 65 years and older and people of any age with serious underlying medical problems. As of April 15, 2021, California has had 3,608,898 confirmed cases of COVID-19, resulting in 59,508 deaths. (See California All, *Tracking COVID-19 in California*, (April 15, 2021), available at <https://covid19.ca.gov>.)

COVID-19 and contact tracing. According to the Centers for Disease Control and Prevention (CDC), contact tracing is a fundamental public health activity that involves working with individuals diagnosed with an infectious disease who are showing symptoms (symptomatic) or not showing symptoms (asymptomatic). Working with individuals who are infected with the virus aids in supporting and identifying people (contacts) who may have been exposed due to interactions with that infected individual. This process prevents further transmission of disease by separating people who have (or may have) an infectious disease from people who do not. It is a core disease control measure that has been employed by public health agency personnel for decades, and is most effective when used as part of a multifaceted response to an outbreak. Specifically, contact tracing is essential for the subsequent identification, monitoring, and support of contacts who have been exposed to, and possibly infected with, the virus.

In the case of the COVID-19 pandemic a prompt identification, voluntary quarantine, and monitoring of COVID-19 contacts can effectively break the chain of disease transmission and prevent further spread of the virus in a community. While contact tracing for COVID-19 may be new, health departments and frontline public health professionals have long used contact tracing for the control of tuberculosis, sexually transmitted infections, HIV, and other infectious diseases. Contact tracing typically entails the following:

- Interviewing people who are infected by the virus to identify everyone they had close contact with during the time they may have been infectious;
- Notifying contacts of their potential exposure;
- Referring contacts for testing;
- Monitoring contacts for signs and symptoms of infection; and/or
- Connecting contacts with services they might need during the self-quarantine period. (See Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Contact Tracing*, <https://www.cdc.gov/coronavirus/2019-ncov/php/open-america/contact-tracing/index.html>.)

Privacy concerns surrounding COVID-19 contact tracing efforts. On May 22, 2020, Governor Newsom announced the launch of California Connected, which he stated “is the state’s comprehensive contact tracing program and public awareness campaign.” The efforts outlined in the program are detailed as follows:

As part of California Connected, public health workers from communities across the state will connect with individuals who test positive for COVID-19 and work with them, and people they have been in close contact with, to ensure they have access to confidential testing, as well as medical care and other services to help prevent the spread of the virus.

The state's program is led by the Administration in collaboration with the California Department of Public Health, local public health departments and the University of California, San Francisco (UCSF) and Los Angeles (UCLA), which have launched a robust online training academy to develop a culturally competent and skilled contact tracing workforce. (See Office of Governor Gavin Newsom, *Governor Newsom Launches California Connected – California's Contact Tracing Program and Public Awareness Campaign* (May 22, 2020) Press Release, available at <https://www.gov.ca.gov/2020/05/22/governor-newsom-launches-california-connected-californias-contact-tracing-program-and-public-awareness-campaign/>.)

California Connected asserts the identity and health information collected for the purpose of contact tracing will be kept confidential and only collected and stored for use by local and state public health departments. Despite the stated desire to ensure confidentiality, no statutory protections or regulations have been laid out in regard to contact tracing. Specifically, there are no protections or regulations for how contact tracing is performed, who can engage in contact tracing, what purposes the collected information can be used for, and how long collected information can be stored.

There are currently two forms of contact tracing being used. The first is contact tracing through technology-assisted applications, and the second is manual contact tracing. Many privacy concerns were recently raised in response to the dramatic increase in technology-assisted contact tracing efforts. Officials using these methods have been forced to scramble to “address serious complaints that arose over extensive user data-mining or poor security practices.” (See Natasha Singer, *Virus-Tracing Apps Are Rife With Problems. Governments Are Rushing to Fix Them* (July 8, 2020) The New York Times, available at <https://www.nytimes.com/2020/07/08/technology/virus-tracing-apps-privacy.html>.) Warnings streamed in from human rights groups and technologists that “the design of many apps put hundreds of millions of people at risk for stalking, scams, identity theft or oppressive government tracking — and could undermine trust in public health efforts.” (See *Scam Alert: Avoid COVID-19 Contact Tracing Scams* (July 20, 2020) Los Angeles County Department of Consumer and Business Affairs, available at <https://dcba.lacounty.gov/newsroom/scam-alert-avoid-covid-19-contact-tracing-scams/>.)

However, there have been privacy concerns with manual contact tracing as well. According to a press release by Attorney General Xavier Becerra, “[s]cam artists pretend to be contact tracers to trick Californians into divulging their private personal information such as Social Security numbers, financial information, or health insurance information.” (See Attorney General Xavier Becerra, *Attorney General Becerra Issues Consumer Alert on COVID-19 Contact Tracing Scams*, (June 8, 2020), available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-covid-19-contact-tracing-scams>.) Given the failure of current contact tracing methods in protecting confidential information, establishing oversight and regulation is necessary to not only address the identified privacy concerns but also to build the public trust that is necessary for effective contact tracing.

Contact tracing and Fourth Amendment considerations. The Fourth Amendment of the United States Constitution protects against “unreasonable searches and seizures.” (U.S. Constitution, 4th Amendment.) It is well recognized that the fundamental purpose of the Amendment is to safeguard the privacy and security of individuals against invasion by governmental officials. Although the Fourth Amendment is most often discussed and applied in the context of law

enforcement efforts to obtain evidence of criminal wrongdoing, digital contact tracing programs that permit the government to monitor activities could constitute an unreasonable search under the Fourth Amendment.

However, Fourth Amendment issues could be circumvented by making use of the “special needs” doctrine, pursuant to which a warrantless search is permitted based on a special need relating to national security. It might be argued that containment of a deadly virus constitutes a special need that could justify some form of warrantless, surveillance or data collection. The special needs doctrine, however, is highly controversial. In *Ferguson v. City of Charleston*, the Medical University of South Carolina subjected pregnant women to tests for cocaine use; those who tested positive were then charged with criminal child abuse. (*Ferguson v. City of Charleston*, (2001) 532 U.S. 67.) Although the women argued that the tests constituted an unreasonable search, the lower court concluded that the searches were reasonable to serve a non-law enforcement end, namely mitigating prenatal cocaine exposure. The Supreme Court reversed the decision, noting that the special need in question cannot ultimately serve a law enforcement purpose.

Despite the uncertainty of future contact tracing initiatives, Fourth Amendment and privacy concerns cannot be neglected. Further as stated in a report to Congress by the Congressional Research Services, “[g]iven the highly fact-specific and fluid nature of the relevant constitutional doctrines, as well as the privacy and governmental interests at stake....Congress might attempt to establish standards for governmental acquisition of digital-location or other kinds of information in response to the COVID-19 pandemic.” (See Congressional Research Services, *COVID-19, Digital Surveillance, and Privacy: Fourth Amendment Considerations* (April 16, 2020), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10449>, at 4.) In conclusion, clear statutory safeguards should be put in place to ensure Californians are guaranteed their right to privacy during contact tracing efforts, especially when providing information essential to combatting a global pandemic.

This bill aims to address issues regarding misuse of contact tracing data by limiting the use of the data obtained solely for the purposes of contact tracing and limiting the time the data is maintained with entities outside of local or state health departments. Public health experts have noted the importance of contact tracing as a strategy to contain the virus and get ahead of the pandemic, stating that successful contact tracing efforts are essential to “re-opening” the country. However, distrust in contact tracing by the public have hindered these efforts. A survey by the Kaiser Family Foundation found that when it comes to digital contact tracing efforts, who manages the data affects peoples’ willingness to download the app for contact tracing. Six in ten individuals said they are “willing” to download an app to track the spread of coronavirus if data from the app was managed by their state health department (63 percent), the federal Centers for Disease Control and Prevention (62 percent), or their local health department (62 percent). Far fewer (31%) are willing to download the app if the data was managed by a private tech company. Further, nearly 38 percent say they are *more worried* private companies will sell their personal data from the app while one-third say they are *more worried* the federal government will use the data for purposes beyond tracking the spread of coronavirus. (See Ashley Kirzinger et al., *KFF Health Tracking Poll – Late April 2020: Coronavirus, Social Distancing, and Contact Tracing* (April 24, 2020) Kaiser Family Foundation, available at <https://www.kff.org/coronavirus-covid-19/issue-brief/kff-health-tracking-poll-late-april-2020/>).

This bill aims to address some of the issues regarding misuse and the distrust surrounding contact tracing by prohibiting data collected, received or prepared for purposes of contact tracing from being used, maintained or disclosed for any purpose other than contact tracing. Further, this bill requires data collected, received, or prepared for purposes of contact tracing to be deleted within 60 days, except for data in the possession of a local or state health department.

Opposition Concerns. A coalition of organizations including the California Chamber of Commerce, the Civil Justice Association of California, and the Internet Association, including others, are opposed to this bill unless amended to address a number of concerns. The coalition argues that the current language of the bill is ambiguous and could have unintended consequences. Further, they state:

If sign-in sheets were initially “collected” for purposes of building security, but were later “received, or prepared” for purposes of contact tracing, then AB 814 would ban the use those sign-in sheets, even if used for their original purpose. Even something as simple as an employee’s phone number can fall into this regulation. For example, if an employer asks an employee to write their phone number on a contact tracing form, that information is now swept into the definition of “data collected, received or prepared for contact tracing.” However, the employer has the employee’s phone number in numerous files and for legitimate reasons other than contact tracing.

After conversation with the author’s office concerning this issue, it is clear that the intention of the author is to delete an employee’s name and phone number *solely* on files used for the purpose of contact tracing, and not every file that might have the employee’s name and phone number. However, the author should continue working with the coalition on clarifying language that may further address this concern.

The opposition also states that “AB 814 does not provide any exceptions to this data deletion requirement, and it therefore runs afoul of current law.” The coalition specifically points out that current California Occupational Safety and Health Administration (Cal OSHA) guidelines have strict requirements for recording illnesses for employees who have contracted COVID-19. Those guidelines further require employee information regarding COVID-19 illnesses to be maintained for 5 years or longer, depending on the circumstances. To address this issue, the author’s office has agreed to continue working with stakeholders to ensure that exceptions are carved out where there may be conflicts with existing law.

Distrust in law enforcement could hinder contact tracing efforts amongst the hardest hit populations. In the United States, COVID-19 has disproportionately affected racial/ethnic minority and underserved groups, especially African American, LatinX, and Native American communities. The CDC reported that 21.8 percent of COVID-19 cases in the U.S. were African Americans and 33.8 percent were LatinX, despite the fact that these groups comprise only 13 percent and 18 percent of the U.S. population, respectively. (See Centers for Disease Control and Prevention *Coronavirus Disease 2019 (COVID-19) in the U.S.* (June 8, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.) It has become clear that contact tracing is a necessary component of the fight against COVID-19. However, participation in contact tracing hinges on public trust. Effective contact tracing requires that participants share a wealth of intimate detail with contact tracers: information about their location, private activities, health status, and associations. (See Frances Stead Sellers and Ben Guarino, *Contact tracing is ‘best’ tool we have until there’s a vaccine, health experts say* (June

14, 2020), The Washington Post, *available at* https://www.washingtonpost.com/national/contact-tracing-is-best-tool-we-have-until-there-s-a-vaccine-say-health-experts/2020/06/13/94f42ffa-a73b-11ea-bb20-ebf0921f3bbd_story.html.) Further, if individuals fear that participating in contact tracing will expose them or their loved ones to deportation or criminalization, they will simply choose not to participate.

Unfortunately, a growing distrust in law enforcement is evident amongst the immigrant population. After increased deportations and news of deceptive raids by U.S. Immigration Customs and Enforcement (ICE) agents disguised as law enforcement, police officers reported a dramatic drop in outreach from, and cooperation with, immigrant and limited English proficiency (LEP) communities. Since police are often the first point of contact for survivors of crime within the justice system, the decline in trust and cooperation has had a significant impact on their work and on the rest of the justice system. A report by the ACLU found that 64 percent of police officials surveyed cited a concern for community safety when immigrant crime survivors were afraid to seek assistance. Approximately 22 percent of police officers reported that immigrants were less likely to make police reports; 21 percent said immigrant crime survivors were less likely to help in investigations when police arrived at the scene of a crime; 20 percent reported that these survivors were less likely to help in post-crime scene investigations; and 18 percent said survivors were less willing to work with prosecutors. (*See American Civil Liberties Union, Freezing Out Justice: How immigration arrests at courthouses are undermining the justice system* (2018), *available at* https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf.)

Further, the growing distrust of law enforcement is evident in communities of color. A study by Pew Research found that about “half of Hispanics and just 33% of black adults” say police officers treat racial and ethnic groups equally at least some of the time. (*See Claire Gecewicz and Lee Rainie, Why Americans Don’t Fully Trust Many Who Hold Positions of Power and Responsibility* (September 19, 2019) Pew Research Center, *available at* <https://www.pewresearch.org/politics/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility/>.) Compounding matters, advocates worry that as a result of overall skepticism of authority, coupled with the police crackdowns on recent protests in response to the death of George Floyd, people less willing to line up and trust a public agency, public health included. Unfortunately this distrust is warranted as evident by the example of the Minnesota public safety commissioner who stated that the government was “contact tracing” protesters, but instead were found to be spying on protesters under the guise of a vital public health effort. (*See Sara Morrison, Minnesota law enforcement isn’t “contact tracing” protesters, despite an official’s comment*, (June 1, 2020), Vox *available at* <https://www.vox.com/recode/2020/6/1/21277393/minnesota-protesters-contact-tracing-covid-19>.) Further, in San Diego County, public health officials had been found to be providing local law enforcement with lists showing the home addresses of all individuals who had tested positive for COVID-19, but have refused to release public data that might have provided insight into where the outbreaks in that county had happened. (*See Jesse Marx, County Distributes COVID Patients’ Addresses to Police Agencies*, (Jan. 21, 2021) Voice of San Diego, *available at* <https://www.voiceofsandiego.org/topics/government/county-distributes-covid-patients-addresses-to-police-agencies/>.) These instances not only hinder essential public health efforts, but also further exacerbate the growing distrust amongst the hardest hit communities to share their private information.

This bill further aims to address distrust in contact tracing by prohibiting law enforcement from participating in contact tracing efforts. Public health experts note that protecting intimate information gathered from COVID-19 contact tracing efforts is key to stemming the spread of COVID-19. As a recent analysis of digital contact tracing concludes: “No amount of technical cleverness is likely to fully resolve the privacy concerns that sends police officers to your door.” (See Toby Shevlane, et al., *Contact tracing apps can help stop coronavirus. But they can hurt privacy.* (April 28, 2020), The Washington Post, available at <https://www.washingtonpost.com/politics/2020/04/28/contact-tracing-apps-can-help-stop-coronavirus-they-can-hurt-privacy/>.) There is a clear concern that vulnerable populations, such as homeless or undocumented individuals, may not be willing to get tested if they fear their information will end up in the possession of law enforcement. This bill would provide the needed safeguards for these vulnerable populations to ensure that law enforcement cannot be involved in the contact tracing efforts.

This bill would allow an individual to bring a civil action for a violation of this bill for injunctive relief, and would further require the court to grant any prevailing plaintiff reasonable attorney fees. It has been said that a right without a remedy is no right at all. Typically, laws without adequate enforcement mechanisms do little to ensure individuals are protected, and therefore providing a statutory mechanism by which to seek relief is essential. This bill authorizes a private right of action for violation of its provisions and authorizes a court to grant injunctive relief, as well as reasonable attorney fees, to a prevailing plaintiff. Providing injunctive relief will further protect privacy and build public trust by ensuring appropriate remedies are available for when an individual’s rights under the existing laws of California are violated. This in turn makes the state’s contact tracing efforts more likely to succeed.

Opponents argue that, “AB 814 discourages any use of contact tracing by allowing predatory lawyers to visit ruin upon already fragile businesses and local governments amid a public crisis. The private right of action is unnecessary and denies our State the opportunity to use one of the most effective tools we have to stop the spread of COVID-19: contact tracing.” Given the limited remedies under the bill—mere injunctive relief and attorney’s fees—these concerns may be considered to be somewhat overstated.

Proposed author amendments ensure that health care providers are also exempt from the data deletion requirement of this bill. As currently in print, this bill requires all data collected, received, or prepared for purposes of contact tracing to be deleted within 60 days, except for data in the possession of a local or state health department. The author however, did not intend to prevent health care providers, who may need this data for future care or treatment of a patient, from maintain patient data, especially given the uncertainty surrounding the long term health impacts of COVID-19. Accordingly, the following proposed amendments would exempt health care providers from the deletion requirement. The provision would read as follows:

1798.601

(c) This section shall not apply to a provider of health care as defined in Section 56.05 of the Civil Code or a provider’s business associate as defined in 45 C.F.R. Section 160.103 to the extent the provider or business associate maintains the data collected, received, or prepared for purposes of contact tracing in the same manner as medical information governed by the Confidentiality of Medical Information Act (Part 2.6 commencing with Section 56) of Division 1) or protected health information governed by the Health Insurance Portability and Accountability Act of 1996.

Further, the author has agreed to continue working with this Committee to ensure that entities such as research institutions may use contact tracing data for scientific research and discovery purposes.

ARGUMENTS IN SUPPORT: In support of this bill, the Western Center on Law and Poverty writes:

Contact tracing is an important tool to limit the spread of COVID19 and is most effective when complete data is provided. Trusted community members, like public health officials or community workers, are the best collectors of this data, especially for communities that are already over-policed. Immigrant communities and communities of color – the very communities disproportionately impacted by the pandemic – are less likely to willingly interact with law enforcement officials. In the current anti-immigrant climate, our legal aid partners report that immigrants are already afraid to seek health care, enroll in public assistance programs, or otherwise seek assistance. Similarly, many people of color have experienced negative interactions with police, even when law enforcement is called to help. If we are serious about slowing the spread of COVID 19 through contact tracing, we should use only those community workers that are already trusted.

ARGUMENTS IN OPPOSITION: In opposition, unless amended, to this bill, a coalition of organizations including the California Chamber of Commerce, the Civil Justice Association of California, and the Internet Association, write:

We appreciate the opportunity to be included in this process and support the aim of the bill to protect the privacy and security of information obtained through contact tracing and to prevent that information from being misused. Unfortunately, AB 814 is drafted in such a way that it creates overbroad restrictions that will slow the use of contact tracing and prevent customary uses of non-contact tracing information. Additionally, the inclusion of a private right of action with attorney fees creates a strong deterrent from using or participating in contact tracing, one of the only tools we currently have to fight COVID-19.

REGISTERED SUPPORT / OPPOSITION:

Support

Access Humboldt
 American Academy of Pediatrics, California
 American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
 Asian Americans Advancing Justice
 California Faculty Association
 California Immigrant Policy Center
 Californians Together
 Common Sense
 Consumer Action
 Consumer Federation of America
 Electronic Frontier Foundation
 Oakland Privacy
 Privacy Rights Clearinghouse
 Western Center on Law & Poverty, INC.

Opposition

Association of Claims Professionals
California Chamber of Commerce
California Grocers Association
California Retailers Association
California Trucking Association
Civil Justice Association of California
Insights Association
Internet Association; the
Internet Coalition
National Payroll Reporting Consortium
State Privacy and Security Coalition, INC.
Technet

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