Date of Hearing: June 8, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 836 (Wiener) – As Amended February 18, 2022

**SENATE VOTE**: 28-0

**SUBJECT**: EVIDENCE: IMMIGRATION STATUS

**KEY ISSUE**: SHOULD A STATUTORY BAN ON DISCLOSING A PERSON'S IMMIGRATION STATUS IN OPEN COURT, SUBJECT TO CERTAIN LIMITATIONS, BE REINSTATED?

## SYNOPSIS

*Regardless of the fact that many have resided in the United States for decades, undocumented residents face a constant threat of loss and deportation often for engaging in processes which the remaining population takes for granted. This includes participation in legal proceedings which often grant access to legal protections and economic recovery. For that reason, undocumented immigrants are sometimes reluctant to serve as witnesses in trials or vindicate their legal rights by participating in a lawsuit. Bad actors exploit this reluctance to prey on undocumented people. In 2018, the Legislature passed SB 785 (Wiener) which prohibited an individual's immigration status from being disclosed in open court. The legislation aimed to protect undocumented parties and participants from being targeted while participating in legal proceedings. SB 785 included a sunset date, which removed these protections as of December 31, 2021. To help all Californians feel more secure participating in the legal system, regardless of their immigration status, this bill would reinstate the extra procedural safeguards implemented by SB 785. Rather than permitting parties to begin questioning or discussing the immigration status of any other party or witness in open court, this bill, in a civil action, would prohibit the disclosure of evidence of a person's immigration status in open court by a party or the party's attorney, unless the judge presiding over the matter first determines, in an in camera hearing requested by the party seeking disclosure of the person's immigration status, that the evidence is admissible.*

*The bill is co-sponsored by the California Employment Lawyers Association (CELA), the Coalition on Humane Immigrant Rights (CHIRLA), Legal Aid at Work, the San Francisco District Attorney and the Los Angeles District Attorney. It is supported by a coalition of immigrants' rights organizations, labor organizations, and other progressive advocacy organizations. This bill was previously heard by the Assembly Committee on Public Safety and passed on a vote of 5-0.*

**SUMMARY:** Reestablishes a prohibition on disclosing a person's immigration status in open court, subject to certain exceptions. Specifically, **this bill**:

1) Prohibits evidence of a person's immigration status from being disclosed in open court in a civil action by a party or their attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status.

2) Excludes cases in which a person's immigration status is necessary to prove an element of a claim or an affirmative defense from the provisions of the bill.

3) Clarifies that the provisions of the bill do not otherwise impact applicable laws governing the relevance of immigration status to liability or the standards applicable to inquiries regarding immigration status in discovery or proceedings in a civil action, nor do they prohibit a person or their attorney from voluntarily revealing the person's immigration status to the court.

4) Prohibits evidence of a person's immigration status from being disclosed in open court in a criminal action by a party or their attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status.

5) Excludes cases in which a person's immigration status is necessary to prove an element of an offense or an affirmative defense.

6) Clarifies that the provisions of the bill do not limit discovery in a criminal action or prohibit a person or their attorney from voluntarily revealing the person's immigration status to the court.

7) Contains an urgency clause.

**EXISTING LAW**:

1) States that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evidence Code Section 350, 351.)

2) Provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory rule of evidence relating to privilege or hearsay, or inadmissibility. (California Constitution, Article I, Section 28.)

3) Defines "relevant evidence" as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evidence Code Section 210.)

4) Authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evidence Code Section 352.)

5) Allows the credibility of a witness to be attacked or supported by any party including the party calling the witness. (Evidence Code Section 785.)

6) Establishes that in determining the credibility of a witness and except as otherwise provided by law, the court or jury may consider any matter that has any tendency to prove or disprove the truthfulness of the witness' testimony, including but not limited to:

    a) The witness' demeanor while testifying and the manner in which the witness testifies;

b) The character of the witness' testimony;

c) The extent of the witness' capacity to perceive, to recollect, or to communicate any matter about which the witness testifies;

d) The extent of the witness' opportunity to perceive any matter about which the witness testifies;

e) The witness' character for honesty or veracity or their opposites;

f) The existence or nonexistence of a bias, interest, or other motive;

g) Any statement previously made by the witness that is consistent with the witness' testimony at the hearing;

h) Any statement made by the witness that is inconsistent with any part of the witness' testimony at the hearing;

i) The existence or nonexistence of any fact testified to by the witness;

j) The witness' attitude toward the action in which the witness testifies or toward the giving of testimony; or

k) The witness' admission of untruthfulness. (Evidence Code Section 780.)

7) Provides that in a civil action for personal injury or wrongful death, evidence of a person's immigration status shall not be admitted into evidence, nor shall discovery into a person's immigration status be permitted. (Evidence Code Section 351.2.)

8) Provides that for purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law. (Civil Code Section 3339 (b); Government Code Section 7285 (b); Health and Safety Code Section 24000 (b); Labor Code Section 1171.5 (b).)

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

**COMMENTS**: Regardless of the fact that many have resided in the United States for decades, undocumented residents face a constant threat of loss and deportation often for engaging in processes which the remaining population takes for granted. This includes participation in legal proceedings which often grant access to important protections and economic recovery. Appearing in court, either as a party in the proceeding or as a witness or other participant, risks exposing these individuals to potentially dangerous situations and removing them from their homes and communities. For that reason, immigrants are sometimes reluctant to serve as witnesses in trials or vindicate their legal rights by participating in a lawsuit, ultimately losing their ability to access justice. In 2018, the Legislature passed SB 785 (Wiener, Chap. 12, Stats. 2018) which prohibited an individual's immigration status from being disclosed in open court. The legislation aimed to protect undocumented parties and participants from being targeted while participating in legal proceedings. Seemingly through collective oversight, SB 785 included a

sunset date, which removed these protections as of December 31, 2021 that was never renewed or removed. As stated by the author, "SB 836 seeks to re-enact provisions to protect a person's immigration status in a public court record, unless the presiding judge determined that immigration status was relevant information." Further, according to the author:

> Prior to SB 785 becoming law, there were numerous documented examples of defense attorneys exposing the immigration status of witnesses and victims of crimes in California courthouses. In addition, there were reports of immigration agents throughout the country monitoring and detaining individuals at courthouses. […] Many immigrants continue to feel apprehension in court settings for fear of being targeted and arrested by Immigration and Customs Enforcement (ICE) agents. Every day that passes without these protections puts immigrants at risk.

***The threat of immigration detention during court proceedings.*** In 2017, the country experienced a marked rise in Immigration and Customs Enforcement agents conducting detentions at local, state, and federal courthouses, exposing immigrants who appeared as a party or witness to a civil or criminal proceeding wholly unrelated to their immigration status at heightened risk of deportation. (*See for example:* Queally, *ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court,* LA Times (March 15, 2017) at https://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html.) In response, many advocates reported a decreasing willingness or ability for undocumented individuals in particular to file lawsuits or appear in court. In essence, individuals were being forced to choose between participating in litigation to pursue legal remedies or risk being separated from their families and communities. In March 2017, California Chief Supreme Court Justice Tani Cantil-Sakauye sent a letter to then-U.S. Attorney General Jeff Sessions and Homeland Security Secretary John Kelly, expressing concern over reports of immigration agents stalking undocumented immigrants in California courthouses. Chief Justice Cantil-Sakauye said, "[o]ur courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws." Seemingly in response to the significant public backlash, in January of 2018 Immigration and Customs Enforcement released a new policy which stated that the agency would focus their enforcement at courthouses to immigrants with criminal convictions or who had otherwise triggered deportation proceedings, and that immigrants:

> [E]ncountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target alien to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions. (U.S. Immigration and Customs Enforcement (January 10, 2018) at ciEnforcementActionsCourthouses.pdf (ice.gov).)

The Legislature sought to prevent immigration enforcement actions in courthouses by clarifying, in AB 668 (L. Gonzalez, Chap. 787, Stats. 2019), that the inherent power of judicial officers to prohibit activities that threaten access to courthouses, also includes protecting the ability of court users to be free from arrest at a courthouse. As a result, no person shall be subject to civil arrest in a courthouse in the state while attending a court proceeding or having legal business in the courthouse.

In April 2021, the Biden administration sharply limited ICE's ability to conduct arrests in or near courthouses. (Katkov, *Biden administration limits power of ICE to arrest immigrants in courthouses* (April 27, 2021) at https://www.npr.org/2021/04/27/991460979/biden-administration-limits-power-of-ice-to-arrest-immigrants-in-courthouses.) The directive allows ICE to detain immigrants at or near courthouses only if one of the following is true: 1) the detention involves a national security matter; 2) there is an imminent risk of death, violence, or physical harm to any person; 3) it follows hot pursuit of an individual who poses a threat to public safety; or 4) there is an imminent risk of destruction of evidence material to a criminal case. (*Ibid.*) Regarding this policy, Department of Homeland Security Secretary Alejandro Mayorkas stated, "Ensuring that individuals have access to the courts advances the fair administration of justice, promotes safety for crime victims, and helps to guarantee equal protection under the law […] civil immigration arrests at courthouses during the prior administration had a chilling effect on individuals' willingness to come to court or work cooperatively with law enforcement." (DHS Announces New Guidance to Limit ICE and CBP Civil Enforcement Actions In or Near Courthouse (April 27, 2021) at https://www.dhs.gov/news/2021/04/27/dhs-announces-new-guidance-limit-ice-and-cbp-civil-enforcement-actions-or-near.)

***Recent legislative action disfavoring relevancy of and discovery into immigration status in civil matters.*** Existing state law generally establishes that a person's immigration status is irrelevant to issues of civil liability, with few exceptions. For example, Civil Code Section 3339 states that a person's immigration status is irrelevant to the issue of liability in civil actions to enforce certain public protection laws—specifically actions to enforce the state's labor, employment, civil rights, employee housing, and consumer protection laws—and inquiry into immigration status in court proceedings and discovery about these cases is prohibited. The California Labor Code, Health and Safety Code, and Government Codes also include language identical to Civil Code Section 3339. Furthermore, in proceedings or discovery undertaken to enforce this broad range of state laws, Civil Code Section 3339 (and parallel provisions in the other codes) prohibits inquiry into a person's immigration status, except where the inquiry has been shown by clear and convincing evidence to be necessary to comply with federal immigration law. The expansion of these rules to apply to California's consumer protection laws occurred just last year by enactment of AB 1690 (Ch. 160, Stats. 2017), authored by this Committee.

As state laws have continued to evolve in this area, some courts have furthered this public policy by issuing opinions confirming the principle that immigration status is irrelevant to liability issues. (See, e.g., *Hernández v. Paicius* (2003) 109 Cal.App.4$^{th}$ 452, 460, holding that, in a medical malpractice action, trial court erred in not granting plaintiff's motion to exclude reference to his immigration status because evidence of such status was entirely irrelevant to liability, particularly where plaintiff was not claiming loss of future earnings.)

In order to provide fair and just compensation for undocumented immigrants who are injured through no fault of their own, AB 2159 (Gonzalez, Ch. 132, Stats. 2016) was enacted in 2016 to provide that in civil actions for personal injury or wrongful death, evidence of a person's immigration status is not admissible and discovery of a person's immigration status is not permitted. AB 2159 earned overwhelming support and was signed into law, underscoring that discovery and evidence relating to immigration status in civil actions is against state public policy. Similarly, AB 560 (Gomez, Ch. 151, Stats. 2015) was enacted in 2015 to prohibit inquiry into the immigration status of a minor child who is seeking recovery under any applicable law, and the bill also made evidence of immigration status irrelevant to the issues of liability or

remedy, except for employment-related prospective injunctive relief that would directly violate federal law. (Civil Code Section 3339.5.)

These numerous examples illustrate the ways in which the Legislature in recent years has sought to prevent the introduction of evidence of immigration status in civil cases for questionable or unnecessary purposes. In some circumstances, however, the immigration status of a witness or party to a legal matter may be appropriate and necessary for the court to consider. As with all other evidence, when one party to a case seeks to introduce information about immigration status and the other party objects, it is up to the court to determine whether or not to admit the information into evidence. With respect to information about a person's immigration status, however, the author contends that any discussion in open court of whether or not that information should be considered can serve to intimidate the witness or party in question, since the hearing and the resulting record, by their nature, are public. The prospect of intimidated witnesses or parties is especially heightened if federal authorities are engaging in immigration enforcement activities in and around California courtrooms, notwithstanding California's efforts to curtail such activities, as has been reported in media accounts.

***This bill.*** To help all Californians feel more secure about participating in the legal system, regardless of their immigration status, this bill would reinstate the extra procedural safeguards implemented by SB 785 (2018). Rather than permitting parties to begin questioning or discussing the immigration status of a party or witness in open court, this bill, in a civil action, would prohibit disclosure of a person's immigration status in open court by a party or the party's attorney, unless the judge presiding over the matter first determines, in an in camera hearing requested by the party seeking disclosure of the person's immigration status, that the evidence is admissible.

This bill includes a similar prohibition for disclosures made in open court in criminal matters. However, because criminal proceedings are under the jurisdiction of the Assembly Committee on Public Safety, that prohibition was fully analyzed by that Committee and is not addressed in this analysis.

It is important to note that the bill explicitly exempts specified sections of the Civil, Government, Health and Safety, and Labor Codes from its provisions. These code sections are part of the push to protect immigrants in legal proceedings, discussed above, and establish that immigration status is irrelevant for purposes of determining liability when enforcing consumer protection, labor, employment, civil rights, and housing laws. As such, courts and parties are prohibited from inquiring into a person's immigration status unless it is necessary to comply with federal immigration law. In order to maintain their intent and impact, this bill expressly states that its provisions do not in any way modify the effect or application of those laws.

***ARGUMENTS IN SUPPORT.*** A coalition of immigrant advocates, law enforcement agencies, and progressive advocacy organizations have voiced their support for this bill. The California Employment Lawyers Association, one of the co-sponsors of the bill write:

> Even setting aside the clear threat posed by immigration agents, it is clear that disclosure of immigration status or even the threat of disclosure hampers immigrant workers' ability to enforce their rights or participate more generally in court proceedings. The stakes are particularly high for immigrant workers facing exploitation at work. The unfortunate reality is that immigrant workers are more likely to be victims of wage theft, and undocumented

> workers are particularly vulnerable to workplace abuses. This means that California's robust labor protections are often illusory for workers who are afraid to assert their rights.

Legal Aid At Work further states:

> As the California Court of Appeals has recognized, California laws already on the books "leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and" other laws. *Hernandez v. Paicius* (2003) 109 Cal. App. 4th 452, 460. Nonetheless, in our representation of immigrant workers—whether documented or undocumented—employers often attempt to discover and disclose this status through the litigation process as a way of deterring workers from asserting their rights. We imagine the same to be true with pro se litigants, who would be even more vulnerable to this form of intimidation. Disclosure of workers' immigration status chills their assertion of essential rights, while eroding the enforcement of California's workplace laws for all. *Cf. Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 420 (noting that "[t]o combat invidious employment discrimination, the [Fair Employment and Housing Act]'s remedial scheme depends heavily on private causes of action[.]").
>
> SB 836 will provide an essential protection against the unnecessary and intimidating disclosure of immigration status in open court, to the benefit of all Californians. We wholeheartedly support this bill.

Finally, the San Francisco District Attorney states in support:

> Prior to SB 785 becoming law, there were numerous documented examples of attorneys exposing the immigration status of witnesses and victims of crimes in California courthouses. In addition, there were reports of immigration agents throughout the country monitoring and detaining individuals at courthouses. Despite the change in federal administrations, courthouses continue to be accessible to immigration agents and a future administration could return to widespread courthouse immigration enforcement.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

California Employment Lawyers Association (co-sponsor)
Coalition for Humane Immigrant Rights (CHIRLA) (co-sponsor)
Legal Aid At Work (co-sponsor)
Los Angeles County District Attorney's Office (co-sponsor)
San Francisco District Attorney's Office (co-sponsor)
Asian Americans Advancing Justice – California
California for Safety and Justice
California Immigrant Policy Center
California Partnership to End Domestic Violence
California Rural Legal Assistance Foundation, INC.
Center for Workers' Rights
Centro Legal De La Raza
Disability Rights California
Ella Baker Center for Human Rights
Equal Rights Advocates

Family Violence Appellate Project
Friends Committee on Legislation of California
National Association of Social Workers, California Chapter
Oakland Privacy
Pico California
Prosecutors Alliance California
Tides Advocacy
UC Hastings Community Justice Clinics
Warehouse Worker Resource Center

**Opposition**

None on file

**Analysis Prepared by**: Manuela Boucher-de la Cadena / JUD. / (916) 319-2334