

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1356 (Bauer-Kahan)
Version: July 8, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Reproductive health care services

DIGEST

This bill updates and expands online privacy laws and peace officer trainings relative to anti-reproduction-rights offenses and creates new offenses arising from recording or photographing patients or providers within 100 feet of the entrance to a reproductive health services facility with the specific intent to intimidate.

EXECUTIVE SUMMARY

Current law provides a number of protections for the providers, patients, and other individuals involved in providing reproductive health care services. This bill is intended to update those existing laws to reflect and capture new tactics intended to threaten and intimidate those patients, providers, and other individuals. Specifically, this bill increases penalties for current crimes under the California Freedom of Access to Clinic and Church Entrances Act (FACE Act); creates new crimes under the Act directed at videotaping, photographing, or recording patients or providers within 100 feet of the facility or disclosing or distributing those images; and updates and expands online privacy laws and peace officer trainings relative to anti-reproduction-rights offenses. The author has agreed to several amendments to narrow the bill's provisions in order to ensure the bill does not overly burden speech or protected expressive activities.

This bill is sponsored by Planned Parenthood Affiliates of California and supported by a number of women's health and pro-choice organizations. The bill is opposed by the American Civil Liberties Union California Action, the Pacific Justice Institute – Center for Public Policy, the Right to Life League of Southern California, and one individual. This bill passed out of the Senate Public Safety Committee with a vote of 4-1.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Affirms the individual right to speak freely and prohibits the state and federal governments from restricting expression, with certain exceptions. (U.S. Const., 1st amend.; Cal. Const., art. I, § 1.)
- 2) Establishes an exception to the right of free speech for “true threats,” which are states where the speaker “means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” (*Virginia v. Black* (2003) 538 U.S. 343, 359.)
- 3) Prohibits a person, business, or association from knowingly publicly posting or displaying on the internet the home address or home telephone number of a provider, employee, volunteer, or patient of a reproductive health care services facility, or of persons residing at the same home address as a provider, employee, volunteer, or patient of a reproductive health care services facility, with the intent to do either of the following:
 - a) Incite a third person to cause imminent great bodily harm to the person identified in the posting or display, or to a coresident of that person, if the third person is likely to commit this harm; or
 - b) Threaten the person identified in the posting or display, or a coresident of that person, in a manner that places the person identified or the coresident in objectively reasonable fear for the person’s or coresident’s personal safety. Establishes a cause of action for damages and declaratory relief for violations. (Gov. Code, § 6218(a).)
- 4) Provides that any reproductive health service provider, employee, volunteer, or patient who is placed in reasonable fear by the posting of their home address and phone number on an Internet website may make a written demand that such information be removed from the website, so long as the demand includes a sworn statement describing the reasonable fear and attesting that the person is a member of the group protected by the statute. Provides injunctive relief. (Gov. Code, § 6218(b).)
- 5) Makes it a misdemeanor, punishable by up to 6 months in a county jail, a fine of not more than \$2,500, or both that fine and imprisonment, to post the home address, telephone number, or personally identifying information about a provider, employee, volunteer, or patient of a reproductive health service facility or other individuals residing at the same home address with the intent that another person imminently use that information to commit a crime involving violence or a threat of violence against that person or entity. If the violation leads to bodily injury of the person, it is a misdemeanor punishable by up to one year in a county jail, a fine of up to \$5,000, or both that fine and imprisonment. (Gov. Code, § 6218.01.)

- 6) Defines the following relevant terms for items 3)-5):
 - a) "Reproductive health care services" is health care services relating to the termination of a pregnancy in a reproductive health care services facility.
 - b) "Reproductive health care services provider, employee, volunteer, or patient" is a person who obtains, provides, or assists, at the request of another person, in obtaining or providing reproductive health care services, or a person who owns or operates a reproductive health care services facility.
 - c) "Reproductive health care services facility" is a hospital, an office operated by a licensed physician and surgeon, a licensed clinic or a clinic exempt from licensure, or other licensed health care facility that provides reproductive health care services and includes only the building or structure in which the reproductive health care services are actually provided.
 - d) "Publicly post" or "publicly display" is to intentionally communicate or otherwise make available to the general public.
 - e) "Image" includes, but is not limited to, any photograph, video footage, sketch, or computer-generated image that provides a means to visually identify the person depicted. (Gov. Code, § 6218.05.)

- 7) Provides that every person who, except a parent or guardian acting towards their minor child or ward, commits any of the following acts shall be subject to the punishment, as specified:
 - a) By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant.
 - b) By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.
 - c) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant.
 - d) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.

- e) Intentionally damages or destroys the property of a person, entity, or facility, or attempts to do so, because the person, entity, or facility is a reproductive health services client, provider, assistant, or facility.
 - f) Intentionally damages or destroys the property of a place of religious worship. (Pen. Code, § 423.2.)
- 8) Provides following penalties for the offenses set forth in 7) as follows:
- a) A first violation of c) or d) is a misdemeanor, punishable by imprisonment in a county jail for not more than six months and a fine of up to \$2,000; a second or subsequent violation is punishable by the same potential jail time and a fine of up to \$5,000. (Pen. Code, § 423.3(a)-(b).)
 - b) A first violation of a), b), e), or f) is a misdemeanor, punishable by imprisonment in a county jail for a period of not more than one year and a fine of up to \$25,000; a second or subsequent violation is punishable by the same potential jail time and a fine of up to \$50,000. (Pen. Code, § 423.3(c)-(d).)
 - c) A court imposing fines shall consider applicable aggravation and mitigation factors set forth in the California Rules of Court and shall treat a prior violation of the federal Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. § 248) (FACE Act) or prior violations of similar statutes in other jurisdictions to be a prior violation of this state's statute. (Pen. Code, § 423.3(e).)
 - d) Provides that the state's law establishes concurrent jurisdiction with the FACE Act, which provides more severe penalties for the same conduct, and that state law enforcement and prosecutors shall cooperate with federal law enforcement on issues of prevention, apprehension, and prosecution under the FACE Act; but that no person shall be convicted under the state and federal laws for the same violation. (Pen. Code, § 423.3(f)-(g).)
- 9) Provides the following relevant definitions for items 7) and 8):
- a) "Crime of violence" is an offense that has an element of the use, attempted use, or threatened use of physical force against the person or property of another.
 - b) "Interfere with" is to restrict a person's freedom of movement.
 - c) "Intimidate" means to restrict a person's freedom of movement.
 - d) "Nonviolent" means conduct that would not constitute a crime of violence.
 - e) "Physical obstruction" is rendering ingress or egress from a reproductive health services facility or to or from a place of religious worship impassable to another person, or rendering passage to or from a reproductive health services facility or a place of worship unreasonably difficult or hazardous to another person.
 - f) "Reproductive health services" is reproductive health services provided in a hospital, clinic, physician's office, or other facility and includes medical, surgical, counseling, or referral services relating to the human reproductive

- system, including services relating to pregnancy or the termination of pregnancy.
- g) "Reproductive health services client, provider, or assistant" is a person or entity that is or was involved in obtaining, seeking to obtain, providing, seeking to provide, or assisting in seeking to assist another person, at that person's request, to obtain or provide any services in a reproductive health care facility, or a person or entity that is or was involved in owning or operating or seeking to own or operate, a reproductive health services facility.
 - h) "Reproductive health services facility" includes a hospital, clinic, physician's office, or other facility that provides or seeks to provide reproductive health services and includes the building or structure in which the facility is located. (Pen. Code, § 423.1.)
- 10) Establishes the Reproductive Rights Law Enforcement Act (RRLEA). (Pen. Code, pt. 4, tit. 5.7, §§ 13775 et seq.)
- 11) Requires the Attorney General, under the RRLEA to the extent the Legislature appropriates funds, to collect information relating to anti-reproductive rights crimes, direct local law enforcement to provide information to the Department of Justice relating to anti-reproductive-rights crimes, and develop a plan to prevent, apprehend, prosecute, anti-reproductive rights crimes. (Pen. Code, § 13777.)
- 12) Requires the Commission on the Status of Women and Girls to have convened an advisory committee, as specified, and provided the Legislature with two reports by 2009 and 2011, evaluating the implementation of the RRLEA and making recommendations. (Pen. Code, § 13777.2.)
- 13) Requires the Commission on Peace Officer Standards and Training to develop a two-hour course on anti-reproductive-rights crimes and make it available to all California law enforcement agencies and the advisory committee convened by the Commission on the Status of Women and Girls. (Pen. Code, §§ 13777.2(d) & 13778).
- 14) Defines the following relevant terms for items 10-13:
- a) "Anti-reproductive-rights crime" is a crime committed partly or wholly because the victim is a reproductive health services client, provider, or assistant, or a crime that is partly or wholly intended to intimidate the victim, any other person or entity, or any class of persons or entities from becoming or remaining a reproductive health services client, provider, or assistant, and including violations of Penal Code section 423.2(a) and (b).
 - b) "Crime of violence," "nonviolent," "reproductive health services," "reproductive health services client, provider, or assistant," and "reproductive health services facility" have the same meaning as set forth in Penal Code section 423.1, item 9) above. (Pen. Code, § 13776.)

This bill:

- 1) Provides new definitions for the prohibitions on posting specified personal information on the internet with the intent to incite violence or threaten the subject as follows:
 - a) "Reproductive health care services, patient, provider, or assistant" is a person or entity, including, but not limited to, employees, staff, volunteers, and third-party vendors, that is or was involved in obtaining, seeking to obtain, providing, seeking to provide, or assisting or seeking to assist another person, at that person's request, to obtain or provide any services in a reproductive health care services facility, or a person or entity that is or was involved in owning or operating or seeking to own or operate a reproductive health care services facility.
 - b) "Reproductive health care services facility" includes a hospital, clinic, physician's office, or other facility that provides or seeks to provide reproductive health care services and includes only the building or structure in which the facility is located.
 - c) "Personal information" is means information that identifies, relates to, describes, or is capable of being associated with a reproductive health care services patient, provider, or assistant, including, but not limited to, their name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, license plate number, employment, employment history, and financial information, but does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.
 - d) "Social media" is an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations.
- 2) Revises the existing prohibitions on posting the personal information of a reproductive health care services patient, provider, or assistant to reflect the new definitions and prohibit posting or distributing the personal information in any online forum or website, or on social media, with the purpose of inciting a third person to cause imminent bodily harm or threaten the subject.
- 3) Revises the existing prohibition on posting the personal information of a reproductive health care services patient, provider, or assistant, upon receipt of a demand not to, to reflect the new definitions and to eliminate the requirement that the demand be sworn and in writing.
- 4) Increases the possible fines and jail time for violations of 2) and 3).

- 5) For purposes of the state FACE Act, provides that “reproductive health services patient, provider, or assistant” means a person or entity including, but not limited to, employees, staff, volunteers, and third-party vendors, that is or was involved in obtaining, seeking to obtain, providing, seeking to provide, or assisting or seeking to assist another person, at that other person’s request, to obtain or provide services in a reproductive health services facility, or a person or entity that is or was involved in owning or operating or seeking to own or operate, a reproductive health services facility.
- 6) Adds two new prohibited acts under the FACE Act:
 - a) Within 100 feet of the entrance to, or within, a reproductive health services facility, intentionally videotaping, filming, photographing, or recording by electronic means, a reproductive health services patient, provider, or assistant without that person’s consent with the specific intent to intimidate the person because that person is a reproductive health services patient, provider, or assistant, or with specific intent to intimidate the person from becoming or remaining a reproductive health services patient, provider, or assistant, and thereby causes the person to be intimidated.
 - b) In any manner or forum, including, but not limited to, internet websites and social media, intentionally disclosing or distributing a videotape, film, photograph, or recording knowing it was obtained in violation of a) with the specific intent to intimidate the person, because that person is a reproductive health services patient, provider, or assistant, or with the specific intent to intimidate the person from becoming or remaining a reproductive health services patient, provider, or assistant, and thereby causes the person to be intimidated. “Social media” is defined as an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations.
- 7) Increases the fines and possible jail time for violations of the FACE Act.
- 8) Adds requirements for various entities under the RRLEA:
 - a) Requires the Attorney General to collect specified data from local law enforcement relating to anti-reproductive-rights crimes, including the total number of anti-reproductive-rights crime-related calls, arrests, and charges brought; and to present the information to the Legislature.
 - b) Requires the Commission on the Status of Women and Girls to convene an advisory committee to evaluate the implementation of the RRLEA and report to the relevant policy committees of the Legislature, the Attorney General, Commission on Peace Officer Standards and Training, and the Commission on the Status of Women and Girls on their findings in 2025 and 2029.

- c) Requires the Commission on Peace Officer Standards and Training to update its telecourse on anti-reproductive-rights crimes every two years and to make the most recent version available online.
- d) Requires every law enforcement agency in this state to develop, adopt, and implement written policies and standards for officers' responses to anti-reproductive-rights calls by January 1, 2023.

COMMENTS

1. Author's comment

According to the author:

Reproductive health clinics like Planned Parenthood provide critical care, especially for young and low income women. Today, this right is threatened as patients and providers are facing an onslaught of organized harassment online and in person. Our laws are insufficient to protect clinics from the attacks against them. When a provider's personal information is shared online to target them, there is little recourse or accountability. AB 1356 is a long overdue update to these laws in order to protect reproductive health patients and providers.

2. Current reproductive health services protections

Certain types of abortion have been legal in California since 1967¹ and recognized as a constitutional right since 1973.² In 2002, the Legislature passed, and the Governor signed, the Reproductive Privacy Act, which declares that "The state may not deny or interfere with a woman'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 woman."³ There nevertheless remains a significant debate over the morality of abortion. In many cases, however, persons opposed to abortion go beyond mere debate and employ tactics to threaten, intimidate, and murder abortion providers.⁴

This state enacted three key measures in the 2000s to protect reproductive health care providers, patients, and volunteers from threats and violence. The first, the California Freedom of Access to Clinic and Church Entrances Act (FACE Act),⁵ made it a misdemeanor to obstruct the entrance to a church or reproductive health services facility, or to injure, intimidate, or interfere with a person attempting to enter one of

¹ See Pendleton, *The California Therapeutic Abortion Act: An Analysis*, 19 Hastings L.J. 242, 242 (1967).

² *Roe v. Wade* (1973) 410 U.S. 113; see also *Planned Parenthood v. Casey* (1992) 505 U.S. 833.

³ SB 1301 (Kuehl, Ch. 385, Stats. 2002); Health & Saf. Code, div. 106, pt. 2, ch. 2, art. 2.5, §§ 123460 et seq.

⁴ See, e.g., Stumpe & Davey, *Abortion Doctor Shot to Death in Kansas Church*, New York Times (May 31, 2009), <https://www.nytimes.com/2009/06/01/us/01tiller.html> [last visited Jun. 27, 2021].

⁵ SB 780 (Ortiz, Ch. 899, Stats. 2001).

those locations.⁶ The state's FACE Act is modeled after the federal act of the same name, and which also criminalizes obstructing the entrance to a reproductive health service provider or religious place of worship.⁷ Courts have upheld the federal FACE Act as consistent with the First Amendment;⁸ Committee staff could not locate any court order or opinion addressing the constitutionality of the state FACE Act.

Next, the Legislature created a program by which reproductive services providers could apply to the Secretary of State to have their addresses, and those of their families, kept confidential;⁹ the bill was passed due to a growing problem of reproductive health service providers' personal information, including addresses and family members' names, being posted on the internet and being used to injure or kill them.¹⁰ Finally, in 2006, the Legislature passed a law prohibiting posting specified personal information of a reproductive health care services provider, employee, volunteer, or patient, when the information was posted was to incite violence or threaten the subject.¹¹ No court has held these statutes to be unconstitutional or otherwise present an unwarranted barrier to protected activities.

According to the author and sponsor of the bill, advances in technology, and especially the internet and social media, have made it easier than ever to harass and threaten the patients and providers of reproductive services.

3. Speech, threats, and the First Amendment

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."¹² The California Constitution also protects free speech: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."¹³ "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁴

"The First Amendment literally forbids the abridgement only of 'speech,' but [the United States Supreme Court has] long recognized that its protection does not end at the spoken or written word."¹⁵ The First Amendment also protects certain forms of

⁶ Pen. Code, §§ 423-423.6.

⁷ 18 U.S.C. § 248.

⁸ E.g., *Planned Parenthood of The Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058, 1070-1080 (en banc); *United States v. Weslin* (2d Cir. 1998) 156 F.3d 292, 297.

⁹ AB 797 (Shelley, Ch. 380, Stats. 2002).

¹⁰ Gov. Code, § 6215.

¹¹ AB 2251 (Evans, Ch. 486, Stats. 2006); Gov. Code, §§ 6218-6218.05.

¹² U.S. Const., 1st amend.

¹³ Cal. Const., art. I, § 2.

¹⁴ *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.

¹⁵ *Texas v. Johnson* (1989) 491 U.S. 397, 404.

conduct – not all conduct, but conduct that “may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’”¹⁶ To determine whether conduct is sufficiently expressive to warrant First Amendment protections, a court will ask “whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’”¹⁷

Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as “exacting scrutiny” in this context.¹⁸ To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest.¹⁹

Additionally, “ ‘not all speech is of equal First Amendment importance.’”²⁰ “Speech on matters of public concern is at the heart of the First Amendment’s protection.”²¹ On the other hand, “where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”²² And some speech has so little value that it is not protected at all. A state may ban “true threats,” which are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²³ “Violence and threats of violence...fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the ‘marketplace of ideas.’ As such, they are punishable because of the state’s interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur.”²⁴

4. This bill updates existing statutes prohibiting posting information on the internet with the intent to incite violence or threaten

Current law prohibits knowingly publicly posting or displaying on the internet, or selling, the telephone number, address, or image of any provider, patient, employee, or volunteer of a reproductive health services facility, or individuals residing at the same address, with either the intent to incite another person to cause imminent great bodily harm against the subject, or to threaten the person.²⁵ Current law also prohibits posting or displaying that same information online when the subject has made a sworn, written

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.

¹⁹ *Ibid.*

²⁰ *Snyder v. Phelps* (2011) 562 U.S. 443, 452.

²¹ *Id.* at pp. 451-452 (internal quotation marks and alterations omitted).

²² *Id.* at p. 452.

²³ *Black, supra*, 538 U.S. at 358-359.

²⁴ *In re M.S.* (1995) 10 Cal.4th 698, 710.)

²⁵ Gov. Code, §§ 6218(a) & (c), 6218.01(a).

demand not to disclose it.²⁶ To avoid running afoul of the First Amendment's press protections, the bill expressly exempts members of the media from the ban on posting information where there has been a written demand.²⁷ Violating these provisions is a misdemeanor.²⁸

This bill leaves the basic structure of existing law intact while modifying the definitions under the bill and updating the means of disclosing information online, as well as the type of information that may not be disclosed. According to the author and sponsor, these updates are necessary to adapt current law to the advances in online communication and the concomitant rise in means of harassing people online, such as doxing. Specifically, the bill replaces the prohibition on sharing a home address, telephone number, or image, with a prohibition on sharing personal information such as social security numbers, license plate information, employment history, and other personal details. Relatedly, the bill modifies the definitions relating to the persons – reproductive health care patient, providers, and assistants – to more broadly encompass the persons who may be affected by these tactics, as well as the definition of “reproductive health care services facility” to include other locations where reproductive health care services are provided. The bill also removes the requirement that a demand not to post information be made as a sworn, written statement.

Because this bill does not modify the existing circumstances under which posting personal information about a reproductive health care patient, provider, or assistant is illegal – i.e., knowingly and with the specific intent to incite imminent great bodily harm against the subject or threaten the subject – the updates to the law do not affect the core of the law, which is criminalizing the incitement of violence and threats. As discussed above, such speech lies outside the protections of the First Amendment.²⁹ These updates to the existing statutes therefore likely do not run afoul of the Constitution.

In order to ensure that the bill's updates are appropriately precise for statutes regulating speech, however, the author has agreed to certain clarifying amendments. Specifically, the author has agreed to language clarifying that the prohibitions on posting or displaying personal information is limited to *online* distribution; as currently drafted, it is unclear whether the bill might also encompass physical distribution. The author has also agreed to add back in the requirement that, to make a demand that personal information not be posted online, the demand must be in writing. While the removal of the requirement that the request be sworn appears reasonable – for patients, it is often not feasible to find a notary and swear to a statement while receiving medical

²⁶ *Id.*, § 6218(b).

²⁷ *Id.*, § 6218(b)(3).

²⁸ *Id.*, §§ 6218 & 6218.01. This bill originally would have made violations of these sections “wobblers,” or chargeable as misdemeanors or felonies. The author agreed to remove the wobbler provisions in the Senate Public Safety Committee, and those amendments are reflected in the current version of the bill.

²⁹ *Black, supra*, 538 U.S. at 358-359.

care – the requirement that the demand be in writing provides greater assurances against erroneous prosecutions. Finally, because posting personal information with the intent to threaten or incite violence is unprotected regardless of the source of that information, the author is removing the exception to “personal information” for information that was publicly available.

5. This bill adds a narrow additional FACE Act prohibition relating to filming and photographing reproductive providers, patients, and assistants

As discussed above, the state FACE Act already prohibits various violent and nonviolent actions intended to intimidate a reproductive services patient, provider, or assistant from entering a reproductive health care facility. This bill adds to the FACE Act a prohibition on intentionally filming or photographing, within 100 feet of an entrance to, or within, a reproductive health services facility, a reproductive services patient, provider, or assistant without their consent and with the specific intent to intimidate them (1) because of their status as a reproductive services patient, provider, or assistant, or (2) from becoming or remaining a reproductive health services patient, provider, or assistant, and thereby causing them to be intimidated. The bill also prohibits posting online any information knowingly obtained in violation of the preceding prohibition and with the same specific intent to intimidate the subject.

Unlike the threats and incitement to violence discussed above in Part 4, filming and photography are expressive conduct and therefore protected by the First Amendment.³⁰ In certain contexts, the ability to film has been recognized as a vital component of holding public officials accountable – such as the right to film law enforcement officers in public areas while on duty.³¹ These opinions are grounded in the interplay between the Free Speech and Free Press Clauses of the First amendment, i.e., that “audio and audiovisual recordings are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes.”³² The United States Supreme Court has also held that a statute restricting video of certain types of speech was subject to strict scrutiny under the Free Speech Clause.³³

It thus appears likely that the act of filming outside a reproductive health services facility constitutes some form of expressive activity. This does not end the constitutional

³⁰ *E.g.*, ; *Smith v. City of Cumming* (11th Cir. 2000) 212 F.3d 1332, 1333.

³¹ *See Fields v. City of Philadelphia* (3d Cir. 2017) 862 F.3d 353, 359-360; *Turner v. Driver* (5th Cir. 2017) 848 F.3d 678, 689; *ACLU v. Alvarez* (7th Cir. 2012) 679 F.3d 583, 606-607; *Glik v. Cunniffe* (1st Cir. 2011) 655 F.3d 78, 82-83; *Smith, supra*, 212 F.3d at p. 1333; *Fordyce v. City of Seattle* (9th Cir. 1995) 55 F.3d 436, 439. California also has statutory protections for filming law enforcement in public settings. (Pen. Code, § 69(b).)

³² *Alvarez, supra*, 679 F.3d at p. 607.

³³ *United States v. Stevens* (2010) 559 U.S. 460, 468.

inquiry, however. A restriction on speech may be upheld if the law is narrowly tailored to achieve a compelling government purpose.³⁴ Here, the state has clearly established that protecting the right to access reproductive health services, including abortions. According to the author and sponsor, the use of cameras, camera phones, and bodycams at reproductive health services facilities to film or photograph patients and providers can be intended as a silent threat, conveying the risk of being publicly shamed, having a private medical procedure disclosed to family and coworkers, or even disseminated to persons who might physically harm the subject. In particular, forcing a patient to endure being filmed on the way to a medical procedure appears akin to erecting another barrier to entering the facility – exactly the type of conduct the FACE Act is intended to prohibit.

Moreover, the bill's filming and photography provisions are consistent with existing FACE Act prohibitions in that they do not attempt to regulate the conduct based on the viewpoint motivating the party filming or photographing. Federal courts have held that the federal FACE Act is content-neutral because it prohibits impeding access to reproductive health care facilities for any reason; the fact that most of the people who run afoul of the law might do so because they are opposed to abortion does not make it viewpoint-specific.³⁵ Similarly here, the bill's filming and photography prohibitions would apply to anyone filming with the specific intent to intimidate a patient, provider, or assistant. An angry ex or a stalker who had no feelings whatsoever on the issue of abortion, and was filming a patient to try and stop them from obtaining medical services for personal reasons, would be equally liable under this bill as the anti-abortion protester motivated by their anti-abortion beliefs.

Finally, the 100-foot buffer zone appears to be reasonably narrowly tailored to accomplish the state's goal of preventing reproductive health services providers, patients, and assistants from being exposed to deliberately intimidating and obstructive filming tactics. While similar buffer zones have been struck down when they prevent *all discourse* between patients and protestors,³⁶ the bill's buffer zone does not prevent anywhere near as broad a scope of conduct. Nothing in this bill prohibits the kind of one-on-one communication of ideas that is at the core of the First Amendment's protections.³⁷ Instead, this bill establishes a framework closer to the state's existing anti-paparazzi laws, which creates liability when a person attempts to capture the image of another in a manner that is offensive to a reasonable person, whether or not there is a physical trespass, when a device is used that avoids the need for a trespass.³⁸ Similarly,

³⁴ *Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.

³⁵ *E.g., United States v. Weslin* (2d Cir. 1998) 156 F.3d 292, 297 ("It is irrelevant whether, in practice, most of those prosecuted under FACE are anti-abortion protestors. First Amendment law does not recognize disparate impact claims. [Citation.] And '[a] group cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group.'").

³⁶ *E.g., McCullen v. Coakley* (2014) 573 U.S. 464.

³⁷ *Id.* at pp. 488-489.

³⁸ Civ. Code, § 1708.8.

this bill prohibits only the use of filming and photographic technology when it is used specifically to intimidate a person out of obtaining, providing, or helping to provide protected medical services.

In order to further ensure that the bill is appropriately narrowly tailored, the author has agreed amend these sections in two ways. First, the author has agreed to remove the prohibition on filming or photographing a person with the specific intent to intimidate them “because of their status as a reproductive services patient, provider, or assistant.” What will remain is the prohibition on filming or photographing a person with the specific intent to intimidate them “from becoming or remaining a reproductive health services patient, provider, or assistant, and thereby causing them to be intimidated.” This amendment removes the more ambiguous prohibition while furthering the core purpose of the FACE Act, namely, protecting access to reproductive health care service facilities. The author has also agreed to provide a provision stating that the filming and photography prohibitions, and the relating posting prohibition, does not apply to members of the media. This amendment will ensure that the First Amendment’s protections for the freedom of the press are not chilled.

6. This bill modifies and expands certain reporting and training requirements relating to anti-reproductive-rights-crimes

Current law requires the Attorney General to collect certain information from local law enforcement relating to anti-reproductive-rights crimes, including threats to commit such crimes.³⁹ This bill amends the existing requirement to specify certain types of data that must be collected, including the number of calls local law enforcement received regarding anti-reproductive-rights crimes, the number of arrests made for anti-reproductive-rights crimes, and the number of cases in which the district attorney charged an individual with anti-reproductive-rights crimes. The bill also requires the Attorney General to report this gathered information to the Legislature on an annual basis beginning in 2023.

Current law also required the Commission on the Status of Women and Girls to convene an advisory committee to report to the Committees on Health, Judiciary, and Public Safety of the Senate and Assembly, to the Attorney General, the Commission on Peace Officer Standards and Training, and the Commission on the Status of Women and Girls, in 2007 and 2011, to evaluate the effectiveness of the state FACE Act and setting forth.⁴⁰ This bill would renew the advisory committee’s reporting requirement, with the new reports due by December 31, 2025, and December 31, 2029.

Finally, current law requires the Commission on Peace Officer Standards and Training (Commission) to develop a two-hour telecourse on anti-reproductive-rights crimes and

³⁹ Pen. Code, § 13777.

⁴⁰ *Id.*, § 13777.2.

make the telecourse available to all California law enforcement.⁴¹ This bill requires the Commission to update the course every two years and make the course available on the internet. The bill further requires every law enforcement agency in the state to develop, adopt, and implement written policies and standards for officers' responses to anti-reproductive-rights calls by January 1, 2023.

7. Amendments

As discussed in the sections above, the author has agreed to amend the bill to clarify certain provisions and narrow others to ensure the bill is appropriately narrowly tailored. The amendments are as follows:

Amendment 1

On page 4, strike out line 5 and insert "on"

Amendment 2

On page 4, strike out "and" and insert "or"

Amendment 3

On page 5, in lines 18 and 19, strike out "in any manner or in any forum, including, but not limited to," and insert "on"

Amendment 4

On page 5, in line 19, strike out "and" and insert "or"

Amendment 5

On page 5, in line 23, after "a" insert "written"

Amendment 6

On page 5, in line 24, after "A" inserts "written"

Amendment 7

On page 6, in line 6, after "internet" insert "or social media"

⁴¹ *Id.*, § 13778.

Amendment 8

On page 6, in line 36, strike out “internet” and insert “internet or social media”

Amendment 9

On page 8, in line 34, strike out ““Personal information” does” and strike out lines 35 to 37, inclusive.

Amendment 10

On page 11, strike out lines 1 and 2.

Amendment 11

On page 11, in line 9, strike out “with the specific intent”, strike out line 10 and in line 11, strike out “health services patient, provider, or assistant, or”

Amendment 12

On page 11, between lines 19 and 20, insert “(i) Subdivisions (g) and (h) do not apply to a person described in subdivision (b) of Section 2 of Article I of the California Constitution.”

8. Arguments in support

According to bill sponsor Planned Parenthood Affiliates of California:

Acts of violence and harassment against abortion providers have persisted in the decades since *Roe v. Wade* and clinics are seeing an increase in threats and security incidents as anti-abortion extremists have faced little retribution for their escalating tactics. Extremists have blockaded abortion clinics, broken into clinic property, murdered doctors, bombed clinics, harassed patients and providers, and doxed volunteers and providers online.

With a rise in aggressive tactics and opportunities for instantaneous and widespread online harassment, it is imperative that we modernize and update our laws to protect people seeking and providing health care services. Doxing — posting identifying information about an individual on the internet with malicious intent — and other forms of online harassment have increased the threat to reproductive care employees, patients, and their families. Having personal information shared online and in anti-abortion hate groups could be life threatening. AB 1356 updates and expands online privacy laws related to reproductive health centers to better conform with the current security concerns

they face, and prohibits malicious photography and videography outside of reproductive health centers.

9. Arguments in opposition

According to the Pacific Justice Institute – Center for Public Policy:

AB 1356 proceeds on the fallacies that abortion-related speech is an exception to the First Amendment, and as such must be more harshly punished, even at a time when the Legislature is lowering penalties for many other crimes.

We should all be able to agree that violence is outside the bounds of legitimate political discourse regardless of who perpetrates it. At the same time, spirited debate must not be punished or stifled by merely relabeling it as intimidating or threatening, based on the viewpoint of the speaker. Unfortunately, AB 1356 disregards these first principles and attempts to punish pro-life speech without comparable limits on pro-abortion speech. It also ensures that law enforcement will be trained in a manner biased against pro-life expression, increasing the likelihood that the law both on its face and as applied will be deemed unconstitutional.

SUPPORT

Planned Parenthood Affiliates of California (sponsor)
American College of Obstetricians and Gynecologists, District IX
California Academy of Family Physicians
California Commission on the Status of Women & Girls
California Latinas for Reproductive Justice
Essential Access Health
Fund Her
NARAL Pro-Choice California
Santa Barbara Women’s Political Committee
Women’s Health Specialists

OPPOSITION⁴²

American Civil Liberties Union California Action
Pacific Justice Institute – Center for Public Policy
Right to Life League of Southern California
One individual

⁴² The California Public Defenders Association removed its opposition to the bill following the amendments to remove the wobblers.

RELATED LEGISLATION

Pending Legislation:

AB 1475 (Low, 2021) prohibits a police department or sheriff's office from sharing, on social media, booking photos of an individual arrested on suspicion of committing a nonviolent crime, as defined. AB 1475 is pending before the Assembly.

AB 514 (Ward, 2021) modifies the private right of action against a person who posts private images of another without consent to be available against a poster who knew, or reasonably should have known, that the other person had a reasonable expectation that the material would remain private. AB 514 is pending before the Senate Appropriations Committee.

Prior Legislation:

AB 3140 (Bauer-Kahan, 2020) was substantially similar to this bill and would have, among other things, updated and increased the penalties for posting certain information relating to reproductive health care services providers and patients. AB 3140 was held in the Assembly Public Safety Committee due to COVID-19-related bill limits.

AB 2262 (Baker, Ch. 881, Stats. 2016) modified the program allowing reproductive health care service providers to apply to ensure that their personal information and addresses remain confidential to, among other things, prohibit a person, business, or association from knowingly posting the home address of a program participant, or of the program participant's residing spouse or child, on the Internet knowing that person is a program participant and intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual.

PRIOR VOTES:

Senate Public Safety Committee (Ayes 4, Noes 1)

Assembly Floor (Ayes 59, Noes 17)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Privacy and Consumer Protection Committee (Ayes 8, Noes 2)

Assembly Public Safety Committee (Ayes 6, Noes 2)
