

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 36 (Skinner)
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SUBJECT

Out-of-state criminal charges: prosecution related to abortion, contraception, reproductive care, and gender-affirming care

DIGEST

This bill prohibits the issuance of warrants for those whose offense pursuant to the laws of another state is related to abortion, contraception, reproductive care, and gender-affirming care legally protected in California. The bill restricts and imposes criminal and civil penalties for those apprehending, detaining, or arresting a bail fugitive based on such offenses. The bill restricts the sharing of information by law enforcement related to such protected activity and ensures convictions in other states of such offenses does not result in ineligibility for state benefits.

EXECUTIVE SUMMARY

Since the 1973 holding in *Roe v. Wade*, the U.S. Supreme Court has continuously held that it is a constitutional right to access abortion before fetal viability. However, on June 24, 2022 in *Dobbs v. Jackson Women's Health Organization*, the Court voted 6-3 to overturn the holding in *Roe* and found that there is no federal constitutional right to an abortion. As a result of the *Dobbs* decision, people in roughly half the country may lose access to abortion services or have them severely restricted.

In addition, a growing number of states have been passing laws putting residents who seek essential gender-affirming care at risk of being prosecuted. States are attempting to classify the provision and seeking of gender-affirming health care as a crime warranting prison time and are threatening parents with criminal penalties if they attempt to travel to another state in order to secure life-saving gender-affirming care for their child.

Though California has enacted numerous laws to protect the right to gender-affirming care and the fundamental right to reproductive freedom, without federal protections

there is nothing prohibiting those providing or seeking abortion or gender-affirming health care from being criminalized or held liable in other states.

This bill seeks to address this issue in myriad ways, including restrictions on and penalties for issuing or executing a warrant on a bail fugitive where the underlying offense imposes a criminal penalty on an individual for performing, receiving, supporting, or aiding in the performance or receipt of an abortion, contraception, reproductive care, or gender-affirming care that is legal in this state. This includes a civil cause of action against a bail bondsman who takes the individual into custody in violation of this law. Law enforcement are also restricted from providing information to specified entities regarding these protected health care activities. Finally, the bill provides greater access to state benefits for those otherwise ineligible as “fleeing felons.”

The bill is co-sponsored by Equality California, NARAL Pro-Choice California, Western Center on Law and Poverty, and the Coalition of California Welfare Rights Organizations. It is supported by an array of organizations. The bill is opposed by Concerned Women for America and the Right to Life League. It passed out of the Senate Public Safety Committee on a vote of 4 to 0.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides that each state shall give full faith and credit to the public acts, records, and judicial proceedings of every other state, and that Congress may prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. (U.S. Const., art. IV, § 1.)
- 2) Provides that a person charged in any state with treason, felony, or other crime who fled from that state and is found in another state shall, on demand from the executive authority of the state from which the person fled, be delivered to the state having jurisdiction of the crime. (U.S. Const., art. IV, § 2; 18 U.S.C. § 3182.)
- 3) Provides that persons in the United States may travel freely throughout the United States. (*E.g., U.S. v. Guest* (1966) 383 U.S. 745, 758 (“freedom to travel throughout the United States has long been recognized as a basic right under the Constitution”).)¹

¹ Although the right to travel is not expressly set forth in the Constitution, it has been recognized as emanating from both the Interstate Commerce Clause (*e.g., Edwards v. People of State of California* (1941) 314 U.S. 160, 174) and the Privileges and Immunities Clause (*e.g., Saenz v. Roe* (1999) 526 U.S. 501-502).

- 4) Provides that records and judicial proceedings of any court of any state, territory or possession, or copies thereof, must be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form; and that such acts, records, and judicial proceedings, or copies thereof, once authenticated, have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, territory or possession from which they are taken. (28 U.S.C. § 1738.)

Existing law:

- 5) Provides, under the state constitution, that all people are by nature free and independent and have inalienable rights, including, among others, the right to privacy. (Cal. Const. art. I, § 1.)
- 6) Prohibits the state from denying or interfering with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. Specifies that this provision is intended to further the constitutional right to privacy guaranteed by Section 1 of Article I of the California Constitution, and the constitutional right to not be denied equal protection guaranteed by Section 7 of Article I of the California Constitution, and that nothing herein narrows or limits the right to privacy or equal protection. (Cal. Const. art. I, § 1.1.)
- 7) Establishes the Reproductive Privacy Act and provides that the Legislature finds and declares that every individual possesses a fundamental right to privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. (Health & Saf. Code §§ 123460 et. seq., § 123462.)
- 8) Prohibits the state from denying or interfering with a person's right to choose or obtain an abortion prior to viability of the fetus or when the abortion is necessary to protect the life or health of the person. (Health & Saf. Code § 123466.)
- 9) Prohibits a person from being compelled in a state, county, city, or other local criminal, administrative, legislative, or other proceeding to identify or provide information that would identify or that is related to an individual who has sought or obtained an abortion if the information is being requested based on either another state's laws that interfere with a person's rights to choose or obtain an abortion or a foreign penal civil action. (Health & Saf. Code § 123466.)

- 10) Provides that a law of another state that authorizes a person to bring a civil action against a person or entity who does any of the following is contrary to the public policy of this state:
 - a) receives or seeks an abortion;
 - b) performs or induces an abortion;
 - c) knowingly engages in conduct that aids or abets the performance or inducement of an abortion; or
 - d) attempts or intends to engage in the conduct described above. (Health & Saf. Code § 123467.5(a).)

- 11) Prohibits the application of an out-of-state law described in the preceding paragraph from being applied to a case or controversy heard in state court and prohibits the enforcement or satisfaction of a civil judgment received through an adjudication under such an out-of-state law. (Health & Saf. Code § 123467.5(b).)

- 12) Prohibits a clerk of a superior court in the county in which discovery in a foreign action is sought, or an attorney licensed in this state and retained by a party in a foreign action, from issuing a subpoena for discovery in this state based on a foreign subpoena if the foreign subpoena is based on an anti-gender-affirming care action. (Code Civ. Proc. § 2029.300(e).)

- 13) Authorizes a magistrate to issue an arrest warrant, upon application by a bail bondsman, for a person who has been admitted to bail in another state, escapes bail, and is present in this State and after a hearing, issue an order to return the fugitive to the jurisdiction from which they escaped. (Pen. Code § 847.5.)

- 14) Makes it a misdemeanor for a bail bondsman to take a fugitive into custody without a warrant from a magistrate. (Pen. Code § 847.5.)

- 15) Provides, starting July 1, 2023, that no person, other than a certified law enforcement officer, shall be authorized to apprehend, detain, or arrest a bail fugitive unless that person is one of the following:
 - a) a bail as defined in paragraph (2) of subdivision (a) of Section 1299.01 who is also a bail fugitive recovery agent as defined;
 - b) a bail fugitive recovery agent as defined; or
 - c) a licensed private investigator who is also a bail fugitive recovery agent as defined. (Pen. Code 1299.02.)

- 16) Defines a “bail fugitive” as a defendant in a pending criminal case who has been released from custody under a financially secured appearance, cash, or other bond and has had that bond declared forfeited, or a defendant in a pending criminal case who has violated a bond condition whereby apprehension and reincarceration are permitted. (Pen. Code § 1299.01.)

- 17) Defines a “bail fugitive recovery person” as a person provided written authorization by the bail or depositor of bail, and is contracted to investigate, surveil, locate, and arrest a bail fugitive for surrender to the appropriate court, jail, or police department, and any person who is employed to assist a bail or depositor of bail to investigate, surveil, locate, and arrest a bail fugitive for surrender to the appropriate court, jail, or police department. (Pen. Code § 1299.01.)
- 18) Establishes the CalWORKs program under which each county provides cash assistance and other benefits to qualified low-income families and individuals. (Welf. & Inst. Code § 11200 et seq.)
- 19) Makes certain individuals ineligible for the CalWORKs program including a person who is fleeing to avoid prosecution, or custody and confinement after conviction, under the laws of the place from which the individual is fleeing, for a crime or an attempt to commit a crime that is a felony under the laws of the place from which the individual is fleeing, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of that state. (Welf. & Inst. Code § 11486.5.)
- 20) Establishes CalFresh whereby recipients of aid and other low-income households receive benefits under the federal Supplemental Nutrition Assistance Program (SNAP). (Welf. & Inst. Code § 18900 et seq.)

This bill:

- 1) Prohibits a magistrate from issuing an arrest warrant for an individual whose alleged offense or conviction is for the violation of laws of another state that criminalizes an individual performing, receiving, supporting, or aiding in the performance or receipt of an abortion, contraception, reproductive care, or gender-affirming care if the abortion, contraception, reproductive care, or gender-affirming care is lawful under the laws of this state (collectively “protected health care”), regardless of the recipient’s location.
- 2) Provides that a bondsman or person authorized to apprehend, detain, or arrest a fugitive admitted to bail in another state who takes into custody a fugitive admitted to bail in another state whose alleged offense or conviction is for the violation of laws of another state that authorizes a criminal penalty to an individual for protected health care, without a magistrate’s order, is ineligible for a license to be a bail fugitive recovery agent and shall forfeit any license already obtained. Imposes criminal penalties against a bail fugitive recovery agent for apprehending, detaining, or arresting a bail fugitive admitted to bail in another state whose alleged offense or conviction was for the violation of laws of another state that criminalizes protected health care.

- 3) Authorizes a person who is taken into custody by a bail agent in violation of this bill's provisions to bring a civil action for injunctive, monetary, or other appropriate relief against the bondsman and bond company within three years.
- 4) Prohibits, except as required by federal law, an officer or employee of a law enforcement agency from providing information or assistance relating to an investigation or inquiry into services constituting legally protected health care activity to any of the following:
 - a) a federal law enforcement agency;
 - b) a state law enforcement agency;
 - c) a private citizen; or
 - d) a bondsman or person authorized as a bail fugitive recovery agent to apprehend, detain, or arrest a fugitive admitted to bail in another state.
- 5) Prohibits a judge from issuing an order directing a witness to appear pursuant to Penal Code Section 1334.2 if the criminal prosecution is based on the laws of another state that authorizes a criminal penalty to an individual for protected health care.
- 6) Provides that an individual is not considered fleeing to avoid prosecution for purposes of CalWORKs eligibility if the felony offense with which the person is charged or convicted is as a result of protected health care.
- 7) Provides that a person who is fleeing to avoid prosecution, or custody and confinement after conviction, whose alleged offense or conviction is for protected health care, is eligible for CalFresh benefits.
- 8) States specified legislative findings and declarations.

COMMENTS

1. Post-Dobbs access to reproductive healthcare is being restricted across the nation

Roe v. Wade (1973) 410 U.S. 113, was the landmark U.S. Supreme Court decision that held the implied constitutional right to privacy extended to a person's decision whether to terminate a pregnancy, while allowing that some state regulation of abortion access could be permissible. *Roe* has been one of the most debated U.S. Supreme Court decisions and its application and validity have been challenged numerous times, but its fundamental holding had continuously been upheld by the Court until June 2022. On June 24, 2022, the Court published its official opinion in *Dobbs* and voted 6-3 to overturn the holding in *Roe*.² The case involved a Mississippi law enacted in 2018 that banned

² *Dobbs v. Jackson Women's Health* (2022) 597 U.S. __ (142 S.Ct. 2228) at p. 5, available at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

most abortions after the first 15 weeks of pregnancy, which is before what is generally accepted as the period of viability.³ The majority opinion upholds the Mississippi law finding that, contrary to almost 50 years of precedent, there is no fundamental constitutional right to have an abortion. The opinion further provides that states should be allowed to decide how to regulate abortion and that a strong presumption of validity should be afforded to those state laws.⁴

The *Roe* decision was the foundation for allowing people the ability to control their reproductive lives because it established a federal constitutional right for anyone who could become pregnant in the United States to decide when and if to have children and prevented the criminalization of having an abortion or providing an abortion. Prior to *Roe*, legal abortion did exist in some states, but the choices available to those seeking to terminate an unwanted pregnancy were limited and disproportionately affected those who were younger, lower income, and members of communities of color.⁵ In the wake of the *Dobbs* decision, it is very probable that abortion will be banned or severely restricted in dozens of states,⁶ with 13 states already having total abortion bans in effect.⁷ Almost one-third of women and people who can become pregnant of reproductive age in the United States live in a state where abortion is not legal or is severely restricted.⁸ If all the states expected to enact a total ban on abortion actually do, the number of patients who would find that their nearest clinic is in California could increase to 1.4 million, an almost 3,000 percent increase.⁹

2. Healthcare providers are often the targets of abortion bans

Many abortion bans target providers of abortions through criminal, civil, and administrative penalties. For example, in Texas it is a felony to perform an abortion, unless it is needed to save the life of the patient, and provides for civil liability and

³ See Miss. Code Ann. §41-41-191.

⁴ *Id.* at 77.

⁵ Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue*, Guttmacher Institute (Mar. 1, 2003), available at <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>.

⁶ Elizabeth Nash and Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, Guttmacher Institute (Jan. 10, 2023), available at <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup>.

⁷ Sharon Bernstein, *Factbox: US. abortion restrictions mount after overturn of Roe v. Wade*, Reuters, (Oct. 4, 2022), available at <https://www.reuters.com/business/healthcare-pharmaceuticals/us-abortion-restrictions-mount-after-overturn-roe-v-wade-2022-10-04/#:~:text=ACTIVE%20BANS,an%20abortion%20rights%20research%20group>.

⁸ Katie Shepherd, Rachel Roubein, and Caroline Kitchner, *1 in 3 American women have already lost abortion access. More restrictive laws are coming*, The Washington Post, (Aug. 22, 2022), <https://www.washingtonpost.com/nation/2022/08/22/more-trigger-bans-loom-1-3-women-lose-most-abortion-access-post-roe/>.

⁹ April Dembosky, *As states ban abortion, Californians open their arms and wallets*, NPR (June 27, 2022), available at <https://www.npr.org/sections/health-shots/2022/06/27/1103479722/as-states-ban-abortion-californians-open-their-arms-and-wallets>.

licensure revocation. (Tex. Health & Safety Code § 171.201 et. seq.) Texas law also prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child, as specified, or failed to perform a test to detect a fetal heartbeat. (Tex. Health & Safety Code § 171.201 et seq. (enacted through Texas Senate Bill 8).) SB 8 provides that any person, other than an officer or employee of a state or local governmental entity in Texas, and regardless if they suffered any actual harm, may bring a civil action to enforce its provisions, which includes liability of \$10,000 plus costs and fees if a plaintiff prevails while a defendant is prohibited from recovering their own costs and fees if they prevail. (*Id.* at § 171.201(b) & (i).) Idaho enacted a similar law via Idaho Senate Bill 1309, which provides for liability of \$20,000 plus costs and fees if a plaintiff prevails. (Idaho Code § 18-8701 et. seq.) Oklahoma also enacted a similar law to Texas and enacted criminal penalties for the performance of an abortion, except when performed to save the life of a pregnant person, with punishment of up to 10 years in prison or fines of up to \$100,000.¹⁰ Similar legislation to SB 8 has also been introduced in Arizona, Florida, Minnesota, and Wisconsin.¹¹ In six states with abortion bans – Arkansas, Georgia, Idaho, Missouri, North Dakota, and Tennessee – prosecutors can criminally prosecute health care professionals for performing abortions and providers are only allowed to offer evidence that the procedure was necessary to save the patient until after they are charged.¹² These laws put providers in extremely difficult positions where they have to make legal and ethical judgments about treating a patient whose health or life may be in jeopardy while facing the very real potential of being held criminally or civilly liable or having their medical license threatened.

3. California is a Reproductive Freedom State

The California Supreme Court held in 1969 that the state constitution's implied right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.) This was the first time an individual's right to abortion was upheld in a court and came before the *Roe* decision. In 1972 the California voters passed a constitutional amendment that explicitly provided for the right to privacy in the state constitution. (Prop. 11, Nov. 7, 1972 gen. elec.) California statutory law provides, under the Reproductive Privacy Act, that the Legislature finds and declares every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate

¹⁰ Dana Branham and Chris Casteel, *Another anti-abortion law goes into effect in Oklahoma. Here's what's changing*, *The Oklahoman* (Aug, 26, 2022), available at <https://www.oklahoman.com/story/news/2022/08/26/oklahoma-senate-bill-612-another-anti-abortion-law-goes-into-effect/65419612007/>.

¹¹ Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban – And These States Might Be Next*, *Forbes* (Mar. 23, 2022) available at <https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/?sh=340dc49425c0>.

¹² Christine Vestal, *Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, *Pew Trusts* (Sept. 1, 2022), available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies>.

decisions about all matters relating to pregnancy; therefore, it is the public policy of the State of California that every individual has the fundamental right to choose or refuse birth control, and every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion. (Health & Saf. Code § 123462.) In 2019, Governor Newsom issued a proclamation reaffirming California's commitment to making reproductive freedom a fundamental right in response to the numerous attacks on reproductive rights across the nation.¹³

In September 2021, more than 40 organizations came together to form the California Future Abortion Council (CA FAB) to identify barriers to accessing abortion services and to recommend policy proposals to support equitable and affordable access for not only Californians, but all who seek care in this state. CA FAB issued its first report in December 2021, which included 45 policy recommendations to protect, strengthen, and expand abortion access in California.¹⁴ In response to the *Dobbs* decision and CA FAB's report, California enacted a comprehensive package of legislation that protects the rights of patients seeking abortion in the state and those supporting them.¹⁵ Additionally, the voters overwhelmingly approved Proposition 1 (Nov. 8, 2022 gen. elec.), and enacted an express constitutional right in the state constitution that prohibits the state from interfering with an individual's reproductive freedom in their most intimate decisions.

Though California has enacted numerous laws to protect the fundamental right to reproductive freedom, without federal protections there is nothing prohibiting providers or recipients of protected health care from being criminalized in other states. In December 2022, CA FAB issued an addendum to its original report and identified additional policy recommendations, including protecting abortion providers "against adverse actions related to their participation in public benefit programs, health plan and insurance contracts, and credentialing due to enforcement of another state's hostile abortion law."¹⁶

4. Out of state bans on gender-affirming care and California policies to protect patients receiving such care

As California and other states have implemented policies to ensure that transgender individuals are not discriminated against and can obtain gender-affirming care, other

¹³ California Proclamation on Reproductive Freedom (May 31, 2019) available at <https://www.gov.ca.gov/wp-content/uploads/2019/05/Proclamation-on-Reproductive-Freedom.pdf>.

¹⁴ *Recommendations to Protect, Strengthen, and Expand Abortion Care in California*, California Future of Abortion Council (Dec. 2021), available at https://www.cafabcouncil.org/files/ugd/ddc900_0beac0c75cb54445a230168863566b55.pdf.

¹⁵ Kristen Hwang, *Newsom signs abortion protections into law*, CalMatters (Sept. 27, 2022), available at <https://calmatters.org/health/2022/09/california-abortion-bills/>.

¹⁶ *December 2022 Addendum*, California Future of Abortion Council (Dec. 2022), available at https://www.cafabcouncil.org/files/ugd/ddc900_cb34dfb0c1154013a43642b9a95adfd6.pdf?index=true.

states have targeted transgender individuals and providers of gender-affirming care. According to Human Rights Watch, as of March 2022, legislatures nationwide had introduced over 300 anti-LGBTQ+ bills, over 130 of which specifically targeted transgender people.¹⁷ Many states have been enacting statutes that potentially impose civil and criminal liability for providing to a minor, or helping a minor obtain, gender-affirming care. For example, Alabama recently enacted a bill that makes it a felony to provide, or help to provide, certain types of gender-affirming care.¹⁸ Arkansas prohibits a physician or other healthcare provider from providing or referring certain types of gender-affirming care for a minor; a violation or “threatened violation” can be punished through a professional board or a civil action.¹⁹ On September 29, 2022, Governor Newsom issued a signing statement for SB 107 (Wiener, Ch. 810, Stats. 2022) that said “[i]n California we believe in equality and acceptance. We believe that no one should be prosecuted or persecuted for getting care they need – including gender-affirming care.²⁰” That bill enacts various safeguards against the enforcement of other states’ laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California.

5. Bolstering California as a sanctuary for the right to abortion and gender-affirming care

According to the author:

Last year the Legislature, Governor Newsom, and California voters took bold action, guaranteeing the right to an abortion and gender-affirming care. But a growing number of states have done the opposite, putting residents who seek essential health care at risk of being prosecuted. My ‘Safe Haven’ bill will ensure that those who come to California fleeing persecution by other states will be free from the worry that a bounty hunter could snatch them up and send them back.

This bill approaches this onslaught of criminal penalties for protected health care in other states from several angles.

First, the bill prohibits a magistrate from issuing a warrant for the arrest of an individual where the underlying offense is for engaging in protected health care, performing, receiving, supporting, or aiding in the performance or receipt of an

¹⁷ Human Rights Watch, Press Release, ICYMI: As Lawmakers Escalate Attacks on Transgender Youth Across the Country, Some GOP Leaders Stand Up for Transgender Youth (Mar. 24, 2022), <https://www.hrc.org/press-releases/icymi-as-lawmakers-escalate-attacks-on-transgender-youth-across-the-country-some-gop-leaders-stand-up-for-transgender-youth> (all links current as of August 29, 2022).

¹⁸ See Al. Code, § 26-26-4.

¹⁹ Ark. Stats. §§ 20-9-1502 & 20-9-1504.

²⁰ Governor’s signing statement on Sen. Bill 107 (2021-22 Reg. Sess.), available at <https://www.gov.ca.gov/wp-content/uploads/2022/09/SB-107-SIGNING.pdf?emrc=1a80c5>.

abortion, contraception, reproductive care, or gender-affirming care if the abortion, contraception, reproductive care, or gender-affirming care is lawful under the laws of this state, regardless of the recipient's location.

Relatedly, the bill restricts a bondsman or other person authorized to apprehend, detain, or arrest a fugitive admitted to bail in another state from taking into custody a person who is a fugitive based on criminal offenses related to protected health care. Such a person is ineligible for specified licenses and must forfeit any already held. A person in violation can be subject to criminal penalties and, most relevant to this Committee's jurisdiction, is subject to a civil action for injunctive, monetary, or other appropriate relief brought by an individual unlawfully taken into custody.

In addition, the bill prohibits law enforcement personnel from sharing information or providing assistance relating to investigations or inquiries into protected health care to specified entities, including federal and state law enforcement and bondsman and other bail agents.

Finally, the bill amends existing law to ensure that those charged with criminal penalties in other states for engaging in protected health care are not thereby made ineligible for specified state benefits, namely CalWORKs and CalFresh.

Writing in support, the Ella Baker Center for Human Rights states:

Following the U.S. Supreme Court overturned *Roe v. Wade* in June 2022, the Legislature passed and the Governor signed a package of bills making California a sanctuary state for abortion services and gender-affirming care. In addition, in the November election, California voters enacted a constitutional amendment guaranteeing the right to abortion and contraception. Meanwhile, a growing number of states have been passing laws putting residents who seek essential health care at risk of being prosecuted.

SB 36 builds on California landmark protections further protecting people who have been charged or convicted in another state as a result of the criminalization of abortion or gender-affirming health care that is fully legal in California.

6. Legal Concerns: Full Faith and Credit Clause

Article IV, section 1 of the U. S. Constitution, known as the Full Faith and Credit Clause, requires every state to give full faith and credit to the public acts (statutes), records, and judicial proceedings of every other state. As the bill requires certain laws and judgments of other states to not be enforced in California, it potentially implicates the Full Faith and Credit Clause. Current legal scholarship regarding the Full Faith and Credit Clause posits that the clause applies differently to public acts (statutes), records,

and judicial proceedings.²¹ Public acts or statutes and state records may not need to be as strictly enforced. (*see Alaska Packers Association v. Industrial Accident Comm.* (1935) 294 U.S. 532; *Adar v. Smith* (5th Cir. 2011) 639 F.3d 146.) However, the current jurisprudence seems to provide that determinative judicial proceedings should be enforced in another jurisdiction. The U.S. Supreme Court provides some guidance:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. “In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.” Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.²²

Writing in opposition, the Right to Life League argues:

On its face, the bill’s subsections (b), (c) and (d) impermissibly violate the U.S. Constitution. Subsection (b) unlawfully forbids magistrates from complying with valid court orders issued in foreign states. Subsection (c) strips state licensing of bail agents and bondsmen complying with valid court orders issued in foreign states. Subsection (d) creates a private cause of action designed to chill the enforcement of foreign states’ laws.

Like other unconstitutional laws AB 1666 and AB 2091, SB 36 usurps valid judicial power to unlawfully ignore other states’ laws. SB 36 blatantly violates the Full Faith and Credit Clause in Article 4 of the U.S. Constitution by instructing those tasked with enforcing foreign state law not to comply. SB 36 will thwart enforcement of foreign laws against abusers and human traffickers who flee to California to escape prosecution in other states, denying justice to their victims.

Passage of SB 36 will subject taxpayers to a lengthy and expensive judicial battle which California will ultimately lose.

²¹ Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records* (2013) 62 Emory L.J. 639.

²² *Baker v. GMC* (1998) 522 U.S. 222, 232-33 (internal citations omitted).

However, case law calls into question whether the clause would require California to respect the criminal laws of another state in this way. In 1892, the Supreme Court was asked to evaluate whether a Maryland court's refusal to uphold a New York judgment was correct when the Maryland court found that the New York cause of action was "intended as a punishment for doing any acts forbidden, and was, therefore...a penalty which could not be enforced."²³ The *Huntington* court opted to examine the definition of "penal" in the "international sense" and harkened back to Chief Justice Marshall's maxim, "the courts of no country execute the penal laws of another." (The Antelope 10 Wheat 66, 123.) The *Huntington* court further explained that whether or not a law were considered penal, and thus could not be enforced in the court of another jurisdiction, "depends on the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

The Supreme Court has continued to examine Full Faith and Credit Clause claims using the penal exception standard.²⁴ In one slightly more recent case, the Supreme Court was faced with whether California was required by the clause to enforce a North Carolina criminal judgment, it found: "Since the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment, *Huntington v. Attrill*, 146 U.S. 657 (1892); cf. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 279 (1935), California is free to consider what effect, if any, it will give to the North Carolina detainer in terms of George's present "custody."²⁵

It should be noted that in certain circumstances the Extradition Clause of the United States Constitution may be implicated: "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."²⁶

SUPPORT

Coalition of California Welfare Rights Organizations (co-sponsor)

Equality California (co-sponsor)

NARAL Pro-Choice California (co-sponsor)

Western Center on Law and Poverty (co-sponsor)

Access Reproductive Justice

American Atheists

Anti-Recidivism Coalition

California Academy of Family Physicians

California Attorneys for Criminal Justice

²³ *Huntington v Attrill* (1892) 146 U.S. 657.

²⁴ See *Milwaukee County v. M. E. White Company* (1935) 296 U.S. 268.

²⁵ *Nelson v. George* (1970) 399 U.S. 224, 229.

²⁶ U.S. Const., art. IV, § 2, cl. 2.

California LGBTQ Health and Human Services Network
City of Berkeley
Desert Aids Project d/b/a Dap Health
Ella Baker Center for Human Rights
End Child Poverty California
Essential Access Health
John Burton Advocates for Youth
National Council of Jewish Women CA
National Health Law Program
Oakland Privacy
Plan C
Sacramento LGBT Community Center
San Francisco Black, Jewish and Unity Group
The Translatin@ Coalition
Training in Early Abortion for Comprehensive Health Care
Young Women's Freedom Center
One individual

OPPOSITION

Concerned Women for America
Right to Life League
Two individuals

RELATED LEGISLATION

Pending Legislation:

SB 385 (Atkins, 2023) authorizes a physician assistant who has completed specified training and achieved clinical competency, as described, to perform abortions by aspirations techniques without the personal presence of a supervising physician and surgeon, except as provided. SB 385 is currently pending in the Senate Committee on Business, Professions and Economic Development.

SB 345 (Skinner, 2023), among other things, prohibits a licensing board from denying an application for licensure or suspending, revoking, or otherwise imposing discipline on a licensed person because they were disciplined or convicted of an offense in another state, if that disciplinary action was the result of providing a legally protected health care activity. SB 345 is currently pending in the Senate Public Safety Committee.

SB 487 (Atkins, 2023) providing protections for providers from other states' laws that seek to restrict access to, or punish the provision of, health care services that are legal in California. SB 487 is currently in the Senate Rules Committee.

AB 571 (Petrie-Norris, 2023) prohibits an insurer from refusing to issue or renew or terminate professional liability insurance for health care providers and from imposing a surcharge or increasing the premium or deductible solely based on any prohibited bases for discrimination, including a health care provider offering or performing abortion, and prohibits an insurer from denying coverage for liability for damages arising from offering, performing, or rendering specified health care services. AB 571 is currently pending in the Assembly Committee on Insurance.

Prior Legislation:

SCA 10 (Atkins and Rendon, Ch. 87, Stats. 2022) expressly provided that the state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives, and states the measure is intended to further the right to privacy and the right to not be denied equal protection, as guaranteed by the California Constitution and that it does not narrow or limit the right to privacy or equal protection.

SB 107 (Wiener, Ch. 810, Stats. 2022) *See* Comment 4.

AB 1242 (Bauer-Kahan, Ch. 627, Stats. 2022) prohibits law enforcement from knowingly arresting a person for performing or aiding in the performance of a lawful abortion or for obtaining an abortion and prohibits specified entities from providing information to another state or political subdivision thereof regarding an abortion that is lawful under California law, except as provided.

AB 1666 (Bauer-Kahan, Ch. 42, Stats. 2022) prohibited the enforcement in this state of out-of-state laws authorizing a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in those actions and declares those out-of-state laws to be contrary to the public policy of this state.

AB 2091 (Mia Bonta, Ch. 628, Stats. 2022), among other things, prohibited compelling a person to identify or provide information that would identify an individual who has sought or obtained an abortion in a state, county, city, or other local criminal, administrative, legislative, or other proceeding if the information is being requested based on another state's laws that interfere with a person's right to choose or obtain an abortion or a foreign penal civil action.

AB 2223 (Wicks, Ch. 629, Stats. 2022), among other things, authorized a party aggrieved by a violation of the Reproductive Privacy Act to bring a civil action against an offending state actor, as specified, and provides that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to

pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

PRIOR VOTES:

Senate Public Safety Committee (Ayes 4, Noes 0)
