

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

SB 385 (Atkins)
Version: February 9, 2023
Hearing Date: April 18, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Physician Assistant Practice Act: abortion by aspiration: training

DIGEST

This bill revises existing training requirements for a physician assistant (PA) to achieve clinical competency to perform abortion by aspiration techniques. The bill provides that a health care professional who is authorized to perform abortion by aspiration techniques is not to be punished, held liable for damages in a civil action, or denied any privilege for any action relating to the evaluation of clinical competency of a PA on performing abortion by aspiration techniques.

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. This bill seeks to expand and modernize reproductive care training options for PAs in a similar manner that SB 1375 (Atkins, Ch. 631, Stats. 2022) did for nurse practitioners (NPs).

The bill is author sponsored. The bill is supported by the American Association of University Women – California, the American College of Obstetricians and Gynecologists District IX, the California Nurse Midwives Association (CNMA), and NARAL Pro-Choice California. The bill is opposed by the Right to Life League. The bill passed the Senate Business, Professions and Economic Development Committee on a vote of 10 to 3.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) 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.)
 - a) Provides 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.)
 - b) Provides that a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. (Cal. Const., art. I, § 7.)
- 2) Establishes the Reproductive Privacy Act and provides that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, 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.)
- 3) Establishes the Physician Assistant Practice Act, administered by the Physician Assistant Board (PAB), which provides for the licensing and regulation of PAs and authorizes a PA to perform medical services under the Act if they do so under the supervision of a licensed physician and surgeon who is not subject to discipline; if the PA renders services pursuant to a practice agreement that meets specified requirements; if the PA is competent to perform the services and; if the PA's education, training, and experience have prepared the PA to render the services. (Bus. & Prof. Code § 3500 et seq., § 3502)
- 4) Specifies that, in order to receive authority from the supervising physician and surgeon to perform an abortion by aspiration techniques, a PA must complete training either through PAB approved training programs or through training to perform medical services that augment the PA's current areas of competency.
 - a) Specifies that, in order to receive authority from the supervising physician and surgeon to perform an abortion by aspiration techniques, a PA must comply with protocols that specify the extent of supervision, the procedures for transferring a patient to physician and surgeon care or a hospital, the procedures for obtaining physician and surgeon assistance and

consultation, and the procedures for providing emergency care until physician and surgeon assistance and consultation is available. (Bus. & Prof. Code § 3502.4)

- 5) Specifies that the training protocols established by HWPP No. 171 shall be deemed to meet the PAB standards and that a PA who has completed training and achieved clinical competency through HWPP No. 171 is authorized to perform abortions by aspiration techniques.
 - a) Makes it unprofessional conduct for a PA to perform an abortion by aspiration techniques without prior completion of training and validation of clinical competency. (*Ibid.*)

This bill:

- 1) Specifies that the required training, necessary for a PA to receive authority from their supervising physician and surgeon to perform abortion by aspiration techniques, must include a clinical and didactic component and be provided by either:
 - a) A PAB-approved training program.
 - b) Training to perform medical services that augment the PA's current areas of competency.
 - c) A course offered by a state or national health care professional or accreditation organization.
 - d) Training based on the competency-based training protocols established by the Health Workforce Pilot Project (HWPP) No. 171 through the Office of Statewide Health Planning and Development, now known as the Department of Health Care Access and Information.
 - e) Training and evaluation of clinical competency, performed at a clinic or hospital, on performing abortion by aspiration techniques that is provided by a physician and surgeon, NP, CNM, or PA authorized to perform abortion by aspiration techniques.
- 2) Clarifies that a PA who completes requisite training and achieves clinical competency is authorized to perform abortions by aspiration techniques without the personal presence of a supervising physician and surgeon, unless specified by their practice agreement, and that the procedure must be practiced consistent with applicable standards of care, within the PA's clinical and professional education and training, and pursuant to their practice agreement.
- 3) Specifies that nothing in these provisions is to be interpreted as authorizing a PA to perform abortion by aspiration techniques after the first trimester of pregnancy.
- 4) Provides that a physician and surgeon, nurse practitioner (NP), or certified-nurse midwife (CNM) authorized to perform abortion by aspiration techniques is not to

be punished, held liable for damages in a civil action, or denied any privilege for any action relating to the evaluation of clinical competency of a PA.

COMMENTS

1. Stated need for the bill

SB 385 would expand and modernize reproductive care training options for physician assistants. This bill builds off the success of AB 154 (Atkins, 2013), which authorized advanced practice clinicians to provide abortion care, and SB 1375 (Atkins, 2022) which streamlined abortion training standards for nurse practitioners and certified nurse midwives. Current abortion training requirements have presented barriers to providers seeking to provide reproductive care due to a lack of available trainers and training opportunities. SB 385 will address these barriers by better aligning abortion training to physician assistant scope of practice and provide multiple options for physician assistants to get trained in abortion care, including Physician Assistant Board approved courses and programs, courses offered by state or national health care professional or accreditation organizations, or training in clinics and hospitals.

2. Until June 2022, access to abortion was held to be a federal constitutional right since 1973

Roe v. Wade 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. ((1973) 410 U.S. 113.) The plaintiff in the case was "Jane Roe," an unmarried woman who wanted to end her pregnancy under safe and clinical conditions but was unable to obtain a legal abortion in Texas because her life was not threatened by the continuation of the pregnancy. Unable to afford travel to another state to obtain an abortion, she challenged the statute making it a crime to perform an abortion unless a woman's life was at stake. She also claimed that the Texas law abridged her right of personal privacy.

The Court struck down the Texas law, finding for the first time that the constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." At the same time, the high court also defined two compelling state interests that would satisfy restrictions on a person's right to choose to terminate a pregnancy: 1) states may regulate the abortion procedure after the first trimester of pregnancy in ways necessary to promote a woman's health; and 2) after the point of fetal viability outside of the womb, a state may, to protect the potential life of the fetus, prohibit abortions that are not necessary to preserve a person's life or health. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, the Court reaffirmed the basic holding of *Roe*,

yet also permitted states to impose restrictions on abortion as long as those restrictions do not create an undue burden on a person's right to choose to terminate a pregnancy.

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*. The case involved a Mississippi law enacted in 2018 that banned most abortions after the first 15 weeks of pregnancy, which is before what is generally accepted as the period of viability. (See Miss. Code Ann. §41-41-191.) 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.

In the wake of the *Dobbs* decision it is very probable that abortion will be banned or severely restricted in 24 states,¹ with 13 states already having total abortion bans in effect.² 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.³ 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.⁴

3. California is a Reproductive Freedom State

a. *California law protects an individual's right to access abortion*

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. In 1972 the California voters passed a constitutional amendment that explicitly provided for the right to privacy in the state constitution.

¹ 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-to-do-so-roundup>.

² 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>.

³ 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).

⁴ 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>.

(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 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.⁵

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.⁶ 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.⁷ 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.

b. This bill provides updated training standards for PAs

SB 1375 (Atkins, Ch. 631, Stats. 2022) authorized nurse practitioners (NPs) who are qualified to independently practice to provide abortion services by aspiration techniques in the first trimester, and updated training standards for NPs and CNMs. Additionally, it provided that a person authorized to perform abortion services by aspiration techniques is not to be punished, held liable for damages in a civil action, or denied any privilege for any action relating to the evaluation of clinical competency of a NP. This bill seeks to expand on SB 1375 by applying recently updated training standards for NPs and CNMs to PAs, aligning abortion training to a PA's scope of practice, and providing multiple options for PAs to get trained in abortion care. The author notes that this bill is intended to address one CA FAB's recommendations to

⁵ 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>.

⁶ *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.

⁷ Kristen Hwang, *Newsom signs abortion protections into law*, CalMatters (Sept. 27, 2022), available at <https://calmatters.org/health/2022/09/california-abortion-bills/>.

address training and workforce barriers health care professionals face when providing reproductive care in order to provide timely care to Californians and absorb projected increases in out-of-state patients seeking reproductive care. According to the Senate Business, Professions and Economic Development Committee analysis, this bill “does not change the abortion services a PA is authorized to provide but instead conforms updated pathways through which a PA can receive training and demonstrate competent care to provide care currently authorized in the PA Act.⁸”

- c. This bill provides immunity for an act related to the evaluation of a PA for clinical competency*

This bill provides that a physician and surgeon, NP, CNM, or PA who is authorized to perform abortion by aspiration techniques is not to be punished, held liable for damages in a civil action, or denied any privilege for any action relating to the evaluation of clinical competency of a PA. The PA would still remain liable for their own actions under existing law.

Liability has the primary effect of ensuring that some measure of recourse exists for those persons injured by the negligent or willful acts of others; the risk of that liability has the primary effect of ensuring parties act reasonably to avoid harm to those to whom they owe a duty. As a general rule, California law provides that everyone is responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by lack of ordinary care, caused their own injury. (Civ. Code § 1714(a).)

Blanket immunity provisions are generally disfavored as a matter of public policy because they, by their nature, prevent an injured party from seeking a particular type of recovery. However, the Legislature has in limited circumstances allowed for measured immunity from liability to promote other policy goals that could benefit the public. Immunity provisions are sometimes allowed when necessary to ensure the willingness of individuals to continue taking on certain roles that may involve some risk. SB 1375 from the 2022 legislative session provided immunity to a physician and surgeon, nurse practitioner (NP), or certified-nurse midwife (CNM) who is authorized to perform abortion by aspiration techniques for any action relating to their evaluation of a NP for clinical competency. This bill seeks to do the same thing for those authorized to evaluate PAs for clinical competency. This limited immunity only applies to the context of an act taken in evaluating a PA for clinical competency to perform an abortion by aspiration techniques. The PA themselves would remain liable for any of their own actions leaving a remedy available to an injured party.

⁸ Sen. Bus., Prof. & Econ. Development Comm. analysis of SB 386 (2023-24 reg. sess.) as introduced Feb. 9, 2023 at p. 5.

4. Statements in support

The American College of Obstetricians and Gynecology (ACOG) District IX writes in support stating:

In the months since the Supreme Court's decision to overturn Roe v. Wade, approximately one in three women in this country has lost abortion access. The decision has opened the door for states to ban and criminalize abortion services – impacting patients and providers across the U.S. Currently, 18 states have enacted a ban on abortion services or have severely restricted access to abortion.

In California, ACOG District IX is committed to mitigating the fallout of the Dobb's decision, working with our partners to find ways to accommodate patients seeking care from outside our borders to the best of our ability and capacity. As California prepares for more patients seeking abortion services and reproductive health care in our state, we must ensure the state has an ample supply of appropriately trained abortion providers qualified to provide that care. SB 385 helps in this effort by building on existing law, expanding the trained pool of qualified non-physician providers to meet this demand during the first trimester.

5. Statements in opposition

The Right to Life League writes in opposition stating:

The bill endangers women's health by further lowering current medical standards to appease a voracious abortion industry. The bill will allow physician assistants to perform abortions by aspirations techniques without the personal presence of a supervising physician and surgeon. [...] SB 385 is the next generation of abortion deregulation designed to eliminate medical doctors' supervision entirely, leaving physician assistants completely in charge. This is an existential threat to women's health and an insult to the years of education and training required of medical doctors.

SUPPORT

American Association of University Women - California
American College of Obstetricians and Gynecologists District IX
California Nurse Midwives Association (CNMA)
NARAL Pro-Choice California

OPPOSITION

Right to Life League

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1375 (Atkins, Ch. 631, Stats. 2022) expanded training options for Nurse Practitioners (NPs) and Certified Nurse-Midwives (CNMs) for purposes of performing abortion by aspiration techniques (AAT), as specified.

AB 154 (Atkins, Ch. 662, Stats. 2013) authorized NPs, certified nurse midwives, and physician assistants to perform abortions during the first trimester if they completed training, as provided, and adhere to standardized procedures and protocols.

PRIOR VOTES:

Senate Business, Professions and Economic Development Committee (Ayes 10, Noes 3)
