

ASSEMBLY THIRD READING

AB 2091 (Mia Bonta)

As Amended , 2022

2/3 vote. Urgency

SUMMARY

Establishes requirements to protect the private information of individuals who seek or consider an abortion.

Major Provisions

- 1) Makes various findings and declarations, including that abortion care is a constitutional right and that California must protect the confidentiality of medical records related to abortion.
- 2) Defines "foreign penal civil action" to mean a civil action authorized by the law of a state other than this state in which the sole purpose is to punish an offense against the public justice of that state.
- 3) Prohibits a provider of health care, health care service plan, or contractor from releasing medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on either another state's laws that interfere with a person's rights set forth in the Reproductive Privacy Act, or a foreign penal civil action, as defined.
- 4) Prohibits the issuance of a subpoena, from the Superior Court or an attorney licensed in California, based on a foreign subpoena that relates to a foreign penal civil action.
- 5) Expands the Reproductive Privacy Act by prohibiting compelling a person, in a state, county, city, or other local criminal, administrative, legislative, or other proceeding, to identify or provide information that would identify an individual who sought or obtained an abortion if that information being requested is based on either another state's laws that interfere with a person's rights set forth in the Reproductive Privacy Act, or a foreign penal civil action, as defined.
- 6) Provides that, if the insurance commissioner determines that an insurer has violated specified rights and requirements providing for the privacy and confidentiality of an insured person, the commissioner may, after appropriate notice and opportunity for hearing, assess a civil penalty not to exceed five thousand dollars (\$5,000) for each violation. Provides that, if a violation was willful, the civil penalty may not exceed ten thousand dollars (\$10,000) for each violation. Vests commissioner with the discretion to determine whether acts or omissions constitute a violation.
- 7) Prohibits prison staff from disclosing identifying medical information related to an incarcerated person's right to seek and obtain an abortion if the information being requested is based on either another state's laws that interfere with a person's rights set forth in the Reproductive Privacy Act, or a foreign penal civil action, as defined.
- 8) Adopts a severability clause.
- 9) Contains an urgency clause.

COMMENTS

Outside of California, several laws have been enacted that effectively ban abortion by diffusing responsibility for the enforcement of abortion restrictions to non-state actors. These laws establish that nearly anyone may sue an individual for acts pertaining to obtaining, or assisting with obtaining, an abortion. These novel rights of action could be characterized as "foreign penal civil actions." This bill defines "foreign penal civil actions" as actions established in other states for the sole purpose of punishing an offense against the public justice of that state. The protections provided for in this bill limit the sharing of specified information that could be used in a case related to an out-of-state anti-abortion law or a foreign penal civil action.

Existing law protects the identity and medical information of individuals who seek or obtain an abortion. The federal Health Insurance Portability and Accountability Act (HIPAA) prohibits health care providers and other covered entities, including health insurance companies, from disclosing protected health information, except under certain conditions. (45 C.F.R. Sec. 164.500 *et seq.*) California has enacted somewhat stronger privacy protections through the Confidentiality of Medical Information Act (CMIA). CMIA prohibits health care providers and other covered entities, including recipients of medical information, from disclosing medical information, including individually identifiable information such as an individual's name, except under specified conditions. To the extent that they receive medical information, health care insurers are also covered by CMIA. Health insurers are also subject to the Insurance Information and Privacy Protection Act (IIPA), which enumerates privacy protections for medical information. Despite the numerous laws protecting the privacy of medical information, these protections are not absolute. HIPAA, CMIA, and IIPA all require health care providers and covered entities to produce medical information necessary to comply with a subpoena or court order.

Since the landmark ruling of *Roe v. Wade* (1973) 410 United States Code (U.S.) 113, which recognized that the constitutionally protected right to privacy limits a state's power to restrict a woman's fundamental right to terminate a pregnancy prior to viability, over 1,300 state statutes have been enacted that restrict access to abortion. (Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century* (Dec. 2021) Guttmacher Institute.) Recently, the momentum and reach of these restrictions have increased exponentially. One of those restrictions was Texas's so-called "fetal heartbeat" bill, or SB 8, which banned nearly all abortions in the state by prohibiting abortions after a so-called "fetal heartbeat" is detected, which usually occurs around five to six weeks into a pregnancy (but is a misnomer, because at that point an embryo is not yet considered to be a fetus, and the embryo does not have a heart or a heartbeat). SB 8 provides an enforcement mechanism of this ban by creating a unique private right of action that provides standing to almost anyone to sue another person for performing, obtaining, attempting to obtain, or "aiding and abetting" an abortion. This right of action makes obtaining an abortion, administering an abortion, and acts such as providing transportation to an abortion provider, a liability great enough to prohibit abortion – and assistance to individuals seeking abortion services – in the state. More than one dozen other states have moved to introduce legislation to adopt their own versions of the Texas law.

In order to protect the privacy of individuals who seek or obtain an abortion, this bill would establish safeguards to ensure that information in California is not used as evidence in an out-of-state case related to an anti-abortion statute or a foreign penal civil action. First, this bill would prohibit compelling an individual to provide the identity of an individual who has sought or obtained an abortion if that information is being sought for an anti-abortion case in another state

or a foreign penal civil action. Second, this bill fortifies privacy protections for medical information by amending several code sections. Though current law requires medical information to be provided if requested by a subpoena, this bill amends the CIMA to expressly prohibit the release of medical information in response to a subpoena based on an out-of-state anti-abortion or foreign penal civil action case. It also amends the IIPA to allow the Insurance Commissioner to issue civil penalties against health insurers who violate the confidentiality of an insured's medical information. Finally, it amends the Penal Code to prohibit prison staff from disclosing identifying abortion-related medical information if that information is being requested for an anti-abortion case in another state or a foreign penal civil action.

This bill proposes to limit the ability for California courts to enforce subpoenas issued by out-of-state courts. Because these subpoenas are judicial actions, such a limit is likely to implicate the provisions of the Full Faith and Credit Clause found in Article IV, Section 1 of the United States Constitution. That clause states, "full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state, and that the United States Congress may by general laws prescribe the manner in which such acts, records and proceedings must be proved, and the effect thereof." As it pertains to judicial proceedings, dating back to 1813, the United States Supreme Court has generally held that one state must recognize and enforce the judicial determination of another state. (*Mills v. Duryee* (1813) 7 Cranch 481, 484-485.) However, the United State Supreme Court has surmised that states are not necessarily required to enforce *civil* judgments rendered based on another state's civil statute if the judgment is aimed at *punishing* a person for an offense against the "public justice" of that state. (*Huntington v Attrill* (1892) 146 U.S. 657, 673-674.) In other words, if another state's civil laws are essentially disguised criminal laws, or penal laws, the Supreme Court has suggested that if a civil statute was "intended as a punishment for doing any acts forbidden," then another state may have the ability to refuse to enforce the judgment. (*Id.* at 664.) Although the Supreme Court has never deemed a state law to be a "penal statute" the *Huntington* decision was just the first of a series of cases in which the court did examine whether or not a statute was aimed at civilly punishing a party for violating the "public justice." (See *Milwaukee County v. M. E. White Company* (1935) 296 U.S. 268.)

When examining statutes like the Texas fetal "heartbeat" law, one can indeed see the "penal" nature of those statutes. For example, the statute requires no showing of an individual harm on the part of the plaintiff which is generally required for a civil action, and the statute confers standing on any person so long as they are not an agent of Texas state or local government, even if they have no relation to any of the parties involved in a woman receiving or attempting to receive an abortion and is basically acting as a vigilante.

Given the proliferation and novelty of anti-abortion laws designed to effectively police behavior through a private right of action, to protect California residents from being targeted by these laws, it is prudent to define such statutes as providing for a "foreign penal civil action" in California law. This bill introduces and defines foreign penal civil actions and prohibits the issuance of subpoenas based on such actions. Given that California can credibly argue that SB 8 and its progeny are purely penal in nature, in keeping with the Supreme Court's indication that a state need not enforce judgements from penal statutes, California can also opt to refuse to validate a foreign subpoena issued in civil actions arising under those laws. By codifying the definition of a foreign penal civil action, this bill protects Californians from the whims of out-of-state legislators and their desire to regulate the conduct of Californians through overly broad civil actions.

According to the Author

States throughout the [United States] have been targeting and restricting abortion access. With the United States Supreme Court likely to overturn the protections granted under *Roe v. Wade*, it is essential for states like California to double down on abortion access and strong abortion related privacy protections. Regressive abortion laws, like we most recently saw in a Texas law that allows private citizens to sue anyone who even utters the word abortion, are a huge infringement on a person's constitutional right to an abortion. We know that people are coming to California to seek reproductive care. However, we worry that private citizens will demand the medical records of those who seek care here in California, in order to punish them. No one should be able to manipulate California's legal system to target and punish people who seeks care and refuge here. My bill will ensure out of state subpoenas, which seek information related to a patient who received reproductive healthcare here in California, are not granted. By doing this, California will protect the medical privacy of those patients who may be targeted under these hostile states' laws. California must proactively protect the confidentiality of medical records, related to abortion care, especially as we see states around the country paving the way to use those records to enforce their own state's anti-abortion laws.

Arguments in Support

In support, Planned Parenthood of California argues that this bill ensures that information about individuals who travel to California to obtain an abortion will not be used against them. The group writes:

As mentioned above, California will see an increase in out of state patients who find their closest and most accessible clinic here as other states restrict abortion access. The California Planned Parenthood health centers are already seeing this increase with at least 80 out-of-state abortion patients visiting our health centers per month. This bill will give those patients the peace of mind of knowing that they can receive comprehensive, compassionate care in California while maintaining their medical privacy.

Arguments in Opposition

The Right to Life League of Southern California is opposed to this bill, arguing that it violates the Full Faith and Credit Clause in the U.S. Constitution and that it would harm women by granting immunity to individuals they characterize as "traffickers" who allegedly coerce individuals into having an abortion. The group writes:

SB 2091 will effectively grant immunity from foreign subpoenas to sexual abusers and human traffickers who coerce women and minors into pregnancy termination in other states then flee to California to avoid the legal consequences. SB 2091 is dangerous because it declares another state's court orders to have no effect, thwarting enforcement of foreign laws against abusers and human traffickers who may hide in California, denying justice to victims.

FISCAL COMMENTS

According to the Assembly Appropriations Committee, no costs to the California Department of Insurance to consider whether an insurance provider violated the provisions of this bill and assess a civil penalty, if appropriate.

VOTES**ASM JUDICIARY: 7-2-1**

YES: Stone, Holden, Kalra, Maienschein, Reyes, Robert Rivas, Luz Rivas

NO: Davies, Mathis

ABS, ABST OR NV: Cunningham

ASM HEALTH: 10-3-2

YES: Wood, Aguiar-Curry, Arambula, Carrillo, Maienschein, McCarty, Nazarian, Rodriguez, Santiago, Cristina Garcia

NO: Waldron, Bigelow, Flora

ABS, ABST OR NV: Mayes, Luz Rivas

ASM APPROPRIATIONS: 12-4-0

YES: Holden, Bryan, Calderon, Carrillo, Mike Fong, Gabriel, Eduardo Garcia, Jones-Sawyer, Quirk, Robert Rivas, Akilah Weber, Wilson

NO: Bigelow, Megan Dahle, Davies, Fong

ASSEMBLY FLOOR: 50-14-14

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Mia Bonta, Bryan, Calderon, Carrillo, Cervantes, Cooley, Cooper, Daly, Mike Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Haney, Holden, Irwin, Jones-Sawyer, Kalra, Levine, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Petrie-Norris, Quirk, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Santiago, Stone, Ting, Villapudua, Akilah Weber, Wicks, Wilson, Wood, Rendon

NO: Bigelow, Chen, Choi, Megan Dahle, Flora, Fong, Gallagher, Mathis, Nguyen, Patterson, Seyarto, Smith, Voepel, Waldron

ABS, ABST OR NV: Boerner Horvath, Cunningham, Davies, Gray, Grayson, Kiley, Lackey, Lee, Mayes, Quirk-Silva, Blanca Rubio, Salas, Valladares, Ward

UPDATED

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CONSULTANT: Alec Watts / JUD. / (916) 319-2334

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