

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

AB 2223 (Wicks)
Version: May 19, 2022
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Fiscal: Yes
Urgency: No
AM

SUBJECT

Reproductive health

DIGEST

This bill prohibits a person from being subject to civil or criminal liability, or otherwise deprived of their rights, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome or based solely on their actions to aid or assist a pregnant person who is exercising their reproductive rights. The bill authorizes a party aggrieved by a violation of the Reproductive Privacy Act to bring a civil action against an offending state actor, as provided, and requires a court to award reasonable attorneys' fees and costs to a prevailing plaintiff upon a motion. The bill also authorizes a person aggrieved by a violation of the Reproductive Privacy Act to bring a civil action pursuant to the Tom Bane Civil Rights Act. The bill deletes the requirement that a coroner hold inquests for deaths related to or following known or suspected self-induced or criminal abortion and the requirement that an unattended fetal death be handled as a death without medical attendance.

EXECUTIVE SUMMARY

Even though existing state law does not criminalize a person's own actions that might result in a pregnancy loss, two women were recently charged and imprisoned for their pregnancy losses in California. In response to this, the bill reaffirms and strengthens protections in existing state law that prohibit civil or criminal liability for the acts of a pregnant person in relation to their pregnancy outcomes. The bill authorizes a party aggrieved by a violation of the Reproductive Privacy Act to: a) bring a civil action against an offending state actor, and b) bring a civil action pursuant to the Tom Bane Civil Rights Act, as provided. The bill also makes changes to statutes relating to coroner's duties in regards to fetal inquests.

The bill is sponsored by ACLU California Action, Black Women for Wellness, California Latinas for Reproductive Justice, If/When/How: Lawyering for Reproductive Justice, NARAL Pro-Choice California, and Planned Parenthood Affiliates of California. The

bill is supported by Lieutenant Governor Eleni Kounalakis and numerous reproductive health advocates, public health associations, organizations advocating to improve maternal and infant health, as well as civil rights advocacy organizations. The bill is opposed by a large number of religious organizations, organizations that oppose abortion rights. If the bill is voted out of this Committee, it will be heard next in the Senate Health Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) 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.)
- 2) Holds that the state constitution's express 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.)
- 3) 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 and, therefore, it is the public policy of the State of California that:
 - a) every individual has the fundamental right to choose or refuse birth control;
 - b) every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions; and
 - c) the state shall not deny or interfere with a person's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted (Health & Saf. Code § 123460 et. seq., § 123462.)
- 4) Provides that the state may not deny or interfere 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 & Safe. Code § 123466.)
- 5) Provides that it shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all specified types of death, including but not limited to violent, sudden, or unusual deaths; and deaths related to or following known or suspected self-induced or criminal abortion. Inquiries pursuant to this provision do not include those investigative functions usually performed by other law enforcement agencies. (Gov. Code § 27491.)
- 6) Requires the coroner, within three days after examination of the fetus, to state on the certificate of fetal death the time of fetal death, the direct causes of the fetal death, the conditions, if any, that gave rise to these causes, and other medical and health

section data as may be required on the certificate, and shall sign the certificate in attest to these facts. (Health & Saf. Code § 103005.)

- 7) Provides that public employees are not liable for injury caused by their instituting or prosecuting any judicial or administrative proceeding within the scope of their employment, even if they act maliciously and without probable cause. (Gov. Code § 821.6.)
- 8) Provides that public employees are not liable for their acts or omissions, exercising due care, in the execution or enforcement of any law, but are liable for false arrest or false imprisonment. (Gov. Code § 820.4.)
- 9) Allows any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, have been interfered with, or attempted to be interfered with by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, to institute and prosecute in their own name and on their own behalf a civil action for damages, including, but not limited to, damages, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct. (Civ. Code § 52.1(c).)

This bill:

- 1) Provides a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights under the Reproductive Privacy Act (Act), based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death due to causes that occurred in utero.
 - a) Specifies that a person who aids or assists a pregnant person in exercising their rights under the Act shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their rights, based solely on their actions to aid or assist a pregnant person in exercising their rights under this article with the pregnant person's voluntary consent.
- 2) Authorizes a party aggrieved by conduct or regulation in violation of the Act to bring a civil action against an offending state actor in a state superior court.
 - a) Provides that whoever denies a right protected by the Act, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right.
 - b) Authorizes a civil penalty of \$25,000 to be awarded to a person denied their rights protected by the Act, and requires an action to be commenced within three years of the alleged practice in violation of the Act.

- c) Authorizes preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this article.
 - d) Provides that, upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in such an action.
 - e) Specifies that Sections 825, 825.2, 825.4, and 825.6 of the Government Code, which provide for defense and indemnification of an employee or former employee of a public entity, apply to any such cause of action against an employee or former employee of a public entity.
- 3) Authorizes a party aggrieved by conduct or regulation in violation of the Act to also bring a civil action pursuant to the Bane Civil Rights Act.
- a) Provides that, notwithstanding the existing immunities in Section 821.6 of the Government Code, a civil action pursuant to Bane Act may be based upon instituting or prosecuting any judicial or administrative proceeding in violation of the Act.
 - b) Provides, for purposes of establishing liability, that the criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, constitutes "threat, intimidation, or coercion" pursuant to the Bane Act.
- 4) Specifically includes 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 under legislative findings and declarations that every individual possesses a fundamental right of privacy with respect to reproductive decisions.
- 5) Deletes the existing duty of the coroner to inquire into and determine the circumstances, manner, and cause of all deaths related to or following known or suspected self-induced or criminal abortion.
- a) Clarifies that existing law requiring a coroner to examine a fetus and state on the certificate of fetal death certain things may not be used to establish, bring, or support a criminal prosecution or civil cause of action seeking damages against any person, whether or not they were the person who was pregnant with the fetus.
 - b) Repeals a provision of law requiring all other fetal deaths required to be registered under provisions of law related to registering fetal deaths to be handled as deaths without medical attendance.
- 6) Clarifies that an abortion is unauthorized if it meets all of the criteria specified in existing law and it is performed by someone other than the pregnant person.

- 7) Changes gendered terminology in relevant code sections and eliminates the phrase “crime against nature” from existing code.
- 8) Makes various legislative findings and declarations.

COMMENTS

1. Stated need for the bill

The author writes:

A critical part of realizing reproductive justice for people in California is clarifying that nobody will be investigated, prosecuted, or incarcerated for their actual, potential, or alleged pregnancy outcomes.

Pregnancy criminalization is a widespread, national problem, and California is not exempt from this issue. Despite clear law that ending or losing pregnancy is not a crime, prosecutors in this state have charged people for homicide offenses for pregnancy loss.

AB 2223 protects reproductive freedom and decisionmaking by ensuring that no one in the State of California will be prosecuted for ending a pregnancy or experiencing a pregnancy loss. As other states that are hostile to abortion rights are attempting to impose criminal or civil penalties on people who assist others in obtaining an abortion, California must reinforce existing state protections against the criminalization and prosecution of abortion and pregnancy outcomes.

2. Reproductive freedom

a. Reproductive freedom is a fundamental right in California

The California Supreme Court held in 1969 that the state constitution’s express 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.) Existing 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; 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 the right to choose to bear a child or to choose to obtain an abortion. (Health & Safe. Code § 123462(a)-(b).) The Act further provides that it is the public policy of the state that the state shall not deny or interfere with a person’s fundamental 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 pregnant person. (Health & Safe. Code § 123462(c) & § 123466.) 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.¹

b. Access to abortion is a constitutional right under Roe v. Wade – for now

Roe v. Wade is the landmark U.S. Supreme Court decision holding that the implied constitutional right to privacy extends 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.) Specifically, the Court found for the first time that the constitutional right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* has been one of the most debated Supreme Court decisions, and its application and validity continue to be challenged. For example, 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. Most significantly is the currently pending case of *Dobbs v. Jackson Women's Health* where the court is deciding whether all pre-viability prohibitions on elective abortions are unconstitutional. (*Dobbs v. Jackson Women's Health* (2021) ___ U.S. ___ (141 S.Ct. 2619).)

On May 3, 2022, Politico reported that that the Court had voted to strike down the holding in *Roe* and *Casey* according to a leaked draft of the initial majority opinion, which was written by Justice Alito.² The opinion has not been officially published but an official opinion in the case is expected by the end of the Court's term in June 2022. In the leaked opinion, the majority upholds the Mississippi law finding that, contrary to 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.³

c. New challenges to exercising one's constitutional right to an abortion

Recently, Texas perniciously enacted a law with an enforcement scheme that was designed to avoid judicial scrutiny of its clearly unconstitutional provisions under the holding of *Roe* and *Casey*.⁴ Texas abortion providers filed a case in an attempt to stop the

¹ 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>.

² Josh Gerstein and Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, Politico (May, 3, 2022), available at <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

³ Leaked 1st Draft of *Dobbs v. Jackson Women's Health* (2022) _ U.S. _ (141 S.Ct. 2619) at p. 66, as reported by Politico (May 2, 2022), available at <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> (as of June 4, 2022).

⁴ See *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, at 543 (conc. opn. Roberts, C.J., Breyer, Sotomayor, & Kagan) that states Texas has passed a law that is contrary to *Roe* and *Casey* because it has

law before it took effect seeking pre-enforcement review of the law and an injunction barring its enforcement. On certiorari from the Fifth Circuit, the U.S. Supreme Court held that a pre-enforcement challenge to the law under the U.S. Constitution may only proceed against certain defendants but not others.⁵ The court did not address whether the law was constitutionally sound. However, the court's ruling essentially insulated the private enforcement of the law from challenge, allowing the law to remain in effect. The inability to challenge the law pre-enforcement allows it to stand as an ominous threat to all persons seeking or performing an abortion. If *Roe* is overturned by the Court, the Texas law may very well be found to be constitutional under the holding of *Dobbs*.

The Texas law 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).) This law essentially places a near-categorical ban on abortions beginning six weeks after a person's last menstrual period, which is before many people even realize they are pregnant and occurs months before fetal viability.⁶ It should be noted that proponents of these laws refer to them as fetal heartbeat laws but medical professionals who specialize in reproductive health believe this is misleading, noting that at six weeks "'valves [of the heart] don't exist' and that the 'flickering we're seeing on the ultrasound that early in the development of the pregnancy is actually electrical activity, and the sound that you 'hear' is actually manufactured by the ultrasound machine' and 'in no way is [it] detecting a functional cardiovascular system or a functional heart.'"⁷

The Texas law has far-reaching implications, not solely for the person receiving an abortion or performing abortion services. This is evidenced in the provisions that prohibit anyone from "aiding and abetting" a person in obtaining an abortion, which could implicate and impose significant civil liability upon a person providing transportation to or from an abortion clinic, a person donating to a fund to assist individuals receiving an abortion, or even a person who simply discusses getting an abortion with someone. (Tex. Health & Safety Code § 171.208.) The Texas law provides that any person, other than an officer or employee of a state or local governmental entity in Texas, 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

"the effect of denying the exercise of what we have held is a right protected under the Federal Constitution" and was "designed to shield its unconstitutional law from judicial review." (footnote omitted).

⁵ *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 530.

⁶ See *Whole Woman's Health v. Jackson* (2021) 141 S. Ct. 2494, at 24998 (dis. opn. Sotomayor, Breyer, & Kagan).

⁷ Selena Simmins-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges On 'Fetal Heartbeat.'* *Doctors Call That Misleading*, NPR (May 3, 2022), available at <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion>.

prohibited from recovering their own costs and fees if they prevail. (*Id.* at § 171.201(b) & (i).) Other states are already following suit. Idaho enacted a similar law via Idaho Senate Bill 1309; however, the implementation of that bill has been stayed by the Idaho Supreme Court pending further action of that court.⁸ Similar legislation has also been introduced in Arizona, Florida, Minnesota, and Wisconsin.⁹ In Missouri, an amendment was introduced that expressly allows civil suits to punish those who would help a person obtain an abortion out of state.¹⁰

d. Two women were imprisoned for the death of their unborn fetus even though California law prohibits this

California's murder statute provides that murder is the unlawful killing of a human being, or a fetus, with malice aforethought but specifically provides that it does not apply when "the act is solicited, aided, abetted, or consented to by the mother of the fetus." (Pen. Code § 187(a) & (b)(3).) However, two women were recently charged and imprisoned for their pregnancy losses in California.¹¹ Eventually their charges were dismissed, but not until after one of the woman spent 16 months in jail and the other nearly four years.¹² One of the District Attorneys has already avowed to refile charges.

As noted in a press release from the Attorney General's Office:

In December 2017, Ms. Perez suffered a stillbirth at a hospital in Kings County. Shortly after, she was wrongfully charged by the District Attorney with murder under California Penal Code section 187 (PC 187), allegedly for causing the death of a fetus through drug use. To avoid the potential penalties associated with that murder charge, Ms. Perez originally pled to a voluntary manslaughter charge under California Penal Code section 192 (PC 192) and was sentenced to 11 years in prison. During the course of Ms. Perez's challenges to her convictions, Attorney General Bonta argued that both the text of the statutes and evidence of the intent of the Legislature confirm that California's laws do not criminalize a person's own actions that might result in a pregnancy loss.

⁸ Order Granting Motion to Reconsider, Idaho Supreme Court, Docket No. 49615-2022, Apr. 8, 2022 available at <https://coi.isc.idaho.gov/docs/Supreme/49615-2022/040822%20Order%20Granting%20Motion%20to%20Reconsider.pdf>.

⁹ 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>.

¹⁰ Caroline Kirchener, *Missouri lawmaker seeks to stop residents from obtaining abortion out of state*, Washington Post (Mar. 8, 2022), available at <https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/>.

¹¹ Sam Levin, *She was jailed for losing a pregnancy. Her nightmare could become more common*, The Guardian (Jun. 4, 2022), available at <https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roe-v-wade>; Nigel Duara, *Prosecutor vows to refile murder charge against woman who delivered stillbirth*, CalMatter (May 10, 2022), available at <https://calmatters.org/justice/2022/05/stillbirth-murder-perez-prosecutor-abortion/>.

¹² *Ibid.*

In March 2022, the Kings County Superior Court issued a decision ruling that the conviction under PC 192 is unlawful and ordered further proceedings in superior court. The court directed the parties to appear for a subsequent hearing that would have allowed Ms. Perez to argue that murder under PC 187 does not cover the conduct or omissions of pregnant persons resulting in stillbirth. Today, the Kings County District Attorney entirely dismissed the charge originally brought against Ms. Perez.¹³

Existing state law provides that all fetal deaths at or after 20 weeks, with the exception of abortions, are treated as “unattended deaths” and require a coroner to investigate. According to the sponsors of the bill these provisions lead to health care providers and institutions reporting people who have just given birth, had an abortion, or experienced a pregnancy loss to police, triggering harmful investigations and even unlawful prosecutions:

This threat of criminal prosecution has a harmful effect on individual and public health, because people who fear prosecution due to their health issues are deterred from seeking care. This is a critical issue for Black, Indigenous, and other people of color, who are more likely to experience adverse pregnancy outcomes as a result of systemic racial inequities¹⁴ and also more likely to be under scrutiny of punitive state systems.¹⁵ It is also a concern for immigrants, queer and trans people, young people, and others who may self-manage abortions because care in formal medical systems is inaccessible.

3. The bill seeks to strengthen the right reproductive freedom

This bill, in response to all the issues raised above, seeks to ensure that no one in the State of California is investigated, prosecuted, or incarcerated from ending a pregnancy or experiencing a pregnancy loss and that their right to reproductive freedom is protected.

¹³ Attorney General, *Attorney General Bonta Issues Statement on Dismissal of Murder Charge Against Adora Perez for Loss of Pregnancy* (May 9, 2022), available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-statement-dismissal-murder-charge-against-adora>.

¹⁴ E.g., Pruitt et al. Racial and Ethnic Disparities in Fetal Deaths – United States, 2015–2017, 69 *MMWR Morb Mortal Wkly Rep* 1277 (2020).

¹⁵ See Hinton et al., Vera Institute of Justice Evidence Brief, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (May 2018); Bridges, *Privacy Rights and Public Families*, 34 *Harvard J. L. & Gender* 113 (2011); Children’s Bureau, U.S. Dept. of Health & Human Servs., *Child Welfare Practice to Address Racial Disproportionality and Disparity* (April 2021).

- a. *Authorizes a private right of action for violation of rights under the Reproductive Privacy Act*

The bill authorizes a civil action against an offending state actor in state superior court for violating rights protected under the Reproductive Privacy Act, with the goal of allowing persons who have had their rights violated by a state actor to seek some accountability. Specifically the bill:

- Authorizes a party aggrieved by conduct or regulation in violation of the Act to bring a civil action against an offending state actor in a state superior court.
- Provides that whoever denies a right protected by the Act, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right.
- Authorizes a civil penalty of \$25,000 to be awarded to a person denied their rights protected by the Act, and requires an action to be commenced within three years of the alleged practice in violation of the Act.
- Provides that, upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in such an action.
- Specifies that Sections 825, 825.2, 825.4, and 825.6 of the Government Code, which provide for defense and indemnification of an employee or former employee of a public entity, apply to any such cause of action against an employee or former employee of a public entity.
- Authorizes preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct.

Additionally, the bill specifically includes 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 within the legislative findings and declarations of the Reproductive Privacy Act that every individual possesses a fundamental right of privacy with respect to reproductive decisions. The bill also restates in the Reproductive Privacy Act that a person shall not be subject to civil or criminal liability or penalty, or be otherwise deprived of their rights under that act, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death due to causes that occurred in utero.

- b. *Authorizes cause of action under the Bane Civil Rights Act for violation of rights under the Reproductive Privacy Act*

The Bane Act provides a right of action against a person who interferes with the rights of an individual afforded by the United States and California constitutions, and other federal and state laws. The Bane Act states that the interference, or attempted interference, with an individual's rights must be by "threat, intimidation, or coercion." An action can be brought by the Attorney General or any district attorney or city attorney in California for injunctive and other equitable relief, "in order to protect the peaceable exercise or enjoyment of the right or rights secured." The prosecuting entity may also seek a civil penalty of \$25,000 to be assessed individually against each person violating this law. Such penalties are provided to the individuals whose rights are determined to have been violated.

Last year in SB 2 (Bradford, Ch. 409, Stats. 2021), the Bane Act was amended to provide that the immunity provisions in Government Code sections 821.6, 844.6, and 845.6 do not apply to Bane Act claims brought against any peace officer or custodial officer, or directly against a public entity that employs such officers. Section 821.6 provides that public employees are not liable for injury caused by their instituting or prosecuting any judicial or administrative proceeding within the scope of their employment, even if they act maliciously and without probable cause." The courts have interpreted this section to grant extremely broad immunity to prosecutors and their discretionary acts, including whether to initiate criminal charges. In *Sullivan v. County of Los Angeles* (1974) 12 Cal. 3d 710, the California Supreme Court interpreted section 821.6 as providing immunity of public employees against malicious prosecution claims and noted that "no statute imposes liability on public entities for malicious prosecution." as "confining its reach to malicious prosecution actions." (*Id.* at p. 720.)

This bill specifically authorizes a person to bring an action under the Bane Act for violations of the Reproductive Privacy Act. A person could bring such an action already; however, the bill makes several changes to the existing provisions of the Bane Act to address the unique circumstances the bill is trying to address. First, the bill specifies that, for purposes of establishing liability, the criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, constitutes "threat, intimidation, or coercion" pursuant to the Bane Act. Second, the bill provides that notwithstanding the existing immunities in Section 821.6 of the Government Code, a civil action pursuant to the Bane Act may be based upon instituting or prosecuting any judicial or administrative proceeding in violation of the Reproductive Privacy Act.

As the Assembly Judiciary Committee analysis notes, the broad immunity granted by Section 821.6 of the Government Code:

[...] has given inadequate recourse to plaintiffs harmed (including by being imprisoned for decades) by unconscionable prosecutorial misconduct, including fabricating evidence and negotiating a plea deal for which there clearly is no factual basis (such as a manslaughter conviction based upon the death of an unborn fetus). In the *Perez* case,[referenced] [...] above, it means that [Ms. Perez] has no recourse after spending 11 years in prison, locked up for a crime that does not exist, other than pursuing an inadequate amount of compensation from the state fund for erroneously convicted persons.¹⁶

c. Changes statutes related to coroner's duties regarding fetal deaths

The bill deletes the existing duty of the coroner to inquire into and determine the circumstances, manner, and cause of all deaths related to or following known or suspected self-induced or criminal abortion by repealing Section 103000 of the Health and Safety Code. The bill clarifies that existing law requiring a coroner to examine a fetus and state on the certificate of fetal death certain information, such as the time of fetal death and the direct causes of the fetal death, cannot be used to establish, bring, or support a criminal prosecution or civil cause of action seeking damages against any person, whether or not they were the person who was pregnant with the fetus. The author may wish to clarify that this change is not intended to prevent the information included by the coroner from being used to support a criminal prosecution when the fetal death was not the result of an act solicited, aided, abetted, or consented to by the mother of the fetus to align the bill's provisions more closely with the author's stated intent and the current provisions in Section 187 of the Penal Code.¹⁷

4. Statements in support

The sponsors of the bill – ACLU California Action, Black Women for Wellness, California Latinas for Reproductive Justice, If/When/How: Lawyering for Reproductive Justice, NARAL Pro-Choice California, and Planned Parenthood Affiliates of California – write in support:

[...] It is not a crime to have an abortion, miscarriage, or experience pregnancy loss. Nevertheless, despite clear law forbidding these charges and protecting the right to make decisions about pregnancy, Californians have been charged with homicide offenses for pregnancy losses. Worse, there is frequently no recourse for people who have been harmed by the legal system as a result of their

¹⁶ Asm. Judiciary Comm. Analysis of Asm. Bill 2223 (2021-2022 Reg. Sess.) as amended Mar. 17, 2022 at p. 13.

¹⁷ A civil cause of action cannot arise under existing California law for injury or death to a fetus if the fetus is never alive outside of the womb. (See *Hegyesh v. Unjian Enterprises, Inc.* (1991) 234 CA3d 1103.)

pregnancy loss or self-managed abortion. A critical part of realizing reproductive justice for all Californians is to ensure that this never happens again. [...]

AB 2223 protects reproductive freedom by clarifying that the Reproductive Privacy Act affirms people's right to be free from investigation, prosecution, and incarceration based on their pregnancy outcomes: whether they have an abortion or experience a pregnancy loss.

It curbs the misuse of state power by eliminating out-of-date provisions that give coroners a duty to investigate certain abortions and pregnancy losses. This helps prevent the harmful investigations and even unlawful prosecutions that happen when abortions and pregnancy losses are reported as though they were crimes. It also ensures that information collected about pregnancy loss is not used to target people through criminal or civil legal systems.

AB 2223 holds state actors accountable by creating a private right of action for people whose rights have been violated by criminalization of their reproductive outcomes, allowing people to seek justice through the civil courts.

5. Statements in opposition

The Right to Life League writes in opposition:

In its attempt to protect women from prosecution for abortion, AB 2223's overbroad language creates a host of unforeseen legal ramifications. The bill potentially de-regulates abortion and overrides existing medical protections for women by creating a class of cooperating individuals unaccountable to state licensing agencies or regulations.

AB 2223 goes much further than simply shielding pregnant people from prosecution; it provides total civil and criminal immunity for the actions (whether legal or illegal) of anyone who aids and assists the pregnant person from civil and criminal liability - so long as the pregnant person consents.

AB 2223 will chill proper investigations of abortion cooperators (not just the pregnant person) by granting penalties, including attorney's fees against anyone who even threatens an investigation including law enforcement, medical professionals and mandated reporters.

AB 2223 should be rejected as incompatible with existing laws protecting women's health. (emphasis omitted)

SUPPORT

ACLU California Action (sponsor)
Black Women for Wellness Action Project (sponsor)
California Latinas for Reproductive Justice (sponsor)
If/When/How: Lawyering for Reproductive Justice (sponsor)
NARAL Pro-choice California (sponsor)
Planned Parenthood Affiliates of California (sponsor)
Access Reproductive Justice
American Association of University Women
American College of Obstetricians and Gynecologists District IX
Asian Americans Advancing Justice - California
California Coalition for Women Prisoners
California for Safety and Justice
California Nurse Midwives Association (CNMA)
California Women's Law Center
Californians United for a Responsible Budget
Citizens for Choice
Courage California
Culver City Democratic Club
Disability Rights California
Ella Baker Center for Human Rights
Fund Her
Initiate Justice
Lieutenant Governor Eleni Kounalakis
Nevada County Citizens for Choice
National Center for Youth Law
National Health Law Program
Physicians for Reproductive Health
Public Health Advocates
Smart Justice California
Stronger Women United
Survived & Punished
Tides Advocacy
Urge: Unite for Reproductive & Gender Equity
Voices for Progress Education Fund
Women's Foundation California

OPPOSITION

Americans United for Life
California Capitol Connection
California Family Council
California ProLife Council
Californians for Life

Calvary Chapel of Placerville
Capitol Resource Institute
Catholic Families 4 Freedom CA
Children's Health Defense, California Chapter
City of Fillmore
Concerned Women for America
Defending Constitutional Rights
Eagle Forum of California
Faith Baptist Church of Wheatland
Feather River Tea Party Patriots
Frederick Douglass Foundation of California
Freedom of Religion - United Solution
Liberty Baptist Church of Norwalk, CA
NorthCreek Church
Pacific Justice Institute
Real Impact
Right to Life League
Right to Life of Kern County
Siskiyou Conservative Republicans
The American Council for Evangelicals
The Center for Bio-Ethical Reform
The National Center for Law & Policy
The Salt and Light Council
The Turning Point Church
Traditional Values for Next Generations

RELATED LEGISLATION

Pending Legislation:

SCA 10 (Atkins & Rendon, 2022) expressly provides that the state shall not deny or interfere with an individual's reproductive freedom in their most intimate choices, which includes the fundamental right to choose to have an abortion and the fundamental right to choose or refuse contraceptives. SCA 10 is set to be heard on the same day as this bill.

AB 1666 (Bauer-Kahan, 2022) prohibits the enforcement of out-of-state fetal heartbeat abortion restriction laws in California. AB 1666 is set to be heard on the same day as this bill.

AB 2091 (Mia Bonta, 2022), among other things, prohibits 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 2091 is set to be heard on the same day as this bill.

Prior Legislation:

SB 2 (Bradford, Ch. 409, Stats. 2021), see comment 3)b) above.

SB 1301 (Sheila Kuehl, Ch. 385, Stat. 2002) enacted the Reproductive Privacy Act, which provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions, including the fundamental right to choose or refuse birth control, and the fundamental right to choose to bear a child or obtain an abortion.

PRIOR VOTES:

Assembly Floor (Ayes 48, Noes 21)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Health Committee (Ayes 11, Noes 3)

Assembly Judiciary Committee (Ayes 7, Noes 2)
