

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

SCA 10 (Atkins and Rendon)  
Version: June 8, 2022  
Hearing Date: June 14, 2022  
Fiscal: No  
Urgency:  
AM

**SUBJECT**

Reproductive freedom

**DIGEST**

This constitutional amendment expressly provides 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. The measure states it is intended to further the right to privacy and the right to not be denied equal protection, as guaranteed by the California Constitution, and states that it does not narrow or limit the right to privacy or equal protection.

**EXECUTIVE SUMMARY**

Since 1973, the U.S. Supreme Court has continuously held that it is a federal constitutional right to access abortion before fetal viability; however, the Court is reviewing a case that directly challenges this precedent. On May 3 of this year, it was reported that the Court had voted to strike down that right according to a leaked draft of the initial majority opinion, which has not been officially published. In response to this threat to reproductive freedom, this constitutional amendment seeks to expressly codify the fundamental right to choose to have an abortion in the California Constitution, and that the state may not interfere with a person's reproductive freedom, including the right to choose or refuse birth control.

The constitutional amendments is sponsored by ACCESS REPRODUCTIVE JUSTICE, Black Women for Wellness Action Project, Essential Access Health, NARAL Pro-Choice California, National Health Law Program, and Planned Parenthood Affiliates of California. It is supported by the County of San Diego and various organizations, including reproductive rights and privacy rights organizations and medical associations. It is opposed by organizations against the fundamental right to access abortion and two individuals. If the constitutional amendment passes this Committee, it will next be heard in the Senate Elections and Constitutional Amendments Committee.

**PROPOSED CHANGES TO THE LAW**

Existing federal law:

- 1) Holds that the federal constitution's implied right to privacy extends to an individual's decision about whether or not to have an abortion. (*Roe v. Wade* (1973) 410 U.S. 113.)
- 2) Authorizes the government to impose restrictions on abortion as long as those restrictions do not create an undue burden on an individual's right to choose to terminate a pregnancy. (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833.)
- 3) Holds that individuals have the right to obtain and use contraceptives under the federal constitution's implied right to privacy. (*Griswold v. Connecticut* (1965) 381 U.S. 479; *Eisenstadt v. Baird* (1972) 405 U.S. 438.)

Existing state 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) 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.)
- 3) 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.)
- 4) 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 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; and
  - b) every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions. (Health & Saf. Code § 123460 et. seq., § 123462(a)-(b).)
- 5) 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 & Saf. Code § 123462(c) & § 123466.)

This constitutional amendment:

- 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.
- 2) Specifies that the constitutional amendment is intended to further the constitutional right of privacy guaranteed by Section 1 of the California Constitution and the constitutional right to not be denied equal protection guaranteed by Section 7 of the California Constitution.
- 3) Specifies that nothing herein narrows or limits the right to privacy or to equal protection.

### COMMENTS

#### 1. Stated need for the constitutional amendment

The authors write:

The United States Supreme Court is expected to use a pending case to strike down the reproductive rights enumerated in *Roe v. Wade* – and allow states across the country to ban access to safe, affordable reproductive health care and lead to the creation of insurmountable challenges to access in many communities.

In light of this possibility, we need to act now to ensure that the right to choose to have an abortion and use contraceptives continues to be protected in California and that important reproductive health and intimate decisions are left to a person and their providers with the backing of science and evidence-based medicine.

The passage of this SCA will allow individuals and families to continue to have the freedom to determine what is best for them and their families, giving people the ability to plan their lives and make intimate reproductive decisions without the government interfering.

Although California law provides meaningful protections for reproductive rights against state interference, the leaked draft opinion from the U.S. Supreme Court highlights how California will no longer be able to rely on long-standing federal protections. Expressly stating a fundamental right to choose to have an abortion or contraceptives in the state constitution will protect against potential future attacks at the federal level and erosion by the courts in the future. SCA 10 continues California's commitment in furthering privacy and equal protection of a person's reproductive freedom and enshrines that in our state Constitution.

2. Reproductive freedom is a fundamental right

a. *The use of contraceptives has been a federal constitutional right since 1965*

The U.S. Supreme Court held in *Griswold v. Connecticut* that a state's ban on the use of contraceptives by married couples violated the right to marital privacy. ((1965) 381 U.S. 479.) A Connecticut law criminalized the encouragement or use of birth control by any person. Estelle Griswold and Dr. C. Lee Buxton were arrested and found guilty under that law. They appealed their convictions to the U.S. Supreme Court arguing the state law violated the U.S. Constitution. The Court agreed finding that the case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and that the state law "seeks to achieve its goals by means of having a maximum destructive impact upon that relationship." (*Id.* at 485.)

In *Griswold*, the majority opinion looked to prior cases that recognized individuals have the right to make decisions about life and associations without undue state interference and used these precedential decisions to find that various provisions of the Constitution (First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, and Ninth Amendment) create "zones of privacy" and that "the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights." (*Id.* at 487.) In 1972, the Court expanded the holding in *Griswold* to also apply to unmarried individuals finding that under the Equal Protection Clause "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." (*Eisenstadt v. Baird* (1972) 405 U.S. 438, 453.)

b. *Access to abortion has been a federal constitutional right since 1973*

*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.) 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.

*Roe* has been one of the most debated U.S. 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).)

*c. The U.S. Supreme Court is reported to have voted to overturn the holding in Roe and Casey*

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 initial draft of the majority opinion in *Dobbs*, which was written by Justice Alito.<sup>1</sup> 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. The case involves a Mississippi law enacted in 2018 that bans 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.) In the leaked opinion, the majority 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.<sup>2</sup> If the Court does vote to overturn the holding in *Roe*, as many as 21 states will certainly ban abortion and a further five very likely will due to the political make-up of their governments and historical actions.<sup>3</sup> According to the Guttmacher Institute, nine states still have abortion bans in their statutes from before *Roe* was decided and 12 other states currently have trigger bans that would go into effect if it is overturned.<sup>4</sup>

Justice Alito, in the leaked draft opinion, attempts to justify the overturning of *Roe* and *Casey* by stating the:

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<sup>1</sup> 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>.

<sup>2</sup> Leaked 1<sup>st</sup> 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).

<sup>3</sup> Elizabeth Nash, *26 States are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, Guttmacher Institute (Oct, 2021) available at <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why>.

<sup>4</sup> *Ibid.*

[federal] Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely – the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in the Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’<sup>5</sup> (citation omitted)

He then attempts to assuage any concerns that other rights may be in jeopardy of being summarily overturned by stating the opinion should not be understood as casting doubt on other precedential decisions that do not relate to abortion.<sup>6</sup> However, this is cold comfort to anyone concerned about the status of other rights found to be within the penumbra or zone of privacy as elucidated in *Casey* and expounded upon by the Court since.

The opinion’s assertion that rights not explicitly mentioned in the Constitution must be deeply rooted in the history and traditions of the nation in order to be guaranteed by the Constitution leaves other decisions establishing important rights vulnerable. These rights include access to contraception,<sup>7</sup> right to interracial marriage,<sup>8</sup> right of same sex couples to engage in intimate sexual conduct,<sup>9</sup> and the right to same-sex marriage,<sup>10</sup> as all of these rights were at one time prohibited under the laws of this nation. And these fears are not unfounded. In response to a question about whether Mississippi would consider banning forms of birth control, which was asked after the leaked opinion was posted, Mississippi Governor Tate Reeves stated that the state is not focused on that issue at this time.<sup>11</sup> Additionally, some conservative politicians have publicly stated their disapproval of *Griswold*, including two current sitting U.S. Senators – Marsha Blackburn and Mitt Romney.<sup>12</sup> In 2020, Justice Thomas issued a statement in a denial for a petition of a writ of certiorari, with which Justice Alito joined, expressing hostility to the holding in *Obergefell*, which held that there is a constitutional right to same-sex marriage, stating the Court “created a problem that only it can fix.” (*Davis v. Ermold* (2020) 592 U.S. \_.)

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<sup>5</sup> Leaked 1<sup>st</sup> Draft of *Dobbs v. Jackson Women’s Health* (2022) \_ U.S. \_ at p. 5, 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>.

<sup>6</sup> *Id.* at 62.

<sup>7</sup> *Griswold v. Connecticut* ((1965) 381 U.S. 479; *Eisenstadt v. Baird* (1972) 405 U.S. 438.

<sup>8</sup> *Loving v. Virginia* 1967) 388 U.S. 1.

<sup>9</sup> *Lawrence v. Texas* (2003) 539 U.S. 558.

<sup>10</sup> *Obergefell v. Hodges* (2015) 575 U.S. 644.

<sup>11</sup> Paul LeBlanc, *Mississippi governor declines to rule out contraception bans, saying his state ‘isn’t presently focused’ on it*, CNN May, 9, 2022, available at <https://www.cnn.com/2022/05/08/politics/mississippi-abortion-contraception-roe-wade-cnntv/index.html>.

<sup>12</sup> Jake Thomas, *Blackburn Says SCOTUS Ruling to Protect Birth Control for Couples ‘Unsound,’* Newsweek (Mar.21, 2022), available at <https://www.newsweek.com/blackburn-says-scotus-ruling-protect-birth-control-couples-unsound-1690259>; Jeffrey Toobin, *The Republicans’ Lost Privacy*, The New Yorker (Jan. 9, 2012), available at <https://www.newyorker.com/news/daily-comment/the-republicans-lost-privacy>.

### 3. California is a Reproductive Freedom State

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.) This was the first time an individual's right to abortion was upheld in a court. 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 every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion. (Health & Saf. Code § 123462.) The Act further provides that the state may not deny or interfere with a person's right to choose or obtain an abortion with limited exceptions. (Health & Saf. 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.<sup>13</sup> 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 the state.<sup>14</sup>

This constitutional amendment explicitly provides that the state cannot deny or interfere with an individual's reproductive freedom in their most intimate decisions, including the right to choose to have an abortion and the fundamental right to choose or refuse contraceptives. It specifies that is intended to further the constitutional right to privacy and equal protection guaranteed by the state Constitution, and that it neither narrows or limits those rights. If the constitutional amendment passes the Legislature and is adopted by the voters, it will enhance the public policy of the state by expressly guaranteeing in the state constitution that individuals have a fundamental right of privacy with respect to personal reproductive choices and that these choices include the right to choose to have an abortion and the right to choose or refuse contraceptives. This will ensure that reproductive freedom remains a fundamental right in this state.

### 4. Statements in support

NARAL Pro-Choice California and Planned Parenthood Affiliates of California, sponsors of the bill, write in support:

The U.S. Supreme Court is expected to overturn the protections granted in the *Roe v. Wade* decision this month, taking away the long-standing right to abortion and eroding the underlying right to privacy. As we prepare for the Supreme Court's

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<sup>13</sup> 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>.

decision, states across the country have introduced and enacted extreme bans on abortion – restricting access for [millions](#) of people. While the California Constitution expressly protects the right to privacy and abortion will remain legal in California under our state laws, the leaked draft opinion from the U.S. Supreme Court [signals](#) that the fundamental right to privacy at the federal level is at risk.

[SCA 10 will expand California’s existing protections] by directly and explicitly protecting the right to abortion and contraception, ensuring further protection against future attempts at the federal level to restrict or ban abortion access, and from any state actions that may interfere with this right in the future. California has long been a leader in the fight for sexual and reproductive health care, reproductive autonomy, and basic human rights – this Senate Constitutional Amendment lays the groundwork to ensure California can and will continue to protect our fundamental rights.

#### 5. Statements in opposition

The Capitol Resource Institute writes in opposition:

The California [C]onstitution states in Article 1 Sect. 1, “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” We believe that it is the duty of the state’s lawmakers and law enforcement to protect and defend life everywhere. Whether inside or outside of the womb, life is protected and defended by the California constitution. Amending the constitution to codify the right to an abortion is contrary to all efforts to defend life in California. Whenever abortion takes place, an innocent life is taken. The media, legislators, and the abortion lobby have sold women the lie that they need abortion to be independent and free. The reality of abortion is that it destroys: the life of the innocent baby and the life of the mother who then has to deal with the trauma of that procedure.

#### **SUPPORT**

ACCESS REPRODUCTIVE JUSTICE (sponsor)  
Black Women for Wellness Action Project (sponsor)  
Essential Access Health (sponsor)  
NARAL Pro-Choice California (sponsor)  
National Health Law Program (sponsor)  
Planned Parenthood Affiliates of California (sponsor)  
ACLU California Action  
ACT for Women and Girls  
Blue Shield of California  
American Association of University Women California

American College of OB/GYN's District IX  
California Academy of Family Physicians  
California Association of Nurse Practitioners  
California Commission on the Status of Women and Girls  
California Faculty Association  
California Latinas for Reproductive Justice  
California Medical Association  
California Nurses Association  
California Nurses Midwives Association  
California Women's Law Center  
County of San Diego  
Equality California  
Feminist Majority Foundation  
FPA Women's Health  
If/When/How: Lawyering for Reproductive Justice  
PLAN C  
National Council of Jewish Women CA  
TEACH  
UCLA Law's Center on Reproductive Health, Law, and Policy  
Women's Foundation California  
Women's Health Specialists

### OPPOSITION

Capitol Resource Institute  
Concerned Women for America  
Not On Our Watch  
Right to Life League  
The Sale & Light Council  
Traditional Values for Next Generations (TVNEXT)  
2 individuals

### Pending Legislation:

SB 1142 (Caballero and Skinner, 2022) establishes a web page for centralized information on services and support for those seeking abortion care, and a fund that would enable private and public sources to support the work of abortion providers and other community-based organizations that secure practical support and other needs for patients and providers. SB 1142 is pending in the Assembly Health Committee.

SB 1245 (Kamlager, 2022) establishes a reproductive health pilot project in Los Angeles County to support innovative approaches and patient centered collaborations to safeguard patient access to abortions, regardless of residency. SB 1245 is pending in the Assembly Health Committee.

SB 1375 (Atkins, 2022), among other things, authorizes nurse practitioners (NPs) who are qualified to independently practice to provide abortion services by aspiration techniques in the first trimester without having to work under existing prescribed standardized procedures and makes conforming changes. SB 1375 is currently pending in the Assembly Business and Professions Committee.

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 in this Committee 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 in this Committee on the same day as this bill.

AB 2134 (Weber, 2022) establishes a gap coverage and uncompensated care program to provide for those Californians lacking coverage for abortion and abortion-related care, including those who are uninsured and underinsured. AB 2134 is currently pending in the Senate Health Committee.

AB 2205 (Carrillo, 2022) requires the qualified health plans contracting with Covered California to report annually to the Department of Insurance and Department of Managed Health Care the total amounts of funds collected in specified segregated accounts, which were established under California's implementation of the Affordable Care Act (ACA) due to the federal restrictions on use of federal ACA funds to hold premium payment of \$1 per member per month and from which claims for abortions must be paid. AB 2205 is pending in the Senate Appropriations Committee.

AB 2223 (Wicks, 2022), among other things, authorizes 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. AB 2223 is set to be heard in this Committee on the same day as this bill.

AB 2320 (Garcia, 2022) creates a pilot program for counties to direct funds to community health clinics providing reproductive healthcare with the goal of improving healthcare delivery for marginalized patients. AB 2320 is currently pending in the Senate Health Committee.

AB 2586 (Garcia, 2022) establishes a working group with specified membership to examine the root causes of the reproductive health & sexual health inequities in California, & requires the working group to submit a report to the Legislature on or before January 1, 2024. Also creates the California Reproductive Justice & Freedom Fund to support community-based organizations to provide medically accurate, culturally congruent, comprehensive repro & sexual health education, inclusive of abortion, to disproportionately impacted communities. AB 2586 is currently pending in the Senate Health Committee.

AB 2626 (Calderon, 2022) Protects abortion providers in California by prohibiting the removal or suspension of medical licenses for a licensee providing abortion care in California who is complying with California law. AB 2626 is currently pending in the Senate Business, Professions and Economic Development Committee.

Prior Legislation:

SB 245 (Gonzalez, Ch. 11, Stats. 2022) prohibits cost-sharing, restrictions, delays, prior authorization and annual or lifetime limits on all abortion services, including follow-up services.

SB 24 (Leyva, Ch. 740, Stats. 2019) requires student health centers located on a University of California or California State University campus that provide primary health care services to students to offer abortion by medication onsite, as provided.

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