



---

Spring 5-28-2024

## **Bans Beyond Borders: Entrenching Out-of-State Abortion Bans and California's Attempt to Shield its Medical Providers from Liability**

Anja Alexander

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>

---

### **Recommended Citation**

Anja Alexander, *Bans Beyond Borders: Entrenching Out-of-State Abortion Bans and California's Attempt to Shield its Medical Providers from Liability*, 57 Loy. L.A. L. Rev. 83 (2024).

Available at: <https://digitalcommons.lmu.edu/llr/vol57/iss1/3>

This Developments in the Law is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# **BANS BEYOND BORDERS: ENTRENCHING OUT-OF-STATE ABORTION BANS AND CALIFORNIA'S ATTEMPT TO SHIELD ITS MEDICAL PROVIDERS FROM LIABILITY**

*Anja Alexander\**

*Since the Dobbs v. Jackson Women's Health Organization opinion stripped U.S. citizens of the constitutional right to obtain pre-viability abortions, individual states have been vested with the power to regulate the procedure within their borders. As a result, many states have banned early-term abortions, while some have drafted bans that attempt to extend beyond their borders, aiming to impede the ability of their citizens to travel to other states and obtain the procedure where it is legal. These confusing and intentionally vague abortion bans have had a chilling effect on health care throughout the United States as medical professionals fear potential legal liability for performing abortions on out-of-state citizens. In response, abortion-supportive states such as California have drafted laws that preserve access to pre-viability abortions and shield abortion providers from out-of-state liability. But this interstate conflict of laws begs the question: will these shields be effective at limiting liability, or can they be penetrated by other states' abortion bans? This Note argues that California's new abortion shield laws will likely survive constitutional scrutiny if challenged. However, California should go further than simply maintaining its abortion protections by actively anticipating new legal tactics from anti-abortion states, bolstering its existing protections, and drafting new laws in light of the ever-changing abortion access landscape. Recognizing that these protections may only narrowly survive a legal challenge and that anti-abortion states continue to test the boundaries of Dobbs, California must not be lulled into a false sense of security behind these shield laws, the overturn of which would weaken the foundation of all abortion protection laws nationwide.*

---

\* J.D. Candidate, May 2024, LMU Loyola Law School, Los Angeles; B.S., University of Nevada, Reno. I would like to thank the tireless staff and editors of the *Loyola of Los Angeles Law Review* for their dedication and hard work. I would also like to thank the scholars and journalists cited in this Note as well as human rights advocates who continue to fight for equality in healthcare. Lastly, I would like to give special thanks to Dean Brietta Clark for her expertise and crucial feedback. All opinions and mistakes are mine alone.

## TABLE OF CONTENTS

INTRODUCTION .....	85
I. UNLIMITED LIABILITY: ANTI-ABORTION STATE ATTACKS ON ABORTION PROVIDERS .....	92
A. Criminal Penalties.....	93
B. Civil Lawsuits.....	98
C. Administrative Discipline.....	103
D. The Result: A Chilling Effect on Abortion Providers ....	107
II. CALIFORNIA'S ANTICIPATORY RESPONSE .....	110
A. Protection from Criminal Arrests and Investigations: A.B. 1242.....	111
B. Protection from Civil, Criminal, and Administrative Laws: S.B. 345.....	112
C. Protection from Out-of-State Civil Laws and J udgments: A.B. 1666 .....	114
D. Protection from Administrative Discipline: A.B. 2626..	115
E. Laying the Groundwork for Interstate Challenge .....	115
III. THE CONSTITUTIONAL CHALLENGE: FULL FAITH AND CREDIT .....	116
A. Current Doctrine: Background and Application of the Full Faith and Credit Clause .....	116
B. Challenges to California's Legislative Strategy to Shield Providers from Out-of-State Attacks.....	118
1. California's Refusal to Recognize Out-of-State Judgments .....	118
2. California's Refusal to Apply Out-of-State Laws.....	119
a. Choice-of-law rule.....	120
b. Refusing jurisdiction .....	121
IV. ANALYSIS: CAN CALIFORNIA CLAIM AN EXCEPTION? .....	122
A. The Penal Exception and the Judgments Enforcement Bars .....	122
B. The Public Policy Exception and the Venue Bar.....	127
CONCLUSION .....	129

## INTRODUCTION

On June 24, 2022, the U.S. Supreme Court overturned *Roe v. Wade*,<sup>1</sup> the landmark ruling that established the constitutional right to abortion.<sup>2</sup> Now that individual states have the power to decide whether this routine medical procedure may be performed, almost half of all states (“anti-abortion” states) have banned or severely restricted the procedure from occurring within their borders.<sup>3</sup> But should those anti-abortion states be allowed to penalize actors in other states (“abortion-supportive” states) who assist in providing abortions to residents of their anti-abortion states?<sup>4</sup> For example, should Texas be permitted to enforce a law that punishes California doctors for providing abortions in California to Texas residents?<sup>5</sup> With California overwhelmingly voting to enshrine reproductive freedom in its state constitution—effectively granting bodily autonomy for women and other persons who may become pregnant<sup>6</sup>—the state has a keen interest in protecting itself from other states’ attempts to intimidate and penalize abortion seekers and out-of-state providers.<sup>7</sup> To address this issue, California recently passed a package of bills aimed at protecting medical providers who perform lawful abortions from liability in states where the procedure is banned or restricted.<sup>8</sup> But in a world where there is no

---

1. 410 U.S. 113 (1973).

2. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

3. As of January 8, 2024, near-total bans have been enacted in fourteen states: Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. The U.S. Supreme Court will hear a challenge to Idaho’s ban in April. Arizona, Florida, Georgia, Nebraska, North Carolina, South Carolina, and Utah have not completely banned the procedure but have gestational limits, ranging from six to eighteen weeks. Judges in Iowa, Montana, Ohio, and Wyoming have blocked bans for now. See Allison McCann et al., *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Jan. 8, 2024, 9:30 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/47LW-QJM6>].

4. Throughout this Note, “anti-abortion” is used to describe states with laws that have limited the ability to obtain an abortion at any time before viability. By contrast, “abortion-supportive” is used to describe states with laws that have maintained the ability to obtain an abortion prior to a twenty-two-week gestational age. See *id.* (defining the earliest gestational age at which states consider abortion “legal” as twenty-two weeks).

5. See S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

6. Press Release, Off. of Governor Gavin Newsom, *Historic California Constitutional Amendment Reinforcing Protections for Reproductive Freedom Goes into Effect* (Dec. 21, 2022), <https://www.gov.ca.gov/2022/12/21/historic-california-constitutional-amendment-reinforcing-protections-for-reproductive-freedom-goes-into-effect/> [<https://perma.cc/2S7F-FSUL>].

7. See generally discussion *infra* Part I (detailing several states’ efforts to hold out-of-state abortion providers criminally or civilly liable).

8. Press Release, Off. of Governor Gavin Newsom, *New Protections for People Who Need Abortion Care and Birth Control* (Sept. 27, 2022), <https://www.gov.ca.gov/2022/09/27/new-protections-for-people-who-need-abortion-care-and-birth-control/> [<https://perma.cc/N6H5-QDQ6>].

longer a fundamental right to abortion, will these laws be sufficient? Recent actions of the U.S. Supreme Court suggest an uphill battle.<sup>9</sup>

For the past five decades, as a result of *Roe*, abortion up to a certain point was constitutionally protected in all states.<sup>10</sup> In that case, the U.S. Supreme Court ruled that states could not prohibit abortion before viability: the point at which the fetus was thought to be able to survive outside the womb.<sup>11</sup> Then, in 1992, *Planned Parenthood v. Casey*<sup>12</sup> upheld *Roe* but implemented a new “undue burden” standard, holding that states could not prohibit abortion by placing a “substantial obstacle” in the path of a woman seeking an abortion before viability.<sup>13</sup> In overruling those cases, *Dobbs v. Jackson Women’s Health*<sup>14</sup> returned to the “rational-basis review” standard for laws governing abortion.<sup>15</sup> Because this standard is the lowest possible hurdle for laws to overcome,<sup>16</sup> every state abortion law is now entitled to a “strong presumption of validity” and “must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.”<sup>17</sup> Such legitimate interests could be “respect for and preservation of prenatal life at all stages of development,” “the elimination of particularly gruesome or barbaric medical procedures,” and “the mitigation of fetal pain.”<sup>18</sup> With this new standard, and without the constitutional protection of pre-viability abortion, the issue has been returned to the states and “the people’s elected representatives” to decide.<sup>19</sup>

---

9. See generally *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (refusing to block Texas’s controversial S.B. 8 law allowing anyone to sue abortion providers or those who aid or abet abortion care despite there still being a constitutional right to abortion at the time); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overturning fifty years of precedent and the guarantee of abortion as a fundamental right). See also *id.* at 2301 (Thomas, J., concurring) (arguing all substantive due process decisions are “demonstrably erroneous,” suggesting fundamental rights to contraception, same-sex marriage, and private sexual acts should also be reconsidered).

10. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

11. *Id.*

12. 505 U.S. 833 (1992).

13. See *id.* at 877.

14. 142 S. Ct. 2228 (2022).

15. *Id.* at 2283.

16. *Rational Basis Test*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) [<https://perma.cc/GC3M-ASFJ>].

17. *Dobbs*, 142 S. Ct. at 2284.

18. *Id.*

19. *Id.* at 2243.

As a result, the floodgates have opened, and conservative politicians and states are enacting increasingly extreme bans on abortion.<sup>20</sup> For example, some states have bans that take effect very early in pregnancy (as early as fertilization);<sup>21</sup> some have very narrow exceptions that exclude rape, incest, and medical necessity and only allow abortion in life-threatening situations;<sup>22</sup> and some treat violations as criminal, with potential punishment on par with sentences for homicide.<sup>23</sup> In response, many pregnant persons have crossed state borders to seek abortion care—an imperfect but essential alternative for abortion access.<sup>24</sup> Yet, there are indications that anti-abortion states are attempting to discourage abortions for their residents, even in states where the abortion would be lawful, effectively extending the scope of their bans beyond their own borders.<sup>25</sup> This was anticipated by U.S. Supreme

---

20. See McCann et al., *supra* note 3.

21. As of August 25, 2022, Texas has banned abortions from “fertilization until birth, including the entire embryonic and fetal stages of development.” TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2022); *see also* TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017) (defining abortion as causing or intending to cause “the death of an unborn child”).

22. All state abortion bans contain exceptions to “prevent the death” or “preserve the life” of the pregnant person, but most do not define at what point this exception applies, so providers are placed in the difficult situation of using their best judgment to protect their patients while also avoiding legal ramifications for intervening too early. *See* Mable Felix et al., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KAISER FAM. FOUND. (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services/> [<https://perma.cc/8VQN-E47V>]. Of the states with bans, only Idaho, North Dakota (in the first six weeks of pregnancy), and West Virginia have exceptions for rape or incest. Mississippi has an exception for rape, but not incest. *See* McCann et al., *supra* note 3.

23. Some states have drafted bills that propose homicide or other criminal charges for those seeking abortions, although some anti-abortion advocates have made it clear the bills “do not align with their views” and the abortion providers should be the targets of criminal abortion laws. Poppy Noor, *Republicans Push Wave of Bills That Would Bring Homicide Charges for Abortion*, GUARDIAN (Mar. 10, 2023, 6:00 PM), <https://www.theguardian.com/us-news/2023/mar/10/republican-wave-state-bills-homicide-charges> [<https://perma.cc/Y2HG-YAB3>].

24. *See* Claire Connolly, *A Year After Dobbs, More People Than Ever Are Traveling for Abortion Care*, NAT'L ABORTION FED'N (June 7, 2023), <https://prochoice.org/a-year-after-dobbs-more-people-than-ever-are-traveling-for-abortion-care/> [<https://perma.cc/898Y-EEM4>] (“The nation’s leading abortion hotline reported a 235 percent increase in plane or bus trips and a 195 percent increase in hotel room bookings in the year following Dobbs.”); *see also* Gianna Melillo, *These States Saw the Biggest Increase in Abortions After Roe’s Overturn*, THE HILL (Oct. 31, 2022), <https://thehill.com/changing-america/respect/accessibility/3712474-these-states-saw-the-biggest-increase-in-abortions-after-roes-overturn/> [<https://perma.cc/BN2R-5ES7>] (“[S]ome [states] located near states with severe restrictions or bans on the procedure reported an increase in legal abortions performed, suggesting women may have crossed state lines to receive the service.”).

25. *See, e.g.*, Sarah Varney & Maea Lenei Buhre, *Idaho Criminalizes Helping Minors Travel Out of State to Get an Abortion*, PBS (May 5, 2023, 6:35 PM), <https://www.pbs.org/newshour/show/idaho-criminalizes-helping-minors-travel-out-of-state-to-get-an-abortion> [<https://perma.cc/P8DF-F9AB>].

Court justices in the *Dobbs* dissent<sup>26</sup> as well as legal scholars<sup>27</sup> who expected anti-abortion states to reach across their borders to impose civil, administrative, and even criminal laws—not only for those who receive abortions but also for anyone who assists in providing or obtaining abortions.<sup>28</sup> Consequently, this has left abortion providers in states where abortion is technically lawful (“out-of-state providers”) feeling vulnerable and fearful of what may come, and as we see countless attempts to persecute them, this fear is not without merit.<sup>29</sup>

---

26. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Kagan, J., dissenting) (“After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provisions of information or funding, to help women gain access to other State’s abortion services. Most threatening of all, no language in today’s decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest.”).

27. See David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 2–3 (2023) (“The Supreme Court’s decision to overturn *Roe v. Wade* will usher in a new era of abortion law and access. . . . In a post-*Roe* country, states will attempt to impose their local abortion policies as widely as possible, even across state lines, and will battle one another over these choices. . . .”); see also Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J. F. 197, 197 (2022) (“Medical care procured outside a patient’s home state increasingly leaves a digital trail that will make its way back to the patient’s domicile.”); Paul S. Berman, *Conflicts of Laws and the Abortion War Between the States*, 172 U. PA. L. REV. (forthcoming 2024) (manuscript at 3) (“Out-of-state abortion activity may give rise to in-state criminal prosecutions, as anti-abortion states attempt to punish those seeking abortions beyond their borders or those who perform the procedures. Anti-abortion states are also seeking to ban the provision of abortion pills to in-state residents. . . . In addition, civil suits may be brought by citizen ‘bounty hunters’ against patients, abortion providers, their staff, and anyone who ‘aids and abets’ abortion, especially those associated with abortion funds.”).

28. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(1)–(3) (West 2021) (holding anyone civilly liable for aiding or abetting the performance of an abortion); see also Amanda Zablocki & Mikela T. Sutrina, *The Impact of State Laws Criminalizing Abortion*, LEXISNEXIS PRAC. GUIDANCE J. (Sept. 28, 2022), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-impact-of-state-laws-criminalizing-abortion> [https://perma.cc/CPF3-FHH6] (“Certain states . . . include express provisions in their statutes for civil or criminal penalties for those who aid and abet an abortion. In other states, general principles of criminal law may give rise to criminal charges for aiding and abetting, conspiring to commit a crime, or being an accessory to the crime.”).

29. See Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, NEW ENGLAND J. MED. (Aug. 4, 2022), <https://www.nejm.org/doi/full/10.1056/NEJMp2207423> [https://perma.cc/936P-58QT] (“The climate of fear created by SB8 has resulted in patients receiving medically inappropriate care. . . . SB8 has taken a toll on clinicians’ mental health; some report feeling like ‘worse doctors,’ and some are leaving the state.”); discussion *infra* Part I; see also Selena Simmons-Duffin, *Doctors Who Would Like to Defy Abortion Laws Say It’s Too Risky*, NPR (Nov. 22, 2022, 5:07 AM), <https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky> [https://perma.cc/HUJ7-LEHH] (“I would love to show my children that I am brave in the world, but our society will not allow me to be a civil-disobedient citizen in the way that some of these articles suggest, because I would be imprisoned, I would be fined, I would lose my license and I very well could be assassinated for doing that work.”); NAT’L ABORTION FED’N, 2022 VIOLENCE & DISRUPTION STATISTICS (2022), <https://prochoice.org/wp-content/uploads/2022-VD-Report-FINAL.pdf> [https://perma.cc/

Part I of this Note highlights various anti-abortion states that have passed laws aimed to prevent its residents from accessing abortions in other states by extending liability to all who “aid or abet” an abortion, regardless of where it is performed.<sup>30</sup> This part describes three threats to out-of-state abortion providers who perform the procedure where it is lawful, such as in California. First, in addition to ramping up their criminal laws regarding doctors who administer abortions within their own borders, some states have attempted to pass laws that criminalize out-of-state providers who perform the procedure on any of their citizens—even in states where the procedure is still legal.<sup>31</sup> Second, some states have resorted to creating civil liability to empower citizens to sue actors who were involved in helping anyone access abortion care in any state, clearly implicating out-of-state providers who are increasingly likely to assist patients traveling from other states.<sup>32</sup> Lastly, some states require state medical boards to discipline abortion providers, regardless of the state where the procedure was performed.<sup>33</sup> Moreover, criminal charges, civil lawsuits, and bad faith and politically motivated investigations from one state may threaten providers’ licenses and their ability to practice in other states where abortion is protected.<sup>34</sup> As a result of these threats, a chilling effect has already and will continue to cause providers to delay or refuse to perform abortions on citizens from other states, even in circumstances where physicians feel that abortion care is ethically and medically required.<sup>35</sup>

---

/PJP3-EDSV] (describing how major incidences of violence and disruption rose the year *Roe* fell: “In 2022, many anti-abortion extremists shifted their attention to protective states after dozens of clinics were forced to close in states that banned abortion.”).

30. See discussion *infra* Part I.

31. See *infra* text accompanying notes 60–78.

32. See *infra* text accompanying notes 117–135.

33. See e.g., OHIO REV. CODE ANN. § 4371.22(B)(10), (12), (14) (West 2022).

34. Beth Collis, *Ohio Licensed Physicians Risk Possible Discipline if They Perform Abortions in Ohio or Any Other State*, DINSMORE & SHOHL LLP (Aug. 3, 2022), <https://www.dinsmore.com/publications/ohio-licensed-physicians-risk-possible-discipline-if-they-perform-abortions-in-ohio-or-any-other-state/> [<https://perma.cc/A8BU-BLCW>] (“The Ohio Medical Board’s authority to discipline a physician licensed to practice medicine in Ohio for *commission of an act that constitutes a felony in Ohio, regardless of the jurisdiction in which the act was committed*, is very broad and could have a far-reaching impact for Ohio licensed physicians who perform or induce abortions not just within the borders of Ohio but also for actions outside of Ohio.”); see Elahe Izadi, *How Local Journalists Proved a 10-Year-Old’s Abortion Wasn’t a Hoax*, WASH. POST (July 28, 2022, 7:00 AM), <https://www.washingtonpost.com/media/2022/07/28/ohio-abortion-journalism/> [<https://perma.cc/8WVJ-KH9U>] (discussing a politically motivated investigation into a doctor who performed a legal abortion on a ten-year-old victim of rape).

35. Upon graduation, medical students take a Hippocratic Oath to care for their patients “to the best of [their] ability and judgment,” which may include performing a medically necessary abortion. *The Hippocratic Oath: Modern Version*, PBS: NOVA, <https://www.pbs.org/wgbh/nova>



Part II introduces California's recently implemented bill package as a direct response to these threats from anti-abortion states to protect its abortion providers and strengthen California's standing as a safe haven for abortion and pregnancy care. A.B. 1666 shields doctors from civil judgments who provide abortions to out-of-state patients.<sup>36</sup> A.B. 2626 prevents the state's medical board from suspending or revoking a doctor's license if he or she is punished for performing an abortion in any state.<sup>37</sup> A.B. 1242 prevents California-based technology companies from disclosing information—such as private text messages or geolocation data—to out-of-state law enforcement for the purpose of prosecuting doctors.<sup>38</sup> Lastly, S.B. 345 prohibits criminal laws and judgments that punish doctors who provide abortions and other reproductive health care.<sup>39</sup>

Part III describes one avenue of attack that anti-abortion states may try to use to undermine California's protections: the Full Faith and Credit Clause of the U.S. Constitution (the "Clause").<sup>40</sup> Generally, the Clause requires states to recognize and enforce all other states' public acts, records, and judicial proceedings.<sup>41</sup> For example, the

---

/doctors/oath\_modern.html [https://perma.cc/SR7H-ZQP6]. However, in many cases, state law has prevented doctors from performing this procedure. For example, in Missouri, a woman was required to carry her baby with no chance of survival because doctors were not allowed to deliver the baby. Instead, she was forced to risk her own health and travel to an abortion clinic in Illinois to receive the care she needed. See Susan Zsuch, *After Missouri Banned Abortions, She Was Left 'with a Baby Dying Inside.' Doctors Said They Could Do Nothing.*, SPRINGFIELD NEWS-LEADER (Oct. 19, 2022, 10:27 AM), <https://www.news-leader.com/story/news/local/ozarks/2022/10/19/missouri-laws-abortion-ban-left-her-with-a-baby-dying-inside-pprom/10366865002/> [https://perma.cc/Z3V2-72JZ]. Similarly in Texas, a woman almost died because doctors were not allowed to induce labor even though her baby had no chance of survival. See Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN (June 20, 2023, 7:17 AM), <https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html> [https://perma.cc/NP5S-5V5G]. In another incident in Ohio, a woman was left to bleed profusely for hours after suffering a miscarriage when doctors were afraid to treat her due to the lack of clarity in the law's meaning of "medical necessity." See Selena Simmons-Duffin, *Her Miscarriage Left Her Bleeding Profusely. An Ohio ER Sent Her Home to Wait*, NPR (Nov. 15, 2022, 12:01 PM), <https://www.npr.org/sections/health-shots/2022/11/15/1135882310/miscarriage-hemorrhage-abortion-law-ohio> [https://perma.cc/3BEZ-8VX2]. Unfortunately, these are just a few examples of the many instances where pregnant persons faced serious health risks or death because they could not receive the care they needed.

36. Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

37. Assemb. B. 2626, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

38. Assemb. B. 1242, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

39. S.B. 345, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

40. See generally U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

41. *Id.*

Clause has been used to uphold civil judgments in one state as equally valid in another state, finding that judgments are final and cannot be relitigated simply because the other state did not render the judgment.<sup>42</sup> Similarly, it has also been used to uphold one state's statutes in another state when they were inconsistent, so long as each state's interests were fairly balanced.<sup>43</sup> However, there is a rebuttable presumption that a state should apply its own laws,<sup>44</sup> and the Clause is infrequently and often inconsistently applied.<sup>45</sup> Furthermore, even if California courts rule that the state is able to uphold and apply its own laws, the U.S. Supreme Court can and has overruled such decisions, requiring forum states to apply the other state's law.<sup>46</sup> As such, it is unclear whether California would be required to adhere to the laws and judgments of anti-abortion states. Thus, a brief overview of the Clause's original intent, current interpretation, and potential exceptions are given to provide context for case analysis and comparison to a hypothetical—but not unlikely—challenge to California's abortion-protective laws. While these new laws protect abortion-seekers and their providers, they are not guaranteed to withstand scrutiny if they intentionally undermine interstate comity by refusing to enforce another state's legal actions.<sup>47</sup>

Ultimately, this Note argues that California's new abortion-supportive laws, passed in response to *Dobbs* and the U.S. Supreme Court's willingness to overturn fifty years of established precedent, are indeed constitutional and therefore should withstand challenges they may face. But these bills and other similar bills are not enough to

---

42. See, e.g., *Mills v. Duryee*, 11 U.S. 481, 485 (1813).

43. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 161–63 (1932) (finding that the Full Faith and Credit Clause required New Hampshire to apply Vermont's law because Vermont had a stronger interest in the dispute, even though the employee died while working in New Hampshire).

44. See *Alaska Packers Ass'n v. Indus. Accident Comm'n.*, 294 U.S. 532, 547–48 (1935).

45. Compare *id.* at 549–50 (allowing California to apply its own law because it had a stronger interest although a contract required Alaska's law to be applied), with *Broderick v. Rosner*, 294 U.S. 629, 642–43 (1935) (requiring New Jersey to entertain a cause of action based on a New York law), and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182–83 (1936) (requiring Georgia to apply a New York law without applying *Alaska Packers*'s rule that courts must balance states' competing interests when deciding which state's laws to apply).

46. See, e.g., *Broderick*, 294 U.S. at 638–39 (holding that the Full Faith and Credit Clause required the New Jersey courts to entertain the suit, reasoning that permitting states to deny jurisdiction to hear cases based on other states' laws would allow states to escape their constitutional obligations to give other states' public acts full faith and credit); see also *John Hancock Mut. Life Ins.*, 299 U.S. at 179–183 (holding that Georgia must apply New York law even though the Georgia Supreme Court previously ruled otherwise).

47. See, e.g., *Broderick*, 294 U.S. at 642–43.

protect abortion providers. Thus, to protect itself and its citizens, California must continue to bolster these laws and be proactive by drafting new laws against threats by anti-abortion states that attempt to enforce their bans beyond their borders, leading to a de facto national abortion ban.

### I. UNLIMITED LIABILITY: ANTI-ABORTION STATE ATTACKS ON ABORTION PROVIDERS

Overturing *Roe* is not the final destination for the anti-abortion movement.<sup>48</sup> From the beginning, the movement was about establishing the idea that “there are fundamental rights for unborn children” and they have “rights to equality under the law.”<sup>49</sup> Essentially, the end goal is to require all states—progressive and conservative—to ban abortion.<sup>50</sup> In this respect, anti-abortion groups view *Dobbs* as a limited first step.<sup>51</sup> Indeed, although the Court said it was returning the issue of abortion access to the states,<sup>52</sup> and there is evidence of impediments to abortion access in states enacting increasingly extreme bans,<sup>53</sup> the ruling may not result in a large decline in the number of abortions. The porous nature of state borders means that people in anti-abortion states will try to travel out-of-state for abortion care or purchase abortion medication online.<sup>54</sup> For these reasons, lawmakers in

---

48. Ellen Ioanes, *Dobbs Didn't End the Anti-Abortion Movement*, VOX (Jan. 21, 2023, 3:50 PM), <https://www.vox.com/policy-and-politics/2023/1/21/23564710/dobbs-anti-abortion-movement-roe-wade> [<https://perma.cc/U3HD-2XAB>].

49. Terry Gross, *Why Overturning Roe Isn't the Final Goal of the Anti-Abortion Movement*, NPR (June 23, 2023, 1:45 PM), <https://www.npr.org/2022/06/23/1106922050/why-overturning-roe-isnt-the-final-goal-of-the-anti-abortion-movement> [<https://perma.cc/QNY6-T6FH>]; see also Kate Zernike, *Is a Fetus a Person? An Anti-abortion Strategy Says Yes*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> [<https://perma.cc/P3QY-VLQU>] (“Even as roughly half the states have moved to enact near-total bans on abortion since the Supreme Court overturned *Roe v. Wade* in June, anti-abortion activists are pushing for a long-held and more absolute goal: laws that grant fetuses the same legal rights and protections as any person.”).

50. Elizabeth Dias & Ruth Graham, *Where Does the Anti-Abortion Movement Go After Roe?*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/us/anti-abortion-movement-roe-v-wade.html> [<https://perma.cc/FGV7-X42E>]; see Ioanes, *supra*, note 48.

51. See Dias & Graham, *supra* note 50; Ioanes, *supra*, note 48.

52. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2234 (2022).

53. Mabel Felix & Laurie Sobel, *A Year After Dobbs: Policies Restricting Access to Abortion in States Even Where It's Not Banned*, KAISER FAM. FOUND. (June 22, 2023), <https://www.kff.org/policy-watch/year-after-dobbs-policies-restricting-access-to-abortion/> [<https://perma.cc/52WS-VVHX>] (listing gestational limits, waiting periods, ultrasound requirements, restrictions on telehealth, physician-only requirements, and adult consent for minors as impediments to abortion access).

54. See Connolly, *supra* note 24.

conservative states are going further than *Dobbs* by granting fetal personhood weeks into pregnancy or at conception to define abortions as homicide,<sup>55</sup> and some advocate reaching beyond their borders to punish abortion providers in states where the procedure is still legal.<sup>56</sup>

### A. Criminal Penalties

Abortion was generally legal in the United States until the Victorian era. During this period, midwives and homeopaths who performed abortions—and were typically female—were criminalized to the benefit of “male-dominated scientific medicine.”<sup>57</sup> With women increasingly gaining independence, which “threatened male power and patriarchy,” the procedure was made illegal and would not become legal again until *Roe* in 1973.<sup>58</sup> But forty-nine years later, we have reverted back to the whims of Victorian jurisprudence: criminalizing the doctors who perform the procedure.<sup>59</sup>

One such method has been through the enforcement of laws that would take effect (“trigger”) when *Roe* was overturned.<sup>60</sup> In anticipation, at least thirteen states passed laws to punish doctors and/or “anyone who provides or attempts to provide abortions” by charging them with criminal penalties, in addition to civil and disciplinary

---

55. See, e.g., H.B. 167, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2022) (“Unborn children have protectable interests in life, health, and well-being and are entitled to the same rights, powers, privileges, justice, and protections as are secured or granted by the laws of this state to any other human person.”); see also ALA. CODE § 13A-6-1 (2022) (defining “person” when referring to a victim of homicide or assault as including an “unborn child in utero at any stage of development”); ARK. CODE ANN. § 5-1-102 (2020) (defining “person” as used in murder and homicide as including “unborn child at any stage of development”).

56. See, e.g., S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); see also IDAHO CODE § 18-623(3) (2023) (“It shall not be an affirmative defense to a prosecution . . . that the abortion providers or the abortion-inducing drug provider is located in another state.”).

57. Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right*, CTR. FOR AM. PROGRESS (Aug. 8, 2013), <https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/> [https://perma.cc/99NS-RP4B] (“Increased female independence was . . . perceived as a threat to male power and patriarchy, especially as Victorian women increasingly volunteered outside the home for religious and charitable causes. During the mid-19th century, American physicians also began to battle ‘irregular’ doctors, such as homeopaths and midwives, in an attempt to assert the authority and legitimacy of male-dominated scientific medicine.”); see Sarah Churchwell, *Body Politics: The Secret History of the U.S. Anti-Abortion Movement*, GUARDIAN (July 23, 2022, 4:00 PM), <https://www.theguardian.com/books/2022/jul/23/body-politics> [https://perma.cc/33XJ-P2BE].

58. Dine, *supra* note 57.

59. See *id.*

60. Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [https://perma.cc/ZP39-X2B5].

punishment.<sup>61</sup> The bans in Kentucky, Louisiana, and South Dakota went into effect automatically when *Roe* was overturned.<sup>62</sup> These laws charge doctors and others who provide abortions with a felony, sentence them from one to ten years in prison, and fine them up to \$100,000.<sup>63</sup> Other bans in Idaho, Tennessee, and Texas went into effect thirty days after *Roe* was overturned and similarly charge abortion providers with a felony and fines.<sup>64</sup> In particular, an attempted abortion in Texas would result in a second-degree felony and up to twenty years in prison—unless an “unborn child dies as a result” which amounts to a first-degree felony and carries up to ninety-nine years in prison.<sup>65</sup> Lastly, the bans in Arkansas, Mississippi, Missouri, North Dakota, Oklahoma, Utah, and Wyoming went into effect after a state official, such as the attorney general or governor, certified that *Roe* was overturned in whole or in part.<sup>66</sup> A doctor or anyone who violates these laws will be charged with a felony, face a prison sentence ranging from one to fourteen years, and be required to pay up to \$100,000.<sup>67</sup> All of these laws generally include exceptions when a pregnant person’s life is in danger, and some include exceptions for rape or incest, but the extent to which “a life is in danger” or there is a risk of “substantial and irreversible impairment of a major bodily function” is not clearly defined.<sup>68</sup>

---

61. *See id.*

62. *Id.*

63. *Id.*; see also S.D. CODIFIED LAWS § 22-6-1 (1939) (stating a class 6 felony results in “two years imprisonment in a state correctional facility or a fine of four thousand dollars, or both”); LA. STAT. ANN. § 1061.29 (1978) (“Whoever violates the provisions of this Chapter shall be fined not more than one thousand dollars per incidence or occurrence, or imprisoned for not more than two years, or both.”); KY. REV. STAT. ANN. § 532.060 (2011) (stating a class D felony results in “not less than one (1) year nor more than five (5) years” imprisonment).

64. Nash & Guarnieri, *supra* note 60; see also Erin Douglas & Eleanor Klibanoff, *Abortions in Texas Have Stopped After Attorney General Ken Paxton Said Pre-Roe Bans Could Be in Effect, Clinics Say*, TEX. TRI. (June 24, 2022, 1:00 PM), <https://www.texastribune.org/2022/06/24/texas-clinics-abortions-whole-womans-health/> [<https://perma.cc/XD2M-3JHR>] (stating that even before the thirty days was reached in Texas, “clinics and abortion funds” ceased services “because the attorney general of Texas and some anti-abortion activists” have argued that “state laws that banned abortion before *Roe v. Wade*—that were never repealed—could now be in effect”).

65. TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (WEST 2021); TEX. PENAL CODE ANN. §§ 12.32, 12.33 (West 2009).

66. Nash & Guarnieri, *supra* note 60.

67. *Id.*

68. *Id.*; see also Simmons-Duffin, *supra* note 35 (“Ohio’s heartbeat law states that abortion procedures are legal ‘when there is a medical emergency or medical necessity’ whether or not the pregnancy could still be viable. However, . . . there were numerous reports of doctors being unsure of what qualifies for this exception, leading them to delay care.”).

In addition to the laws that were already on the books, some states have passed new laws that explicitly promise prison sentences and/or fines.<sup>69</sup> For example, in Florida, Governor Ron DeSantis signed the “Heartbeat Protection Act” to ban abortions after six weeks, amending the state’s previous fifteen week ban.<sup>70</sup> Under this bill, if a doctor performs or induces an abortion after six weeks (or after fifteen weeks if the pregnancy is the result of rape, incest, or human trafficking), provides a medical abortion via telehealth, or dispenses abortion medication through the mail, he or she would be guilty of a third-degree felony and face a maximum of five years in prison.<sup>71</sup> Similarly, in Oklahoma, Governor Kevin Stitt signed a bill authorizing criminal penalties for doctors who perform an abortion, except to save the life of a pregnant person.<sup>72</sup> The punishment is a fine of up to \$100,000, a prison sentence of up to ten years, or both.<sup>73</sup> In Texas, Governor Greg Abbott signed the “Human Life Protection Act” which classifies abortion as a first-degree felony if a human “from fertilization until birth” dies as a result.<sup>74</sup> There is an exception to save the life of the mother, but otherwise, under the existing criminal code, the doctor is subject to a minimum imprisonment of five years and a maximum of ninety-nine years—in addition to a possible \$10,000 fine.<sup>75</sup> Lastly, Governor Kay Ivey of Alabama signed the “Human Life Protection Act of

---

69. See *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023, 12:01 AM), <https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs> [<https://perma.cc/8AUH-C84G>] (“Following Dobbs, 13 states’ statutes now criminalize healthcare providers who perform abortions. Penalties include up to life in prison (Texas) and fines as much as \$100,000 (Oklahoma).”); see also Jon Greenberg, *Fact-Check: Do Republicans Want to Throw Doctors Who Break Abortion Laws in Jail?*, AUSTIN-AM. STATESMAN (May 7, 2022), <https://www.statesman.com/story/news/politics/politifact/2022/05/07/fact-check-do-republicans-seek-criminalize-providing-an-abortion/9676456002/> [<https://perma.cc/6BKY-TQU2>] (arguing that while Republicans claim they do not want to throw doctors in jail, the evidence proves otherwise).

70. See S.B. 300, 2023 Leg., Reg. Sess. (Fla. 2023).

71. *Id.* (“Any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of this section [or] commits a felony of the third degree, punishable as provided in s. 775.082, s.775.083, or s. 775.084.”).

72. S.B. 612, 58th Gen. Assemb., Reg. Sess. (Okla. 2022); see also OKLA. STAT. tit. 63, § 1-731.3 (2021) (stating that any person who performs an abortion without first detecting whether the unborn child has a “heartbeat” or who performs an abortion after a “detectable heartbeat,” except to avert death or serious injury, “shall be guilty of homicide”).

73. *Id.*

74. H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

75. *Id.*; TEX. PENAL CODE ANN. § 12.32(a) (West 2009) (“An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years.”); *id.* § 12.32(b) (“In addition to imprisonment, an individual adjudged guilty of a felony of the first degree may be punished by a fine not to exceed \$10,000.”).

Alabama,” which classifies performing an abortion, except to save the life of a pregnant person, as the most serious felony: a Class A.<sup>76</sup> Thus, under the existing criminal code, if a doctor performs the procedure, he or she would be imprisoned for not more than ninety-nine years (or life) or less than ten, and face a fine of up to \$60,000.<sup>77</sup>

By enacting these bills into law (with the exception of Florida’s bill, which has yet to go into effect),<sup>78</sup> state actors from anti-abortion states have made it clear that they believe abortion is homicide and as such, abortion providers must be severely punished. But legislators and government officials anticipated that these laws would be undermined when their citizens travel to other states to receive a legal abortion—it would be as if the ban did not exist.<sup>79</sup> Rather than accept state sovereignty, some state actors have ignored their jurisdictional boundaries and extended the bans beyond their own borders by threatening abortion providers in other states.<sup>80</sup>

One such example was a Missouri bill introduced in 2021 that aimed to not only make it illegal to “aid or abet” an abortion in Missouri, but also illegal to do so in states where abortion is legal.<sup>81</sup> The bill expanded the meaning of “resident” by classifying a fetus a resident of Missouri if its mother intended to give birth within the state if carried to term, if sexual intercourse occurred within the state and the fetus *may* have been conceived by that act, if the mother sought any form of prenatal care within the state during pregnancy, and if the mother had “substantial conduct” within the state other than “mere

---

76. H.B. 314, 2019 Gen. Assemb., Reg. Sess. (Ala. 2019).

77. ALA. CODE § 13A-5-6 (1977); *id.* § 13A-5-11 (“A sentence to pay a fine for a felony shall be for a definite amount, fixed by the court, within the following limitations: For a Class A felony, not more than \$60,000.”).

78. S.B. 300, 2023 Leg., Reg. Sess. (Fla. 2023). As of September 8, 2023, the bill is not in effect because the Florida Supreme Court has yet to rule on a case that challenges the legality of the state’s fifteen-week ban. *Florida Supreme Court Hears Oral Argument in Abortion Ban Challenge*, AM. C.L. UNION (Sept. 8, 2023), <https://www.aclu.org/press-releases/florida-supreme-court-hears-oral-argument-in-abortion-ban-challenge> [<https://perma.cc/M3W8-UFQ6>] (“Unless the court blocks the 15-week ban, a separate law signed by Gov. Ron DeSantis earlier this year that bans abortion at six weeks in pregnancy . . . will automatically go into effect 30 days after the court issues its decision.”).

79. *See supra* notes 69–77; *see also* Varney & Buhre, *supra* note 25 (arguing that because many people are now traveling for abortions, Idaho has passed a law ending that option for minors and other states will likely try to do the same); *see* Connolly, *supra* note 24 (“The nation’s leading abortion hotline reported a 235 percent increase in plane or bus trips and a 195 percent increase in hotel room bookings in the year following *Dobbs*.”).

80. *See* Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow.*, POLITICO (Mar. 19, 2022, 7:00 AM), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539> [<https://perma.cc/66EM-T59U>].

81. *See* S.B. 603, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

physical presence.”<sup>82</sup> Essentially, any conduct by the mother vaguely related to Missouri would have created a state interest in the fetus, justifying enforcement of the law and threatening out-of-state abortion providers who likely would not have known if their pregnant patient stepped foot (literally or metaphorically) in Missouri at any point before they performed the procedure.<sup>83</sup> This bill would have worked in tandem with Missouri’s current ban, subjecting countless out-of-state abortion providers to five to fifteen years in prison.<sup>84</sup> While this particular bill did not pass, it indicated a strong conviction by conservative lawmakers to extend criminal liability to conduct outside of their state. And just two years later, Idaho became the first state to successfully do so.<sup>85</sup>

In April 2023, Idaho passed a law that bans adults from “abortion trafficking,” defined as “recruiting, harboring, or transporting” pregnant minors to other states for abortion care without parental consent.<sup>86</sup> As a novel law, it attempts to avoid the constitutional right to travel by only making the in-state part of the trip to an out-of-state abortion provider illegal.<sup>87</sup> Nevertheless, twenty states, including Washington, Oregon, and California, are challenging the law.<sup>88</sup> In their amicus brief, they argue that it is unconstitutional for Idaho to regulate conduct occurring outside of its own borders,<sup>89</sup> referring to a provision that states “it shall not be an affirmative defense to a prosecution . . . that the abortion provider or the abortion-inducing drug provider is located in another state.”<sup>90</sup> Furthermore, they argue that the law’s requirements are unclear, such as if “recruiting” would include

82. *Id.*

83. *See id.*

84. *See* MO. REV. STAT. § 188.017 (2022); *id.* § 558.011.

85. *See* H.B. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023); IDAHO CODE § 18-623 (2023).

86. Idaho H.B. 242.

87. *Idaho Governor Signs ‘Abortion Trafficking’ Bill into Law*, ASSOCIATED PRESS (Apr. 6, 2023, 9:48 AM), <https://apnews.com/article/idaho-abortion-minors-criminalization-b8fb4b6feb9b520d63f75432a1219588> [<https://perma.cc/4HLN-ZXER>]; *see* Idaho H.B. 242 (“[R]ecruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking.”).

88. Amicus Brief of the States of Washington et al. in Support of Plaintiffs’ Motion for a Temporary Restraining Order, *Matsumoto v. Labrador*, No. 23-cv-00323-DKG (D. Idaho July 11, 2023); *see Insee, Ferguson Say Idaho’s Abortion ‘Travel Ban’ Is Illegal*, KOMO NEWS (Aug. 1, 2023, 1:58 PM), <https://komonews.com/news/local/idaho-abortion-trafficking-law-washington-attorney-general-bob-ferguson-amicus-brief-challenge-out-of-state-care-law-increase-planned-parenthood-minors-prevental-approval> [<https://perma.cc/W2LD-L4X9>].

89. Amicus Brief of the States of Washington et al., *supra* note 88.

90. IDAHO CODE § 18-623 (2023).



a Washington provider sharing a pamphlet with a pregnant Idahoan.<sup>91</sup> As a result of this uncertainty, providers may choose to “self-censor rather than face the risk of criminal prosecution,”<sup>92</sup> placing the patient at a greater health risk and preventing providers from acting in their patients’ best interest. If allowed to stand, the likely consequences of this law—as well as other laws that may attempt to copy it—are startling because it may threaten another constitutionally protected right: the right to travel.<sup>93</sup>

### B. Civil Lawsuits

When the U.S. Supreme Court refused to block Texas’s Senate Bill 8 (S.B. 8) abortion restriction in December 2021,<sup>94</sup> it foreshadowed “an uncertain future for abortion jurisprudence” months before the constitutional right to abortion was stripped away in *Dobbs*.<sup>95</sup> Texas’s “Heartbeat Bill” banned abortions in the state after six weeks of pregnancy when alleged cardiac activity could be detected—well before most pregnant persons know they are pregnant and significantly earlier than viability at twenty-four weeks.<sup>96</sup> Thus, the bill was

---

91. Amicus Brief of the States of Washington et al., *supra* note 88.

92. *Id.*

93. See Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE (2022) (“What is commonly described as a *right to travel* is better characterized as a series of travel-related rights protected by different provisions of the Constitution: ‘the Constitution guarantees, at the very least, a right to free movement, to travel between the states, and to relocate from one state to another.’” (quoting Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367, 1381 (2021))). Stripping Americans of their constitutional right to abortion necessitated discussion of the right to travel also being stripped away. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (Kavanaugh, J., concurring) (“[S]ome of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”); *see also id.* at 2318 (Breyer, J., dissenting) (“The majority tries to hide the geographically expansive effects of its holding . . . . After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State.”).

94. *See generally* *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (denying injunctive relief because the named defendants—state-court judges, state-court clerks, and the state attorney general—were not shown to have the power to enforce S.B. 8).

95. Cathy Zhang, *Beyond Abortion: The Far-reaching Implications of SB 8’s Enforcement Mechanism*, PETRIE-FLOM CTR. HARV. L. SCH.: BILL HEALTH BLOG (Sept. 8, 2021), <https://blog.petrieflom.law.harvard.edu/2021/09/28/tx-sb8-abortion-enforcement-mechanism/> [https://perma.cc/3LWT-2Q3K].

96. *See* Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on ‘Fetal Heartbeat.’ Doctors Call That Misleading*, NPR (May 3, 2022, 4:55 PM), <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> [https://perma.cc/CJ5N-R4TA]; *see* *Roe v. Wade*, 410 U.S. 113, 160 (1973) (“Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.”).

poised to outlaw nearly all abortions.<sup>97</sup> However, at the time it was signed into law in May 2021, *Roe* and *Casey* were still in effect and abortion access before viability was still constitutionally protected.<sup>98</sup> Yet, the bill survived several legal challenges due to its “novel enforcement mechanism” that put the power in the hands of private citizens instead of state actors.<sup>99</sup> By specifying that government actors could not enforce the law—“[a]ny person, other than an officer or employee of a state or local government entity in this state, may bring a civil action . . . [and] a state official, or a district or county attorney may not intervene”<sup>100</sup>—the bill attempted to “evade judicial review.”<sup>101</sup> Abortion providers challenged the bill and sought an injunction barring state actors—including a state court judge and the Texas attorney general—from enforcement, arguing it was “inconsistent with Federal and Texas Constitutions.”<sup>102</sup> The U.S. Supreme Court granted certiorari and chose not to rule on the bill’s constitutionality but held the only state actors providers were permitted to sue were medical licensing boards because they had “specific disciplinary authority” to enforce the law.<sup>103</sup> However, the case was relegated back to the Texas Supreme Court, which held otherwise: state licensing boards did not enforce the law, so they could not be sued.<sup>104</sup> Thus, because the courts held there was essentially no state actor to sue, the substance of S.B. 8 cannot be challenged nor can its enforcement be blocked.<sup>105</sup> As such, vigilantes have been emboldened to sue anyone involved with an abortion, leading to a dramatic decrease in Texas

---

97. Simmons-Duffin & Feibel, *supra* note 96; see also Diego Zambrano et al., *The Full Faith & Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382, 383 (2023) (citing critics’ argument that S.B. 8 “indirectly nullified the then-established constitutional right to abortion”).

98. Timothy Bella, *Texas Governor Signs Abortion Bill Banning Procedure as Early as Six Weeks into Pregnancy*, WASH. POST (May 19, 2021, 9:21 PM), <https://www.washingtonpost.com/nation/2021/05/19/texas-abortion-law-abbott/> [<https://perma.cc/37CR-T7ZU>].

99. See Zhang, *supra* note 95.

100. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a), (h) (West 2021).

101. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., dissenting) (“I dissent, however, from the Court’s dangerous departure from its precedents, which establish that federal courts can and should issue relief when a State enacts a law that chills the exercise of a constitutional right and aims to evade judicial review.”).

102. *Id.* at 530 (majority opinion).

103. *Id.* at 539.

104. *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022).

105. See Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html> [<https://perma.cc/Z26Y-9RGT>]; Zhang, *supra* note 95.

abortions by forcing clinics to stop performing abortions after six weeks, even before *Dobbs* permitted this limitation.<sup>106</sup>

In addition to the novel enforcement mechanism, S.B. 8 attempted to expand the ability to sue because provable harm from the abortion was not a requirement for standing.<sup>107</sup> Legal scholars stressed this was a threat to democracy and a “radical expansion of the concept of standing.”<sup>108</sup> However, the concept was ruled out when an Illinois resident sued a Texas abortion provider who admitted to performing an abortion after six weeks.<sup>109</sup> The court held that bystanders could not sue, limiting the application of the law to those who were directly harmed by the abortion procedure.<sup>110</sup> For example, a biological parent who did not consent to an abortion could claim they were harmed by the loss of their child. Because the required extent of the harm is currently unknown, an even more distant family member such as a grandparent or cousin could potentially claim they were harmed. And since these actions can be brought against any person who “performs or induces an abortion,” “knowingly engages in conduct that aids or abets the performance or inducement of an abortion,” or “intends to engage” in that conduct, abortion providers are still at risk—even those who strictly perform legal abortions in states without these laws.<sup>111</sup> For example, if a California provider performs an abortion on a Texas woman in California—assuming jurisdictional requirements are

---

106. See Erin Douglas, *Texas Abortion Law a “Radical Expansion” of Who Can Sue Whom, and an About-Face for Republicans on Civil Lawsuits*, TEX. TRIB. (Sept. 3, 2021, 5:00 AM), <https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits/> [<https://perma.cc/D5ZF-UCPY>] (“Planned Parenthood and Whole Woman’s Health, both of which operate multiple clinics in the state, both reported canceling all abortions that violate the new law—estimated to be about 85 percent of abortions in Texas.”); see also Elena Rivera, *Abortions Decreased Dramatically in Texas in the Months After SB 8*, Study Shows, KERA NEWS (Nov. 2, 2022), <https://www.keranews.org/health-wellness/2022-11-02/texas-abortion-ban-law-sb-8-impact-study> [<https://perma.cc/CM7D-RM9L>] (“A new study from the Texas Policy Evaluation Project (TxPEP) at the University of Texas at Austin showed abortion decreased more than 30% in the six months after Texas Senate Bill 8 went into effect in September 2021.”).

107. Douglas, *supra* note 106.

108. *Id.*; see Tavernise, *supra* note 105.

109. *Texas Court Throws Out Case Against Doctor Who Violated Abortion Ban*, CTR. FOR REPROD. RTS. (Dec. 8, 2022), <https://reproductiverights.org/texas-court-throws-out-case-against-doctor-who-violated-abortion-ban/> [<https://perma.cc/7XUQ-2AWN>].

110. *Texas Court Rejects Vigilante Lawsuit Against Doctor*, CTR. FOR REPROD. RTS. (Dec. 9, 2022), <https://reproductiverights.org/texas-sb8-vigilante-lawsuit-doctor-braid/> [<https://perma.cc/NL45-WBMS>].

111. See TEX. HEALTH & SAFETY CODE § 171.208(a)(1)–(3) (West 2021); Maggie Astor, *Here’s What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html> [<https://perma.cc/G5Q2-CQ88>]; see Tavernise, *supra* note 105.

met—nothing would prevent the other biological parent or a family member from suing in Texas court.<sup>112</sup> And if the provider lost the suit, he or she would be ordered to pay the plaintiff \$10,000 as well as reimburse the plaintiff's legal fees.<sup>113</sup> To add insult to injury, the court would also place an injunction on the provider to prevent him or her from assisting other patients who need abortion care.<sup>114</sup> Even if the provider were to prevail, a lawsuit would still harm the doctor's reputation and subject them to other ramifications, such as medical license revocation.<sup>115</sup>

As expected, months after this law went into effect, many states began introducing copycat legislation or signaling their intent to do so.<sup>116</sup> For example, Idaho's "Fetal Heartbeat Preborn Child Protection Act" banned abortion after six weeks and "deputize[d] private citizens to bring civil lawsuits;"<sup>117</sup> however, only the individual who received the abortion and the individual's family would be able to sue for damages.<sup>118</sup> This is in direct contrast to Texas's bill which initially allowed anyone to sue.<sup>119</sup> A second distinction is that the Idaho law limited abortion providers as the only parties who could be sued;<sup>120</sup> Texas's bill targeted anyone who "aided or abetted" in the procedure.<sup>121</sup> These differences suggest Idaho legislators were less concerned with increasing potential lawsuits and more concerned with avoiding constitutional issues so the law would not be overturned.<sup>122</sup> But even with fewer potential plaintiffs, the damage reward is double that of Texas's law—\$20,000 for each violation.<sup>123</sup>

Oklahoma took the opposite approach, going further than Texas by immediately banning *all* abortions in the state, except in the event

112. See Astor, *supra* note 111.

113. TEX. HEALTH & SAFETY CODE § 171.208(b)(1)–(3) (West 2021); Astor, *supra* note 111.

114. TEX. HEALTH & SAFETY CODE § 171.208(b)(1) (West 2021); Astor, *supra* note 111.

115. See Cohen et al., *supra* note 27, at 45.

116. NARAL PRO-CHOICE AM., MEMO: FIFTEEN STATES AND COUNTING POISED TO COPY TEXAS' ABORTION BAN, <https://www.prochoiceamerica.org/report/memo-fifteen-states-and-counting-poised-to-copy-texas-abortion-ban/> [<https://perma.cc/7TXL-8GVK>].

117. Shefali Luthra, *Idaho Is Second State to Ban Abortion After Six Weeks*, THE 19TH (Mar. 23, 2022, 12:44 PM), <https://19thnews.org/2022/03/idaho-state-senate-votes-six-week-abortion-ban/> [<https://perma.cc/3CTN-79WL>].

118. See S.B. 1309, 66th Leg., Reg. Sess. (Idaho 2022); IDAHO CODE § 18-8807 (2023).

119. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); see also *supra* notes 109–10 (citing court ruling that an individual must have direct harm to be able to sue under S.B. 8).

120. See Idaho S.B. 1309.

121. Tex. S.B. 8.

122. See Luthra, *supra* note 117 (quoting Idaho's Governor, Brad Little, who was worried the enforcement mechanism would "be proven unconstitutional and unwise").

123. See Idaho S.B. 1309.

of an emergency.<sup>124</sup> At around the same time, the state also passed the “Oklahoma Heartbeat Act” banning abortions after a fetal heartbeat was detected around six weeks.<sup>125</sup> Both laws required civil enforcement, but their contradicting standards led to confusion as to which ban would be controlling.<sup>126</sup> Nonetheless, both were struck down in May 2023 by the Oklahoma Supreme Court.<sup>127</sup> Because they both required a “medical emergency” to occur before an abortion could be performed, the court felt that “forcing [pregnant persons] to wait for their life-saving abortions until there is a medical emergency” was too dangerous.<sup>128</sup> Oklahoma eventually amended and codified its multiple bans which now contain a more general exception to preserve the pregnant person’s life.<sup>129</sup>

At least fifteen states were “poised” to copy Texas’s civil enforcement law and may have successfully done so.<sup>130</sup> While all have the potential to impede on abortion-supportive states’ sovereignty by allowing citizens to sue abortion providers from those states, Missouri’s attempt to pass a civil enforcement law was the most blatant.<sup>131</sup> In early 2022, state Representative Mary Elizabeth Coleman proposed an amendment to several bills to allow Missouri citizens to sue anyone who helps a resident obtain an abortion in another state.<sup>132</sup> It explicitly stated that it was unlawful to perform, aid, or abet an abortion—or attempt to do so—of a resident of Missouri, by “[o]ffering or knowingly providing transportation to or from an abortion provider,” as well as various other prohibitions, “regardless of where the abortion is

---

124. H.B. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022).

125. S.B. 1503, 58th Leg., Reg. Sess. (Okla. 2022); OKLA. STAT. tit. 63, § 1-745.34 (2022) (“[A] physician shall not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child . . . or failed to perform a test to detect a fetal heartbeat.”).

126. Jordan Smith, *Oklahoma’s Total Abortion Ban Will Mean Surveillance, Criminalization, and Chaos*, INTERCEPT (May 20, 2022, 12:15 PM), <https://theintercept.com/2022/05/20/oklahoma-abortion-ban-surveillance-criminalization/> [https://perma.cc/DFY5-5J4P].

127. Peggy Dodd, *Oklahoma Supreme Court Rules Two Abortion Laws Unconstitutional*, KOSU (May 31, 2023, 12:29 PM), <https://www.kosu.org/health/2023-05-31/oklahoma-supreme-court-rules-abortion-bills-unconstitutional> [https://perma.cc/UA26-786G].

128. Catherine Sweeney, *Oklahoma Supreme Court Clarifies Medical Exemptions in the State’s Abortion Ban*, KOSU (Mar. 21, 2023, 4:54 PM), <https://www.kosu.org/local-news/2023-03-21/oklahoma-supreme-court-clarifies-medical-exemptions-in-the-states-abortion-ban> [https://perma.cc/U8MP-CM7Y].

129. See OKLA. STAT. tit. 63, § 1-738.7 (2022).

130. NARAL PRO-CHOICE AM., *supra* note 116.

131. See H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

132. See Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions Out-of-State*, WASH. POST (Mar. 8, 2022), <https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/> [https://perma.cc/EW9D-3KEGJ].

or will be performed.”<sup>133</sup> Coleman was clear that her intent was to target “the Illinois and Kansas-based doctors who handle the procedure.”<sup>134</sup> This amendment did not pass, but Republican lawmakers have not abandoned efforts to extend their reach into other states to control the actions of out-of-state physicians.<sup>135</sup>

### C. Administrative Discipline

In addition to criminal and civil liability, many anti-abortion states have stated that providers who perform abortions will be susceptible to license revocation or other forms of discipline by the Medical Board. For example, in Nebraska, the Medical Board will revoke doctors’ licenses if they perform an abortion after twelve weeks of pregnancy or if they do not follow the proper procedure for determining the gestational age of the fetus.<sup>136</sup> Similarly, in Texas, if doctors perform or attempt to perform an abortion at any gestational age—regardless of rape or incest—their licenses would be revoked and they would face additional penalties.<sup>137</sup>

As a result of these administrative penalties in some states, the Interstate Medical Licensure Compact, which “coordinates and streamlines the process by which physicians can be licensed in multiple states,” has changed its rules relating to disciplinary actions.<sup>138</sup> Previously, if a physician’s license was revoked or suspended in one state, it would also be revoked or suspended for ninety days in all forty states participating in the compact.<sup>139</sup> But now, if a license is taken away in one state because of performing an abortion, the other states do not have to automatically follow suit.<sup>140</sup> Because many states in the Compact have banned or restricted abortion,<sup>141</sup> this has prevented a

---

133. Prop. Amendment 4388H03.01H, H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

134. Kitchener, *supra* note 132.

135. See Ollstein & Messerly, *supra* note 80.

136. NEB. REV. STAT. § 71-6915 (2023) (“Preborn Child Protection Act”); *id.* § 38-178.

137. TEX. HEALTH & SAFETY CODE ANN. §§ 170A.002, 170A.007 (West 2022); TEX. PENAL CODE ANN. §§ 12.32, 12.33 (West 2009).

138. David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html> [perma.cc/6MR9-RYYK].

139. *Id.*

140. *Id.*; see *Participating States*, INTERSTATE MED. LICENSURE COMPACT, <https://www.imlcc.org/participating-states/> [https://perma.cc/WJV6-8MAM].

141. The states participating in the Compact where abortion is banned include Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. The Compact was

huge roadblock to physicians' ability to provide abortion care. However, they are still at risk of revocation or suspension if they are licensed in multiple states.

For example, in Ohio, the Medical Board is authorized to discipline a medical provider licensed to practice medicine in Ohio "regardless of the jurisdiction in which the act was committed."<sup>142</sup> Thus, if a provider is licensed in California and Ohio, even if the abortion was performed in California, the Medical Board of Ohio can still revoke the California provider's license in its state. If such disciplinary action occurs, it could create a "domino effect" that disrupts all the other states where the provider is licensed and subject the provider to possible discipline there, as well.<sup>143</sup> Furthermore, the Ohio Medical Board is able to impose discipline even if the provider's Ohio's license is inactive.<sup>144</sup> According to the Federation of State Medical Boards, 24 percent of doctors in the United States hold two or more active licenses from other states, so these kinds of laws would harm a significant number of physicians.<sup>145</sup>

Similarly, civil suits that are brought from anti-abortion states could have adverse consequences that threaten a provider's medical license.<sup>146</sup> Simply "[b]eing named as a defendant too many times" in lawsuits or "being subject to a disciplinary investigation" in an anti-abortion state, even if the provider prevails, "could result in "licensure suspension, high malpractice insurance costs, and reputational damage," which could threaten a provider's ability to practice medicine and to support themselves and their family.<sup>147</sup> This has already placed providers in a moral dilemma where they can either keep their license without providing the care they swore to provide to their patients or they can provide that care but risk losing their license and the ability to help others.<sup>148</sup>

---

introduced in North Carolina and implementation of the Compact has been delayed in Missouri. See *Participating States*, *supra* note 140; Oriana González, *Where Abortion Has Been Banned Now That Roe v. Wade Is Overturned*, AXIOS (Aug. 23, 2023), <https://www.axios.com/2022/06/25/abortion-illegal-7-states-more-bans-coming> [<https://perma.cc/44VB-MGL6>].

142. OHIO REV. CODE ANN. § 4371.22(B)(10), (12), (14) (West 2022).

143. Collis, *supra* note 34.

144. *Id.*

145. *Physician Licensure in 2022*, FED'N STATE MED. BDS., <https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/u.s.-medical-licensing-and-disciplinary-data/physician-licensure/> [<https://perma.cc/PDQ4-TQAY>].

146. Cohen et al., *supra* note 27, at 34–35.

147. *Id.* at 35.

148. See Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an 'Impossible Choice' When Providing Care*, NPR (June 24, 2022, 4:26 PM), <https://www.npr.org/sections>

Furthermore, uncorroborated accusations driven by political motivation could also lead to license revocation. In the summer of 2022, shortly after *Dobbs* took effect, the country learned about a ten-year-old rape victim in Ohio who was forced to travel to Indiana for an abortion because of Ohio's new abortion laws.<sup>149</sup> Since she was just three days too far along in her pregnancy to receive an abortion, many critics of the law saw this as an example of new abortion restrictions "harming the most vulnerable people."<sup>150</sup> Proponents doubled down, finding she should have carried the child to term.<sup>151</sup> But likely because it sounds unreasonable to make a child give birth to her rapist's baby, anti-abortion politicians and political pundits created the narrative of the story being a hoax.<sup>152</sup> However, when it was proven to be true, they demonized the doctor who performed the abortion, subjected her to harassment, and caused her to fear for "her own safety and the safety of her family."<sup>153</sup> Dr. Caitlin Bernard's name and face were blasted on conservative-leaning television to harm her reputation and she was publicly criticized by government officials, including Indiana's attorney general, Todd Rokita, who called for an investigation into her actions by the Indiana Medical Licensing Board.<sup>154</sup> Rokita claimed,

---

/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion [https://perma.cc/HDH4-THBF].

149. Shari Rudavsky & Rachel Fradette, *Patients Head to Indiana for Abortion Services as Other States Restrict Care*, INDYSTAR (July 8, 2022, 11:14 AM), <https://www.indystar.com/story/news/health/2022/07/01/indiana-abortion-law-roe-v-wade-overturned-travel/7779936001/> [https://perma.cc/V57E-W2EB]. At the time, Ohio's Senate Bill 23 (S.B. 23) banned abortions after fetal cardiac activity was detected around the sixth week of pregnancy, but the bill was blocked in December of that year. See generally *Preterm-Cleveland v. Yost*, No. C-220504, 2022 WL 17744345, at \*1 (Ohio Ct. App. Dec. 16, 2022) (denying Ohio's appeal of a preliminary injunction that barred the state from enforcing S.B. 23). After citizens voted overwhelming to make abortion legal until viability in November 2023, state clinics have sought declaration from the courts that S.B. 23 is unconstitutional. Susan Tebben, *Clinics Ask Court to Declare Ohio Six-Week Abortion Ban Unconstitutional After Amendment Passage*, OHIO CAP. J. (Mar. 5, 2024, 5:00 AM), <https://ohiocapitaljournal.com/2024/03/05/clinics-ask-court-to-declare-ohio-six-week-abortion-ban-unconstitutional-after-amendment-passage/> [https://perma.cc/99ZN-X5KU]. However, after previously conceding the bill was invalid, the state's attorney general has filed a challenge to the lawsuit. *Id.*

150. Solycere Burga, *How a 10-Year-Old Rape Victim Who Traveled for an Abortion Became Part of a Political Firestorm*, TIME (July 15, 2022, 7:29 PM), <https://time.com/6198062/rape-victim-10-abortion-indiana-ohio/> [https://perma.cc/24FQ-JBDA].

151. *Id.*

152. Izadi, *supra* note 34 (listing various deniers including Tucker Carlson and Jesse Watters on Fox News; Dave Yost, the Ohio Attorney General; and Ohio Republican Congressman Jim Jordan).

153. Sarah McCammon & Becky Sullivan, *Indiana Doctor Says She Has Been Harassed for Giving an Abortion to a 10-Year-Old*, NPR (July 26, 2022, 5:59 PM), <https://www.npr.org/2022/07/26/1113577718/indiana-doctor-abortion-ohio-10-year-old> [https://perma.cc/2ML8-W79Y].

154. *Id.*



without any evidence, that Dr. Bernard consistently failed to follow reporting requirements.<sup>155</sup>

After a yearlong battle, the Board's members who were appointed by the state's anti-abortion governor—and some who even donated to Rokita's political campaigns<sup>156</sup>—found that Dr. Bernard violated patient privacy laws by discussing the patient's age, her rape, her home state, and her abortion.<sup>157</sup> Instead of revoking Dr. Bernard's license, they reprimanded and fined her \$3,000 while acknowledging that her statements did not actually name the girl;<sup>158</sup> however, Rokita continued to smear her reputation, proclaiming her statements “led to the little girl being identified,” which was not corroborated.<sup>159</sup>

When Dr. Bernard was asked why she discussed the Ohio girl's case with reporters instead of using a hypothetical, she stated, “I think it's important for people to know what patients will have to go through because of legislation that is being passed, and a hypothetical does not make that impact.”<sup>160</sup> One member of the Board even opposed the majority and found that Dr. Bernard did not release any “direct protected identifying information such as the girl's name or address” that could have exposed the girl's identity.<sup>161</sup> Regardless, the investigation was tainted from the start with board members more likely to agree with Rokita and the governor because they were personally appointed by them and/or donated to their campaigns.<sup>162</sup>

Dr. Bernard was fortunate to maintain her ability to practice medicine. Even though she won that larger battle, her name has been stained among the anti-abortion community and there is no guarantee she will not be attacked again. Moreover, this politically motivated

---

155. *Id.*

156. See Johnny Magdaleno & Tony Cook, *AG Rokita's Prosecution of Abortion Doctor Caitlin Bernard Gets Medical Board Hearing*, INDIANAPOLIS STAR (May 24, 2023, 2:48 PM), <https://www.indystar.com/story/news/local/2023/05/24/todd-rokita-prosecution-abortion-doctor-caitlin-bernard-medical-board-hearing/70248885007/> [<https://perma.cc/PZ8L-DHML>].

157. See Ava Sasani, *Indiana Reprimands Doctor Who Provided Abortion to 10-Year-Old Rape Victim*, N.Y. TIMES (May 28, 2023), <https://www.nytimes.com/2023/05/26/us/indiana-doctor-abortion-reprimand.html> [<https://perma.cc/QX3N-5H3J>].

158. *Id.*

159. Todd Rokita (@AGToddRokita), TWITTER (May 26, 2023, 9:18 AM), <https://twitter.com/AGToddRokita/status/1662131018093015044?cxt=HHwWiMC9-djWiZEuAAAA> [<https://perma.cc/GGP2-VFGS>].

160. Tom Davies, *Indiana Doctor Reprimanded, Fined \$3,000 for Talking Publicly About Ohio 10-Year-Old's Abortion*, PBS (May 26, 2023, 1:08 PM), <https://www.pbs.org/newshour/nation/indiana-doctor-reprimanded-fined-3000-for-talking-publicly-about-ohio-10-year-olds-abortion> [<https://perma.cc/3XVT-JZVH>].

161. *Id.*

162. Magdaleno & Cook, *supra* note 156.

action has likely exacerbated abortion providers' fears of license revocation. Rokita has yet to face any consequences for the investigation,<sup>163</sup> which suggests other bad faith actors will not be deterred from trying a similar stunt.

#### D. *The Result: A Chilling Effect on Abortion Providers*

As of March 2023, these bans have led to 25,640 fewer abortions nationally<sup>164</sup> and have disrupted access to over 80,000 people seeking abortions.<sup>165</sup> Abortions provided via telehealth have increased by 85 percent compared to the months before *Dobbs* because of the inability to find doctors to perform the procedure.<sup>166</sup> As far as state findings, during the nine-month period after *Dobbs*, the largest state increases in abortions occurred in Florida (12,460), Illinois (12,400), North Carolina (7,930), Colorado (4,500), and California (4,260).<sup>167</sup> Unsurprisingly, the highest surges occurred in states that bordered the states with abortion bans.<sup>168</sup> The largest declines occurred in Texas (23,340), Georgia (15,720), and Tennessee (10,100).<sup>169</sup> The data shows that “the states with the greatest structural and social inequities in terms of maternal morbidity and mortality and poverty” had the largest declines in the number of abortions.<sup>170</sup> Furthermore, many facilities are now offering later term care because more patients are traveling further distances, which has delayed care due to taking time off work, arranging childcare, and obtaining funds to pay for those accommodations.<sup>171</sup> As a result, “sanctuary states” that still provide abortion access have been overwhelmed due to the large increases in patients traveling from out of state.<sup>172</sup> This has increased the physical and mental toll on

---

163. Todd Rokita was under investigation by the state Disciplinary Commission, but so far there does not appear to be any sort of repercussion for his actions. See Carter DeJong, *Indiana Attorney General Todd Rokita Under Investigation by State Disciplinary Commission*, IND. DAILY STUDENT (Feb. 12, 2023, 2:22 PM), <https://www.idsnews.com/article/2023/02/indiana-attorney-general-todd-rokita-under-investigation-state-disciplinary-commission> [<https://perma.cc/Q3Q2-U RLK>].

164. SOC'Y OF FAM. PLAN., #WECOUNT REPORT 2 (2023), [https://societyfp.org/wp-content/uploads/2023/06/WeCountReport\\_6.12.23.pdf](https://societyfp.org/wp-content/uploads/2023/06/WeCountReport_6.12.23.pdf) [<https://perma.cc/B72A-RLT3>].

165. #WeCount, SOC'Y OF FAM. PLAN., <https://societyfp.org/research/wecount/> [<https://perma.cc/Z643-4GZR>].

166. SOC'Y OF FAM. PLAN., *supra* note 164, at 3.

167. *Id.* at 4.

168. *See id.*

169. *Id.*

170. *Id.* at 8.

171. *See Human Rights Crisis, supra* note 69.

172. See Reena Diamante, 'We Have Already Reached Capacity': Abortion Clinics Overwhelmed by Out-of-State Travel, SPECTRUM NEWS (Aug. 31, 2022, 3:25 PM), <https://www.ny1>

providers, which could lead to deferred care and adverse health outcomes for patients.<sup>173</sup>

All of these laws, whether enacted or proposed, demonstrate that anti-abortion state legislators have prioritized punishing abortion providers as a means to block access to abortion. The severe punishments for violating these laws have “muddl[ed] [providers’] ability to exercise their medical judgment.”<sup>174</sup> Although there are generally exceptions to save a patient’s life, it is difficult—if not impossible—to determine whether a particular patient is dying.<sup>175</sup> This has created a chilling effect on the health community, leading providers to feel pressure to “sit and watch patients’ health deteriorate until they are able to intervene.”<sup>176</sup> As a result, some doctors have delayed treatment because the law required second opinions and final approval from hospital lawyers.<sup>177</sup> Other doctors have entirely refused to perform necessary abortions, leading to serious health conditions and nearly

---

.com/nyc/all-boroughs/politics/2022/08/31/abortion-services-have-taken--emotional-toll--on-patients--advocates-say- [https://perma.cc/Q2AF-TNXH]; see also Mallika Seshadri, *Out-of-Staters Are Flocking to Places Where Abortions Are Easier to Get*, NPR (Apr. 16, 2023, 5:08 AM), <https://www.npr.org/2023/04/16/1168695321/out-of-staters-flocking-to-places-where-abortion-are-easier-to-get> [https://perma.cc/M32T-N6TH] (explaining that sanctuary states are “seeing record high out-of-state demand”).

173. See Seshadri, *supra* note 172.

174. Emily Baumgaertner, *Doctors in Abortion-ban States Fear Prosecution for Treating Patients with Life-threatening Pregnancies*, L.A. TIMES (July 29, 2022, 2:00 AM), <https://www.latimes.com/world-nation/story/2022-07-29/fearful-of-prosecution-doctors-debate-how-to-treat-pregnant-patients> [https://perma.cc/C47Y-4WAZ].

175. See, e.g., MO. REV. STAT. § 188.039 (2017) (stating an exception to the ban is a medical emergency defined as “a condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function”); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2022) (stating the abortion prohibition does not apply if a licensed physician “performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create a greater risk of the pregnant female’s death; or a serious risk of substantial impairment of a major bodily function of the pregnant female”); see also Olivia Goldhill, *‘A Scary Time’: Fear of Prosecution Forces Doctors to Choose Between Protecting Themselves or Their Patients*, STAT (July 5, 2022), <https://www.statnews.com/2022/07/05/a-scary-time-fear-of-prosecution-forces-doctors-to-choose-between-protecting-themselves-or-their-patients/> [perma.cc/27S8-KRGW] (“The lack of specificity over what counts as a threat to the mother’s life means some doctors feel pressure to sit and watch patients’ health deteriorate until they’re able to intervene.”).

176. Goldhill, *supra* note 175.

177. Baumgaertner, *supra* note 174; see Nadine El-Bawab, *Termination Boards: How Physicians Are Providing Abortions Within Exceptions Allowed by Bans*, ABC NEWS (June 23, 2023, 2:01 AM), <https://abcnews.go.com/US/termination-boards-physicians-providing-abortion-exceptions-allowed-bans/story?id=100167990> [https://perma.cc/ZD5P-TFJ9].

death.<sup>178</sup> And some have opted to perform more severe and complicated procedures—such as hysterectomies that completely eliminate the ability to become pregnant—to avoid the treatment being construed as an elective abortion.<sup>179</sup>

But this chilling effect is not just limited to providers in banned states. These abortion bans have made it possible that out-of-state doctors could be found liable; either by unequivocally stating providers can be charged or sued regardless of where the abortion occurs,<sup>180</sup> or by stating “any person” who assists an abortion can be found guilty without limiting the liable conduct to what occurs in-state.<sup>181</sup> Thus, there is uncertainty for providers in states where abortion is legal. As an issue of first impression, providers—and lawyers—likely have an endless stream of questions. For example, could an abortion provider based in California be subpoenaed to comply with the Idaho travel ban? Would he or she be required to describe the care provided or to incriminate someone who brought a patient to the clinic? What if he or she is sued by a relative of an aborted fetus? Could the provider be targeted for “aiding and abetting” an abortion? Could he or she be arrested for stepping foot in a state where a previous patient lives? There are no clear answers.

This confusion, chaos, and fear has led to some providers suspending abortion services altogether.<sup>182</sup> Even clinics that can legally provide abortions have been instructed to stop providing medication

178. Nadine El-Bawab & Mary Kekatos, *Women Suing Texas over Abortion Bans Give Emotional Testimony*, ABC NEWS (July 19, 2023, 2:49 PM), <https://abcnews.go.com/US/women-suing-texas-abortion-bans-court-testify/story?id=101487004> [<https://perma.cc/FQG2-PGVT>] (discussing the multiple plaintiffs to a lawsuit against the state of Texas who were denied care, including Amanda Zurawaski “who developed sepsis and nearly died after being refused an abortion when her water broke at 18 weeks”).

179. Baumgaertner, *supra* note 174; see *Hysterectomy*, CLEVELAND CLINIC (Oct. 16, 2021), <https://my.clevelandclinic.org/health/treatments/4852-hysterectomy> [<https://perma.cc/WNR4-3Y48>] (“A hysterectomy is a surgical procedure that removes your uterus. After surgery, you can’t become pregnant and no longer menstruate.”).

180. See, e.g., S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); see also IDAHO CODE § 18-623 (2023) (stating explicitly that “[i]t shall not be an affirmative defense to a prosecution . . . that the abortion provider or the abortion-inducing drug provider is located in another state”).

181. See, e.g., TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(a)(1)–(3) (West 2021); see also H.B. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022) (stating that “[a]ny person” who performs or engages in “conduct that aids or abets the performance” of an abortion is in violation of the act).

182. See *West Virginia's Only Abortion Clinic Stops Performing Abortions*, WSAZ (June 24, 2022, 2:00 PM), <https://www.wsaz.com/2022/06/24/west-virginias-only-abortion-clinic-stops-performing-abortion/> [<https://perma.cc/W7CU-XM3U>] (discussing the only abortion clinic in West Virginia stopping abortion services even though the ban had not fully entered in to force); see also *Human Rights Crisis*, *supra* note 69 (quoting an African American provider in Arizona who decided to suspend abortion services because she felt particularly vulnerable to criminalization).

abortions to those traveling from states with bans.<sup>183</sup> Other providers have been hesitant to move to or continue practicing in states where the laws were unstable, citing “an atmosphere . . . perceived as antagonistic to physicians.”<sup>184</sup> This fear has created substantial risks for those receiving health care, including increasing the risk of maternal death and pregnancy-related complications.<sup>185</sup> But it also harms providers who struggle to uphold their ethical obligations to treat patients with the best care. Sometimes the best care *is* an abortion,<sup>186</sup> but now doctors have to weigh performing the procedure against the personal risks of losing their freedom and the means to support their families.<sup>187</sup> In the end, these additional physical, mental, and emotional strains on providers will result in worse health care outcomes for patients and providers alike.<sup>188</sup>

## II. CALIFORNIA’S ANTICIPATORY RESPONSE

In anticipation of these issues, California drafted various bills to protect abortion providers from retaliation by other states.<sup>189</sup> This part will highlight four key bills that were signed into law to allow California providers to assist out-of-state patients with legal abortions.<sup>190</sup>

---

183. See, e.g., Nicole Girtten, *Planned Parenthood of Montana Halts Medication Abortions for Patients from ‘Trigger Law’ States*, IDAHO CAP. SUN (July 1, 2022, 4:00 AM), <https://idahocapitalsun.com/2022/07/01/planned-parenthood-of-montana-halts-medication-abortions-for-patients-from-trigger-law-states/> [<https://perma.cc/54XT-884R>].

184. *Human Rights Crisis*, *supra* note 69.

185. Annalies Winny, *Abortion Restrictions and the Threat to Women’s Health*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (May 19, 2023), <https://publichealth.jhu.edu/2023/a-year-without-roe> [<https://perma.cc/YW5N-3CYN>].

186. See, e.g., El-Bawab & Kekatos, *supra* note 178 (describing the experiences of several pregnant patients with medical conditions and/or complications who faced higher rates of mortality without abortion care).

187. See Christine Vestal, *Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, STATELINE (Sept. 1, 2022, 12:00 AM), <https://stateline.org/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies/> [[perma.cc/SUC2-FS68](https://perma.cc/SUC2-FS68)]; Goldhill, *supra* note 175; see also El-Bawab, *supra* note 177 (quoting a fearful doctor who said, “I think we are also balancing our ethical obligations as physicians and the oath that we took, and many of us have just decided that we’re going to do what we think is right for patients to ensure that nobody dies or has serious morbidity as a result of not performing care. . . . Most of us do this at great personal risk.”).

188. See, e.g., Goldhill, *supra* note 175; see also Karina Pereira-Lima, *Association Between Physician Depressive Symptoms and Medical Errors: A Systematic Review and Meta-analysis*, JAMA NETWORK OPEN (Nov. 27, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755851> [<https://perma.cc/9678-VUUD>] (showing that there is a correlation between physician depressive symptoms and medical errors).

189. See Press Release, Off. of Governor Gavin Newsom, *supra* note 8.

190. A legal abortion is one performed by a licensed provider on a non-viable fetus or viable fetus if the health or life of the pregnant person is at risk. See LEGIS. ANALYST’S OFF., PROPOSITION

First, Assembly Bill 1242 (A.B. 1242) prevents local law enforcement from cooperating with another state's criminal investigation.<sup>191</sup> Second, Senate Bill 345 (S.B. 345) bars bounty hunters from apprehending providers in California who face criminal prosecution in another state and creates a private cause of action to sue those who attempt to enforce an out-of-state order or judgment.<sup>192</sup> Third, Assembly Bill 1666 (A.B. 1666) bars California courts from enforcing civil judgments against providers under another state's law.<sup>193</sup> And lastly, Assembly Bill 2626 (A.B. 2626) prohibits California licensing boards from suspending or revoking a doctor's medical license "for performing [a legal] abortion."<sup>194</sup>

*A. Protection from Criminal Arrests and Investigations: A.B. 1242*

A.B. 1242 was introduced by California Assemblymember Rebecca Bauer-Kahn to protect reproductive digital information about providers and to prevent "the arrest of individuals or the disclosure by law enforcement of information in an investigation" if it relates to an abortion that is legal in California.<sup>195</sup> In an effort to "set[] a national privacy standard" for other pro-choice states, the law was designed to protect the user data of doctors who provide abortions and the data of patients who seek them.<sup>196</sup>

There are two primary shields: (1) the law enforcement bar and (2) the digital information bar.<sup>197</sup> First, the law enforcement bar amended California Penal Code section 13778.2 to prohibit state and local law enforcement from knowingly arresting or knowingly participating in an arrest against medical providers who perform or aid in

1. CONSTITUTIONAL RIGHT TO REPRODUCTIVE FREEDOM 1 (2022), <https://lao.ca.gov/BallotAnalysis/Proposition?number=1&year=2022> [<https://perma.cc/4P6Y-KATN>].

191. See Assemb. B. 1242, 2021–2022, Leg. Reg. Sess. (Cal. 2022).

192. See S.B. 345, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

193. See Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

194. See Assemb. B. 2626, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

195. Press Release, Rob Bonta, Att'y Gen., Cal. Dep't of Just., Governor Newsom Signs Assemblymember Bauer-Kahan and Attorney General Bonta's Groundbreaking Legislation Protecting Digital Information on Abortion (Sept. 27, 2022), <https://oag.ca.gov/news/press-releases/governor-newsom-signs-assemblymember-bauer-kahan-and-attorney-general-bonta%E2%80%99s> [<https://perma.cc/J2CY-8JXS>].

196. *Id.*

197. *Id.* ("This first-in-the-nation law helps shield those seeking or providing reproductive healthcare against wrongful prosecution and ensures that California laws and California courts are not used to facilitate investigation or prosecution of abortion-related actions that are legal in our state.").

the performance of an abortion that is lawful in California.<sup>198</sup> It also prohibits state and local agencies from cooperating with federal and out-of-state entities regarding a lawful abortion.<sup>199</sup> Furthermore, it prevents judicial officers, court employees, and attorneys from issuing subpoenas that relate to a proceeding in another state that pertains to a lawful abortion.<sup>200</sup> Lastly, it provides that investigations relating to unlawful abortions are not prohibited, but rather, that information relating to the procedure may not be shared with out-of-state entities or individuals “for the purpose of enforcing another state’s abortion law.”<sup>201</sup>

Secondly, the digital privacy protection bar amended various sections of the California Penal Code, including sections 1524.2 and 1546.5,<sup>202</sup> and aims to block electronic communications from being infiltrated to access user data.<sup>203</sup> For example, if another state wants to track the movement of a woman traveling to California for an abortion, the other state would be “blocked from accessing cell phone site tower location data” of the woman’s whereabouts, including the location of the medical office where she received the procedure.<sup>204</sup> Furthermore, internet search history that could lead to personally identifiable information will also be shielded.<sup>205</sup>

*B. Protection from Civil, Criminal,  
and Administrative Laws: S.B. 345*

S.B. 345 was introduced by California Senator Nancy Skinner.<sup>206</sup> In a press release, Senator Skinner stated this bill will strengthen California’s standing “as the safe haven and national beacon for protecting every individual’s right to an abortion or gender-affirming care” and that it will enable “California health care practitioners . . . to provide this essential health care, regardless of their patient’s geographic

---

198. CAL. PENAL CODE § 13778.2(a) (2022).

199. *See id.* § 13778.2(b).

200. *See id.* § 13778.2(c)(2).

201. *Id.* § 13778.2(d).

202. *See id.* §§ 1524.2, 1546.5.

203. *See* Press Release, Rob Bonta, *supra* note 195.

204. *Id.*

205. *Id.*

206. Press Release, Off. of Nancy Skinner, CA Senate Approves Sen. Skinner’s S.B. 345, Strengthening and Protecting Access to Abortion, Contraception, and Gender-Affirming Care (May 31, 2023), <https://sd09.senate.ca.gov/news/20230531-ca-senate-approves-sen-skinner’s-sb-345-strengthening-and-protecting-access-abortion> [<https://perma.cc/Y94J-N88F>]; S.B. 345, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

location.”<sup>207</sup> She noted that S.B. 345 creates “new protections for those in California who face persecution from another state.”<sup>208</sup> It includes three significant sections: (1) the public policy statements, (2) the judgments bar, and (3) the out-of-state law bar.<sup>209</sup>

First, the bill declares California’s public policies.<sup>210</sup> Section 1798.301 will be added to the Civil Code and states “[i]nterference with [reproductive health care services], whether or not under the color of law, is against the public policy of California.”<sup>211</sup> Additionally, section 1798.302 will be added and provides that an out-of-state or foreign law that “prohibits, criminalizes, sanctions, [or] authorizes . . . a civil action against . . . a person, provider, or other entity in California that . . . aids, abets, [or] provides . . . reproductive health care . . . shall be a violation of the public policy of California.”<sup>212</sup>

Second, the abusive litigation judgments bar will be added to the Civil Code as section 1798.300 to bar judgment relating to abusive litigation.<sup>213</sup> It defines “abusive litigation” as a legal action meant to “deter, prevent, sanction, or punish a person engaging in legally protected health care activity.”<sup>214</sup> The litigant engages in this conduct by filing or prosecuting an action in a state other than California where liability is based on “a legally protected health care activity” that was legal in the state where it occurred, or by attempting to enforce an order or judgment based on that legally protected health care activity.<sup>215</sup>

Lastly, the out-of-state law bar will be added as section 123468.5 to the Health and Safety Code and explicitly states “California law governs in any action in this state”—regardless if it is criminal, civil, or administrative—against providers of “reproductive health care services” by any means, including telehealth, “if the provider was located in this state or any other state where the care was legal at the time.”<sup>216</sup> The purpose of the “by any means” addition is to protect providers who prescribe abortion pills in other states with laws contrary to that

---

207. Press Release, Off. of Nancy Skinner, *supra* note 206.

208. *Id.*

209. *See* Cal. S.B. 345.

210. *See id.*

211. *Id.* at 15.

212. *Id.*

213. *Id.* at 13.

214. *Id.*

215. *Id.*

216. *Id.* at 23–24.



action; however, the bill clarifies that it only applies if the services were performed in a state where the act was legal.<sup>217</sup>

*C. Protection from Out-of-State  
Civil Laws and Judgments: A.B. 1666*

A.B. 1666 was introduced by California Assemblymember Bauer-Kahan to protect abortion providers and pregnant persons who could potentially be sued by out-of-state plaintiffs.<sup>218</sup> In the press release announcing the bill, Bauer-Kahan warned: “Laws across the country leave abortion providers, organizations, and individuals open to tens of thousands of dollars in liability.”<sup>219</sup> Thus, this bill aimed to shield California doctors from civil lawsuits in California courts.<sup>220</sup> Specifically, the bill includes three important provisions: (1) the public policy statement, (2) the venue bar, and (3) the judgments enforcement bar.<sup>221</sup> The bill added section 123467.5 to the Health and Safety Code.<sup>222</sup> On February 14, 2023, Senate Bill 487 amended section 123467.5 to include abortion “providers” to specify more clearly that doctors will also be shielded from civil liability and not just abortion “performers.”<sup>223</sup>

First, the public policy statement provides that “a law of another state that authorizes a person to bring a civil action against a person” who receives, seeks, provides, or performs an abortion—or attempts to engage in that conduct—is “contrary to the public policy of this state.”<sup>224</sup> Secondly, the venue bar states that courts “shall not . . . apply a law described in [the public policy statement] to a case or controversy heard in state court.”<sup>225</sup> The purpose of this provision is to prevent other states from using California courts as a venue for their civil actions and to instruct the courts to not apply laws contrary to public

---

217. *Id.* at 23.

218. Press Release, Assemblymember Rebecca Bauer-Kahan, AB 1666 Would Protect Californians from Civil Liability for Providing or Obtaining Abortion Care (Jan. 20, 2022), <https://a16.asmdc.org/press-releases/20220120-assemblymember-bauer-kahan-introduces-bill-protect-reproductive-health-care> [<https://perma.cc/BRR4-DT28>].

219. *Id.*

220. *Id.*

221. See Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

222. See CAL. HEALTH & SAFETY CODE § 123467.5 (2023).

223. See S.B. 487, 2023–2024 Leg., Reg. Sess. (Cal. 2023). For the prior version, see CAL. HEALTH & SAFETY CODE § 123467.5 (2022).

224. CAL. HEALTH & SAFETY CODE § 123467.5 (2023).

225. *Id.*

policy.<sup>226</sup> Lastly, the judgments enforcement bar provides that state courts “shall not . . . enforce or satisfy a civil judgment received through an adjudication under a law described in [the public policy statement].”<sup>227</sup> The purpose of this provision is to prevent California courts from enforcing judgments reached in other states.

#### *D. Protection from Administrative Discipline: A.B. 2626*

A.B. 2626 was introduced by California Assemblymember Lisa Calderon—and co-authored by Bauer-Kahan—to prohibit suspending or revoking the license of a medical provider for providing legal abortion services under California law.<sup>228</sup> The bill amended section 2253 of the Business and Professions Code and established the suspension and revocation bar which prevents the California Medical Board and Osteopathic Board from (1) revoking or suspending a license and (2) denying a licensure application or revoking a license because of discipline or conviction in another state, solely based on performing an abortion in that state.<sup>229</sup>

#### *E. Laying the Groundwork for Interstate Challenge*

These bills are intended to help preserve the public policy of reproductive health care activity that is guaranteed in California—even though it is no longer guaranteed by the United States Constitution.<sup>230</sup> California has led the nation in its response to the reversal of *Roe* by refusing “to accept that anyone except an individual and their healthcare provider should be involved in making decisions about their bodies.”<sup>231</sup> This is in accordance with 61 percent of adults in the U.S. who believe that abortion should be legal in all or most cases.<sup>232</sup>

226. Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

227. *Id.*

228. See Assemb. B. 2626, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

229. CAL. BUS. & PRO. CODE §§ 2253(d)–(e) (2022).

230. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (“The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”).

231. Press Release, Off. of Governor Gavin Newsom, *supra* note 6 (“Since the Supreme Court’s decision in the *Dobbs* case this summer, California has refused to accept that anyone except an individual and their healthcare provider should be involved in making decisions about their bodies.”).

232. Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), <https://www.pewresearch.org/short-reads/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/> [<https://perma.cc/5R8V-FTGF>].

Although only 37 percent of adults say that it should be illegal in all or most cases,<sup>233</sup> California—and other abortion-supportive states<sup>234</sup>—has had to be proactive in shielding its medical professionals who are increasingly subjected to extreme attacks by out-of-state actors.<sup>235</sup> Nonetheless, because these laws may be construed as hostile to the laws of anti-abortion states, they will likely be challenged on constitutional grounds.

### III. THE CONSTITUTIONAL CHALLENGE: FULL FAITH AND CREDIT

California's aforementioned legislation explicitly refuses to recognize the laws and judgments from other states. If *Dobbs* was the end for the anti-abortion movement, it is doubtful that the California legislature would have passed so many laws that risk constitutional challenge. Instead, it could have just accepted that it was now up to each state to choose whether and when to legalize abortion. It is likely California would still have passed laws to increase access for those traveling from other states to access care. But in reality, states are now at war and California could not just allow attacks from anti-abortion states that do not accept the basis of *Dobbs* and instead seek to regulate abortion access for the whole country by passing hostile laws that endanger abortion seekers, performers, providers, and those who assist them. As a result, California has had to bolster its laws and risk the possibility they are overturned.

#### A. *Current Doctrine: Background and Application of the Full Faith and Credit Clause*

Article IV, section I of the United States Constitution, known as the Full Faith and Credit Clause, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings

---

233. *Id.*

234. See Sydney Kashiwagi, *Blue States See 'Shield Laws' as Bulwark Against Republican Efforts to Restrict Abortion and Gender-affirming Care*, CNN (July 13, 2023, 3:55 PM), <https://www.cnn.com/2023/07/13/politics/shield-laws-abortion-gender-affirming-care/index.html> [<https://perma.cc/66MD-AZAW>]; see also Moira Donegan, *GOP-Run States Are Eyeing Abortion Beyond Their Borders. Blue States Are Fighting Back*, GUARDIAN (June 25, 2023, 7:00 AM), <https://www.theguardian.com/us-news/2023/jun/25/shield-laws-abortion-rights-roe-washington-idaho> [<https://perma.cc/R7PZHC4H>] (discussing the endless possibilities of criminal penalties and civil liabilities extending to out-of-state abortions providers).

235. See Donegan, *supra* note 234.

shall be proved, and the Effect thereof.”<sup>236</sup> While the meaning of the second sentence is unclear and remains unsettled,<sup>237</sup> essentially, the Clause requires every state to give “full faith and credit” to the public acts (laws), records, and judicial proceedings (judgments) of every other state by “imposing mandatory comity.”<sup>238</sup>

The Clause has been used to resolve interstate conflicts, including whether judgments from one state were required to be enforced in the forum state (where the current claim is heard).<sup>239</sup> For example, if a plaintiff claims personal injury due to defendant’s negligence and wins a monetary judgment in Colorado, is the plaintiff permitted to satisfy that judgment against the defendant’s business in Florida? Because judgments are given conclusive effect, rather than just evidentiary effect, the out-of-state judgment can be enforced in Florida courts and the defendant cannot claim otherwise.<sup>240</sup>

The Clause has also been used to determine whether one state’s law can or should be enforced in another state. Using the same personal injury hypothetical, assume the statute of limitations to claim a personal injury is two years in Colorado and three years in Florida and that the plaintiff does not file until two years and six months after the accident in Florida court. If the plaintiff sues the defendant based on a Colorado law (assuming jurisdictional requirements are met), Florida

236. U.S. CONST. art. IV, § 1.

237. See Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 485 (2013) (“The Constitution commands that ‘Full Faith and Credit shall be given’ to state acts, records, and judgments. Although this clause appears to create a self-executing constitutional directive, the very next sentence provides that Congress ‘may’ prescribe the manner in which state acts and judgments ‘shall be proved, and the Effect thereof.’ Paradoxically, the Full Faith and Credit Clause thus arguably seems to give Congress the power to nullify the command that full faith and credit be given.”); see *id.* (“[T]he Court has not yet ruled on the second portion of the Clause—that is, it has not addressed the contours of Congress’s full faith and credit power.”).

238. See Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 466 (2005); William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 412–13 (1994) (arguing that because Article IV includes the Extradition Clause and Privileges and Immunities Clause, which were “designed to alleviate friction among the states,” the Full Faith and Credit Clause is likely to also serve that same purpose); see also *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (stating the primary purpose of the Clause “was to help fuse into one Nation a collection of independent, Sovereign States”); *Comity*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/comity> [<https://perma.cc/ZTQ5-E3GW>] (“Comity refers to courts of one state or jurisdiction respecting the laws and judicial decisions of other jurisdictions—whether state, federal or international—not as a matter of obligation but out of deference and mutual respect.”).

239. *Forum*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/forum> [<https://perma.cc/NM5Q-U3MA>] (defining a forum as “the jurisdiction and court or other tribunal in which a dispute is heard”).

240. See *Mills v. Duryee*, 11 U.S. 481, 485 (1813) (reasoning that if judgments were “considered prima facie evidence only,” the Clause would be “utterly unimportant and illusory”).

is permitted to apply its statute of limitations of three years because its own procedural rules are a subject matter it is “competent to legislate.”<sup>241</sup> Although the defendant would likely argue that Colorado law regarding the statute of limitations should apply because the claim is based on Colorado personal injury law (and because the suit would be barred since it has been more than two years), because Florida is the forum state, it would be entitled to apply its own statute of limitations.

Nonetheless, there have been exceptions limiting a state’s ability to apply its own law. For example, special laws that “evinced a policy of hostility” because they only apply in lawsuits against other states are constitutionally impermissible.<sup>242</sup> There is an exception for public policy reasons, but they must be sufficient to justify the application of the special rule. In the hypothetical, if the plaintiff sued the defendant (a Colorado entity) for an abusive tax audit, the Florida court could not award damages against the defendant that exceeded the damages it would normally award in a similar suit against its own agencies. And if Florida argued it departed from its usual standards because of its policy to provide adequate redress to its citizens, which Colorado failed to do, the court would find this was discriminatory and hostile based on a “conclusory” and “disparaging” statement about Colorado’s entities.<sup>243</sup> Thus, Florida would be required to apply Colorado’s law that caps tort damages.

### *B. Challenges to California’s Legislative Strategy to Shield Providers from Out-of-State Attacks*

By purposely exercising its broad powers to maintain the right for individuals to make their own health care decisions, California sought to allow its physicians to provide abortion care to out-of-state citizens who travel to the state for health care without the risk of legal ramifications or negative consequences to health care.

#### 1. California’s Refusal to Recognize Out-of-State Judgments

First, A.B. 1666 and S.B. 345 refuse to recognize out-of-state judgments for civil disputes by stating that California courts cannot

---

241. Franchise Tax Bd. of Cal. v. Hyatt (*Franchise Tax Bd. I*), 538 U.S. 488, 496 (2003) (quoting Pac. Emps. Ins. Co. v. Indus. Accident Comm’n, 306 U.S. 493, 501 (1939)) (finding that Nevada was “competent to legislate” its own intentional torts which were the alleged injuries of one of its citizens that occurred within its state).

242. *Id.* at 489.

243. Franchise Tax Bd. of Cal. v. Hyatt (*Franchise Tax Bd. II*), 136 S. Ct. 1277, 1282 (2016).

enforce or satisfy a civil judgment received through an adjudication under an out-of-state law that authorizes a civil action against abortion providers.<sup>244</sup> Plainly, the Full Faith and Credit Clause requires states to respect the judgments of other states,<sup>245</sup> but it was not always clear what effect those judgments were required to have. In the early case of *Mills v. Duryee*,<sup>246</sup> the U.S. Supreme Court examined whether the Clause required forum states to accept the judgments only as evidence or if they were required to give them conclusive effect.<sup>247</sup> Reasoning that if judgments could only be used as evidence, the Clause “would be utterly unimportant and illusory,” it held that out-of-state judgments were final and must be given the same effect in every state.<sup>248</sup> As such, A.B. 1666 and S.B. 345 would not withstand constitutional scrutiny unless they qualified under an exception.

Similarly, A.B. 2626 bars the ability of the California Medical and Osteopathic Boards to revoke or suspend a provider’s license as the result of discipline or conviction in another state solely relating to an abortion performed in the other state.<sup>249</sup> Traditionally, Medical Boards are state-specific and are only required to abide by out-of-state judgments as they choose.<sup>250</sup> Because the Full Faith and Credit Clause does not require states to abide by each other’s regulatory actions, A.B. 2626 will likely remain in effect if challenged.

## 2. California’s Refusal to Apply Out-of-State Laws

Next, S.B. 345 refuses to apply out-of-state laws whether they are criminal, civil, or administrative. It is a choice-of-law rule that unequivocally states, “California law governs in any action in this state.”<sup>251</sup> Its implications for civil laws will be discussed below, but the general rule for criminal laws is that “courts of one jurisdiction do

244. See Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022); S.B. 345, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

245. U.S. CONST. art. IV, § 1.

246. 11 U.S. 481 (1813).

247. *Id.* at 484.

248. *Id.* at 485.

249. See Assemb. B. 2626, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

250. See CAL. GOV. CODE § 11340.5 (2001) (“No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.”).

251. S.B. 345, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

not enforce the penal laws of another jurisdiction.”<sup>252</sup> Thus, as it pertains to criminal laws, S.B. 345 does not violate the Full Faith and Credit Clause. Furthermore, for out-of-state administrative laws that require revocation of an abortion provider’s state license—regardless of where the abortion was performed—the Clause does not require California to uphold or abide by another state’s regulatory action.

A.B. 1242 also bars application of out-of-state criminal laws by refusing to permit its law enforcement and corporations to assist in an out-of-state investigation regarding an abortion that was lawful in California.<sup>253</sup> The same rule applies here: California would not be required to enforce the penal laws of another state.

Additionally, S.B. 345 and A.B. 1666 prohibit applying out-of-state laws for civil disputes. A.B. 1666 provides that courts “shall not” apply an out-of-state law that authorizes a civil action against abortion providers,<sup>254</sup> but this can be read in one of two ways: as a choice-of-law rule that requires courts to only apply California law or as directing courts to refuse jurisdiction. These interpretations must be examined separately.

#### *a. Choice-of-law rule*

For deciding choice-of-law issues, the U.S. Supreme Court developed an interest-balancing-approach. In *Allstate Insurance Co. v. Hague*,<sup>255</sup> the Court held that for a state’s law to apply, it must have had “significant contact or . . . aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>256</sup> Under this test, if a plaintiff sues a California physician

---

252. Peter B. Kutner *Judicial Identification of Penal Laws in the Conflicts of Laws*, 31 OKLA. L. REV. 590, 590 (1978); *see, e.g.*, *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (“The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.”); *see also* *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888) (“Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim: ‘The courts of no country execute the penal laws of another.’”).

253. Assemb. B. 1242, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

254. Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

255. 449 U.S. 302 (1981); *see* Whitten, *supra* note 238, at 473; *see also* Elizabeth Redpath, *Between Judgment and Law, Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 649–55 (2013) (describing how Full Faith and Credit has been interpreted depending on the type of state record at issue).

256. *Hague*, 449 U.S. at 313; *see also* *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 161–63 (1932) (finding that the Full Faith and Credit Clause required New Hampshire to apply Vermont’s law because Vermont had a stronger interest in the dispute, even though the defendant’s alleged negligence leading to the plaintiff’s death occurred in the state of New Hampshire).

in California state court under another state's civil liability statute, the court could apply A.B. 1666 and S.B. 345, which would instruct it not to apply an out-of-state civil law.<sup>257</sup> Because the defendant would be a California resident and the abortion would have taken place in California, there would be sufficient contacts and state interests such that applying California law would not be “arbitrary nor fundamentally unfair.”<sup>258</sup>

But since *Hague*, the Court has moved away from this test, finding that because the test's standards were unclear, it was difficult to assess the strength of each state's interest.<sup>259</sup> In *Franchise Tax Board v. Hyatt (Franchise Tax Board I)*,<sup>260</sup> the Court held that states could apply their own laws as long as the “subject matter concern[s] what it is competent to legislate.”<sup>261</sup> Thus, California could still apply its own laws under this test because it is undoubtedly “competent to legislate” abortions that occur within its borders, not to mention it already has a litany of laws that regulate the procedure.<sup>262</sup> Thus, as a choice-of-law rule, the Clause likely does not pose a challenge to A.B. 1666 or S.B. 345.

### *b. Refusing jurisdiction*

However, if A.B. 1666 is interpreted as refusing to hear any civil liability claims for abortion based on an out-of-state law, it can be argued it is impermissibly “hostile” to those laws. The idea that hostility toward another state's laws might violate the Clause originated in *Hughes v. Fetter*.<sup>263</sup> In that case, a wrongful death action was filed in Wisconsin after a car accident occurred in Illinois.<sup>264</sup> Because

257. See *Clapper*, 286 U.S. at 161–63.

258. *Hague*, 449 U.S. at 313.

259. See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547–48 (1935) (reaffirming *Clapper*'s holding that courts should balance states' competing interests, but adding a new presumption in favor of states applying their own laws, indicating a departure from the standard); see also *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 40 (1965) (overruling *Clapper* in part and describing *Alaska Packers* as “mark[ing] a break with the *Clapper* philosophy”); see e.g., *Franchise Tax Bd. of Cal. v. Hyatt (Franchise Tax Bd. I)*, 538 U.S. 488, 496 (2003) (explaining that the Court has abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause).

260. 538 U.S. 488 (2003).

261. *Id.* at 494 (quoting *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)) (finding Nevada was competent to legislate alleged intentional torts which have injured one of its citizens within its borders).

262. See generally CAL. HEALTH & SAFETY CODE §§ 123420–123473 (1995) (California law regulating abortion).

263. *Hughes v. Fetter*, 341 U.S. 609 (1951); see *Redpath*, *supra* note 255, at 264.

264. *Hughes*, 341 U.S. at 610.



Wisconsin's wrongful death statute only allowed recovery for deaths that occurred in the state, the plaintiff sued under the Illinois statute instead.<sup>265</sup> However, the Wisconsin court held that it was permitted by its public policy to close its courthouse doors on claims brought on by another state's wrongful death statute; thus, it dismissed the suit on its merits.<sup>266</sup> But the U.S. Supreme Court reversed, holding that such action "was forbidden by the national policy of the Full Faith and Credit Clause."<sup>267</sup>

Similarly, in *Franchise Tax Board v. Hyatt (Franchise Tax Board II)*,<sup>268</sup> a Nevada court declined to apply a cap on tort liabilities that it typically granted for its own state agencies, opting instead to award higher damages against a California agency.<sup>269</sup> The U.S. Supreme Court held that the Clause prohibited states from applying "a special rule of law that evinces a 'policy of hostility' toward California."<sup>270</sup> Thus, Nevada was required to apply California law.<sup>271</sup> If A.B. 1666 is deemed hostile to out-of-state laws, it likely will not hold up unless it can meet an exception.

#### IV. ANALYSIS: CAN CALIFORNIA CLAIM AN EXCEPTION?

Of these various protections, it appears that the judgment enforcement bars in A.B. 1666 and S.B. 345, as well as the venue bar in A.B. 1666 (if interpreted to refuse jurisdiction to hear civil claims), implicate the Full Faith and Credit Clause. However, there are two exceptions to the Clause that California may use to uphold its laws: (1) the penal exception and (2) the public policy exception.<sup>272</sup>

##### *A. The Penal Exception and the Judgments Enforcement Bars*

While the U.S. Supreme Court has generally held that credit must be given to the judgment of another state, it defined an exception in *Huntington v. Attrill*,<sup>273</sup> holding that a judgment in one state was

---

265. *Id.* at 610 n.2.

266. *Id.* at 610.

267. *Id.* at 613.

268. 136 S. Ct. 1277 (2016).

269. *Id.* at 1281.

270. *Id.*

271. *Id.* at 1283.

272. Reynolds, *supra* note 238, at 435.

273. 146 U.S. 657 (1892). In this case, the U.S. Supreme Court held that a New York civil judgment was enforceable in Maryland and the penal judgments exception did not apply because the law was "in no sense a criminal or quasi criminal law" and the remedy only went to creditors who were directly injured, only in the amount of the debt and not as a penalty. *Id.* at 676.

inapplicable in another state if it was based on the first state's civil statute and if the goal or purpose of that statute was to punish a person for an offense against the "public justice."<sup>274</sup> Thus, an out-of-state judgment is penal if "its purpose [is] to punish, rather than to recompense, and the recovery [is] in favor of the state, not a private individual."<sup>275</sup>

California courts have applied this standard in criminal cases, holding the exception to judgment enforcement was met.<sup>276</sup> But in the civil context, the California Supreme Court has generally only considered a judgment a penalty if it "compell[ed] a defendant to pay a plaintiff other than what is necessary to compensate . . . for legal damage."<sup>277</sup> And yet, California courts have rarely—if ever—found that another state's *civil* judgment was penal and unenforceable; however, California courts have found the exception applies in international civil judgments.<sup>278</sup> Because the state will need to rely on precedent to support its argument for enforcing its own abortion-supportive laws, California may need to apply the same reasoning for using the penal exception in international civil judgments when determining whether to enforce another state's civil judgment against a doctor in California.<sup>279</sup>

For example, in *De Fontbrune v. Wofsy*,<sup>280</sup> where the plaintiff sought to enforce a French judgment of copyright violations, the Ninth Circuit noted that "under California's Uniform Recognition Act, penal judgments [were] unenforceable," which is an exception comparable

274. *Id.* at 673–74.

275. Reynolds, *supra* note 238, at 435.

276. *See* *People v. Halim*, 223 Cal. Rptr. 3d 491 (Ct. App. 2017) (holding that federal judgments and plea agreements were not determinative of whether defendants violated California's human trafficking laws and thus California could choose to prosecute them); *see also* *People v. Laino*, 87 P.3d 27, 34 (2004) (holding that California was free to determine under its own laws whether defendant's Arizona plea constituted a conviction under its own three strikes rule even though Arizona dismissed his aggravated assault charge).

277. *Miller v. Mun. Ct. of L.A.*, 142 P.2d 297, 308 (Cal. 1943).

278. *Zambrano et al.*, *supra* note 97, at 17; *see* *Farmers & Merchs. Tr. Co. v. Madeira*, 68 Cal Rptr. 184, 189–91 (Ct. App. 1968) (determining that a Pennsylvania court order was only a civil judgment awarding "decendent child support for the support of the parties' minor child" and not a penal judgment "to punish respondent for desertion and nonsupport" and was thus enforceable in California courts); *see also* *Java Oil Ltd. v. Sullivan*, 86 Cal. Rptr. 3d 177, 185–87 (Ct. App. 2008) (finding that attorney's fees awarded by a British court were not a penalty because they were not punishment for an offense against the public, not payable to the state, not intended to provide an example, nor were they against the state's public policy).

279. *See* *Zambrano et al.*, *supra* note 97, at 17–18.

280. 838 F.3d 992 (9th Cir. 2016). The Ninth Circuit even specifically referred to the *Huntington* test and stated "California courts likewise concentrate on the character of a foreign judgment" when enforcing foreign-country judgments. *Id.* at 1001.

to the penal judgments exception.<sup>281</sup> But in order to determine whether “the essential character and effect” of the monetary award was penal, the court applied a balancing test utilizing four factors:

- (1) whether the purpose of the award is to compensate an individual or to “provide an example” or punish “an offense against the public”; (2) whether the award is payable to an individual or to the state or one of its organs; (3) whether the judgment arose in the context of a civil action or through the enforcement of penal laws; and (4) whether the award was a “mandatory fine, sanction, or multiplier.”<sup>282</sup>

After analyzing those factors, the court determined the judgment failed the four prongs and held the French judgment was not penal or enforceable because: (1) it provided a “private remedy” for the plaintiff to have his copyright protected; (2) was awarded directly to him instead of the French state or court; (3) arose as a civil remedy without any criminal or penal proceedings; and (4) the fine was not mandatory, with the judge determining the final amount.<sup>283</sup>

In contrast, the Ninth Circuit in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*<sup>284</sup> found that a French judgment was likely penal and it was “exceedingly unlikely” that it could be enforced.<sup>285</sup> In that case, multiple French organizations sued Yahoo! for hosting a sale of Nazi memorabilia in violation of a French statute that declared displaying Nazi emblems a crime.<sup>286</sup> The French court ruled against Yahoo!, so to avoid the judgment, it sought a declaratory judgment in California federal court that the French court’s judgments could not be enforced in the United States.<sup>287</sup> In applying the *Huntington* factors, the court noted “a number of indications” that the French judgments were penal.<sup>288</sup> First, the word “astreinte” used by the French court was consistently translated to “penalty” in court records, relating to the price Yahoo! was required to pay each day it did not remove the postings.<sup>289</sup> Second, Yahoo!’s violation of the French Penal code was

---

281. Zambrano et al., *supra* note 97, at 17–18.

282. *De Fontbrune*, 838 F.3d at 1001.

283. *Id.* at 1005.

284. 433 F.3d 1199 (9th Cir. 2006) (en banc) (per curiam).

285. *Id.* at 1218–20.

286. *Id.* at 1202–03.

287. *Id.* at 1204.

288. *Id.* at 1219–20.

289. *Id.* at 1219.

actually a crime under French law and the monetary penalties “did not lose their character . . . simply because they were obtained in a civil action.”<sup>290</sup> Lastly, the imposed penalties were “primarily designed to deter Yahoo! from creating . . . ‘a threat to internal public order’” and were payable to the government and not individual people.<sup>291</sup> With a majority of the factors satisfied, summary judgment was granted for Yahoo!<sup>292</sup>

The contrasting holdings in *Wofsy* and *Yahoo!* demonstrate that determining whether a judgment is “civil and compensatory” rather than “criminal or punitive” is an important factor in the penal judgments test.<sup>293</sup> In finding that a foreign law was enforceable, *Wofsy* addressed a civil judgment meant to protect the rights of a specific party where payments were made to an individual. In contrast, the court in *Yahoo!* held that a foreign law was *unenforceable* because the civil judgment was based on a criminal statute intended to protect the public as a whole and payments were made to the government.<sup>294</sup> Both cases were civil, so the distinction between civil and criminal judgments does not appear to weigh as heavily as finding a judgment was compensatory versus punitive.<sup>295</sup> Thus, if an out-of-state civil judgment regarding abortion makes its way into a California court, the court will likely try to argue the judgment was penal by focusing on whom the payments were made to and whether the judgment was to benefit a specific person or society at large. But, applying the factors, the outcome is not definitive either way.<sup>296</sup>

Generally, a civil remedy is designed to address a harm.<sup>297</sup> But what harm are these vigilante laws addressing? A simple example would be a situation involving a couple in which the pregnant partner decides to get an abortion and the other partner objects. This could be a reasonable claim of injury because the objecting partner would have an interest in the fetus; however, this type of law specifically allows

---

290. *Id.*

291. *Id.* at 1220.

292. *Id.* at 1224.

293. Zambrano et al., *supra* note 97, at 19.

294. *Id.*

295. *See id.* at 19–20.

296. *Id.* at 19.

297. *Remedy*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/remedy> [<https://perma.cc/JSP8-9GPF>] (defining a remedy as “a form of court enforcement of a legal right resulting from a successful civil lawsuit” and explaining that damages are a category of remedy awarded for the “plaintiff’s losses, injury, and/or pain or restitutionary measures designed to restore the plaintiff’s status to what it was prior to the violation of his or her rights”).

anyone to bring a claim against those who aid or abet an abortion.<sup>298</sup> Furthermore, it grants the claimant a minimum of \$10,000, as well as attorney's fees and costs.<sup>299</sup> While a deterrent function may suggest a penal judgment, it is not dispositive on its own because even compensatory remedies, such as those awarded in torts, serve as deterrents.<sup>300</sup>

Applying the *Huntington* factors, under the first prong it appears the purpose of these civil judgment enforcement laws is to compensate individuals. But anti-abortion states have signaled their intent to punish the abortion-supporting public as a whole and intimidate physicians to prevent them from performing the procedure.<sup>301</sup> This lends credibility to the laws' penal nature. However, on their face, the purpose of these laws is not to punish anyone but to respect life and compensate private individuals—<sup>302</sup> much like wrongful death statutes.<sup>303</sup> But these laws are distinguished from wrongful death statutes because they are “not limited to plaintiffs with a close connection to the deceased”—which would be the fetus, in this case—because “the damages can go to anyone.”<sup>304</sup> Furthermore, “a widow or next of kin” would have a strong claim of personal injury in a typical wrongful death case, while the general public would not.<sup>305</sup>

Under the second prong regarding whether the award is payable to an individual or to the state, the damages for these laws are only paid to individuals.<sup>306</sup> In *Yahoo!*, the court found that the judgment

---

298. See TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021) (“Any person, other than an officer or employee of a state or local government entity in this state, may bring a civil action.”).

299. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b) (West 2021).

300. See RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1979) (stating that one of the “purposes for which actions of tort are maintainable” is to “punish wrongdoers and deter wrongful conduct”).

301. See Tara Romano, *Some Specifics Are New, but the Tactics and Objectives Underlying the New Texas Abortion Law Are Quite Familiar*, NC NEWSLINE (Sept. 16, 2021, 6:00 AM), <https://ncpolicywatch.com/2021/09/16/some-specifics-are-new-but-the-tactics-and-objectives-underlying-the-new-texas-abortion-law-are-quite-familiar/> [<https://perma.cc/26UC-5E84>] (“[Some bills] are designed to intimidate physicians out of providing abortion care, burdening the person seeking the abortion to often travel farther, take more time, incur more expenses, and/or resort to unsafe means to obtain this time-sensitive healthcare.”); see also Simmons-Duffin, *supra* note 148 (discussing the lack of specificity in abortion laws leading doctors to avoid intervening when abortion care is needed).

302. See Reynolds, *supra* note 238, at 435.

303. See *infra* text accompanying notes 318–327.

304. Zambrano, *supra* note 97, at 20.

305. *Id.*

306. TEX. HEALTH & SAFETY CODE § 171.208(b)(2) (“If a claimant prevails in an action brought under this section, the court shall award . . . statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of this

was likely penal because the monetary awards went to the French government. Here, because the award does not go to the state but to a successful claimant, this prong weighs in favor of the anti-abortion laws not being penal.<sup>307</sup>

Additionally, under the third prong, the court may find that because the lawsuit “arises in a civil context” and is not based on a criminal statute, this factor would also weigh against these laws being categorized as penal.<sup>308</sup> These kinds of laws were specifically designed to be a civil remedy between citizens to avoid the possibility that state officials could be sued.<sup>309</sup> However, *Yahoo!* suggests the civil label is not dispositive because the plurality held that the label “did not strip a remedy of its penal nature.”<sup>310</sup>

Lastly, the fourth prong likely weighs in California’s favor.<sup>311</sup> In *Wofsy*, “mandatory fines” indicated that the statute was penal.<sup>312</sup> The vigilante lawsuits are subject to mandatory fines, so proponents could argue that they are penal in nature and that the court should therefore uphold the judgment enforcement bar.

Overall, California has a strong argument that these laws result in civil judgments that are penal, but the court could still rule otherwise. California could argue that the civil label should not be dispositive because the laws and actions from these states demonstrate they want to punish providers first and foremost. But unless a court finds these kinds of laws are penal, California would still have to enforce the judgments from the anti-abortion states.

### B. *The Public Policy Exception and the Venue Bar*

The venue bar in A.B. 1666 provides that California state courts “shall not . . . [a]pply a law” contrary to the public policy of the state

subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted . . .”).

307. *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199, 1220 (9th Cir. 2006) (en banc) (per curiam).

308. Zambrano, *supra* note 97, at 21; *see also* TEX. HEALTH & SAFETY CODE § 171.208(a)(1) (Texas’s vigilante law specifically bars government officials from enforcing the law by stating “[a]ny person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action”).

309. Ian Millhiser, *Texas’s Radical Abortion Law, Explained*, VOX (Sept. 2, 2021, 9:39 AM), <https://www.vox.com/2021/8/31/22650303/supreme-court-abortion-texas-sb8-jackson-roe-wade-greg-abbott> [<https://perma.cc/5RSH-5ZBE>]; *see* TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

310. *Yahoo!*, 433 F.3d at 1219; *see* Zambrano, *supra* note 97, at 21.

311. Zambrano, *supra* note 97, at 21.

312. *De Fontbrune v. Wofsy*, 838 F.3d 992, 1001 (9th Cir. 2016).

“to a case or controversy heard in state court.”<sup>313</sup> The bill further provides that “a law of another state that authorizes a person to bring a civil action against a person who” receives, seeks, performs, or induces an abortion is “contrary to the public policy of this state.”<sup>314</sup> Similarly, S.B. 345 provides “interference with the right to reproductive health care services . . . is against the public policy of California” and that a “public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, authorizes a person to bring a civil action against, or otherwise interferes with a person, provider, or other entity in California” regarding its connection to an abortion “shall be a violation of the public policy of California.”<sup>315</sup> In making these statements about public policy, the authors of the bills likely anticipated the argument that they violated the Full Faith and Credit Clause and explicitly used the “public policy” language so the exception could apply. This exception holds that “states are not obligated to apply out-of-state law that violates the forum state’s own legitimate public policy.”<sup>316</sup> In *Hughes*, the U.S. Supreme Court addressed whether a forum state has the power to block courts from applying another state’s laws when the forum state “would have barred the suit.”<sup>317</sup> The case involved a wrongful death that occurred in Illinois, but the suit was brought in Wisconsin—where all parties were residents.<sup>318</sup> Wisconsin’s statute only permitted recovery for deaths that occurred within the state, so the plaintiff sued under the Illinois statute instead.<sup>319</sup> Because Wisconsin had its own wrongful death statute and had “no real feeling of antagonism against wrongful death suits in general,” the U.S. Supreme Court found that Wisconsin’s policy violated the Full Faith and Credit Clause and Illinois law could be applied.<sup>320</sup>

In contrast, in *Wells v. Simonds Abrasive Company*,<sup>321</sup> the U.S. Supreme Court found that a forum state can apply its own laws if they conflict with another state’s laws.<sup>322</sup> That case also involved a

---

313. Assemb. B. 1666, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

314. *Id.*

315. S.B. 345, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

316. Zambrano, *supra* note 97, at 9.

317. *Id.* at 10–11.

318. *Hughes v. Fetter*, 341 U.S. 609, 613 (1951).

319. *Id.* at 610.

320. *Id.* at 613.

321. 345 U.S. 514 (1953).

322. *Id.* at 517 (“The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states. . . . We are not concerned with the reasons which have led some states for their own purposes to adopt the

wrongful death where the plaintiff was killed in Alabama while using a faulty grinding wheel that burst.<sup>323</sup> The plaintiff's estate sued the wheel manufacturer in Pennsylvania, where its principal place of business was located.<sup>324</sup> Because the Pennsylvania wrongful death statute had a one-year statute of limitations and the estate filed its case more than one year after the accident, the estate attempted to apply Alabama law, which had a two-year statute of limitations.<sup>325</sup> However, the Pennsylvania court held it was compelled to apply Pennsylvania law.<sup>326</sup> The U.S. Supreme Court agreed with the lower court's ruling because Pennsylvania applied its one-year limit "to all wrongful death actions wherever they may arise" and did not discriminate against actions in other states.<sup>327</sup>

Thus, the public policy exception will probably protect A.B. 1666 from constitutional challenges because the bill "does not discriminate against out-of-state causes of action while privileging California's own law—it instead declares a fundamental public policy against anti-abortion laws."<sup>328</sup> As such, California is emphatically opposed to vigilante lawsuits, and its laws should fit within the exception articulated in *Hughes*.<sup>329</sup>

## CONCLUSION

There is uncertainty for abortion access and whether abortion providers will face punishment from out-of-state laws. The extent to which abortion laws may apply is an issue of first impression, so it is too soon to accurately predict what may come. So far, California's laws have created a shield effective enough to defend its citizens and others traveling from out of state from the legal attacks of anti-abortion states. But alone, these laws are likely not enough to preserve abortion access in California. California's laws may be able to withstand constitutional scrutiny, but anti-abortion state legislators are reinforcing their post-*Roe* abortion "trigger" bans as well as drafting *new*

---

foreign limitation, instead of their own, in such a situation. The question here is whether the Full Faith and Credit Clause compels them to do so. Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state.").

323. *Id.* at 515.

324. *Id.*

325. *Id.*

326. *Id.* at 516.

327. Zambrano, *supra* note 97, at 12.

328. *Id.* at 13.

329. *Id.* at 14.



bans to subvert these kinds of protections. For example, in 2023, Idaho successfully passed a law that blocks interstate travel for abortion.<sup>330</sup> Essentially, if an Idaho minor contacts an abortion provider in California to schedule the procedure in California, the provider could be guilty of “abortion trafficking” and face a prison sentence.<sup>331</sup> Although the right to travel is generally held to be a guaranteed right that states cannot limit,<sup>332</sup> the right to travel *to procure an abortion* has not yet been challenged, leaving open the possibility for the U.S. Supreme Court to hold that states *do* have the power to limit travel for this specific purpose.<sup>333</sup> This suggests there could be more extreme laws to come that encourage this eventuality. If so, out-of-state abortion providers will face more drastic liability, far fewer abortions will be performed, and California and all other states and their citizens will be robbed of their promise to have “the issue of abortion [returned] to the people’s elected representatives.”<sup>334</sup>

---

330. See IDAHO CODE § 18-623 (2023).

331. *Id.* § 18-623(1) (“An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion . . . or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking.”); *id.* § 18-623(5) (“Any person who commits the crime of abortion trafficking . . . shall be punished by imprisonment in the state prison for no less than two (2) years and no more than five (5) years.”).

332. *Crandall v. Nevada*, 73 U.S. 35, 47 (1867) (striking down a Nevada law that taxed every person leaving the state by common carrier and holding that “the right of passing through a State by a citizen of the United States is one guaranteed to him by the Constitution”); see also *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (“The right of ‘free ingress and regress to and from’ neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’” (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966))).

333. See *Jones v. Helms*, 452 U.S. 412, 422–23 (1981) (upholding a state law that made it a criminal offense for a parent to intentionally leave the state and abandon his or her children, allowing states to restrict travel if “rationally related to the offense itself”). Traveling for an abortion is rationally related to the abortion itself, which suggests that states may have the power to restrict such travel.

334. *Dobbs v. Jackson Women’s Health, Org.*, 142 S. Ct. 2228, 2243 (2022).