

Date of Hearing: April 5, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2223 (Wicks) – As Amended March 17, 2022

As Proposed to be Amended

SUBJECT: REPRODUCTIVE HEALTH

KEY ISSUES:

- 1) SHOULD STATE LAWS THAT PROHIBIT THE IMPOSITION OF CIVIL AND CRIMINAL PENALTIES FOR PREGNANCY LOSS BE STRENGTHENED AND CLARIFIED?
- 2) SHOULD A NEW PRIVATE RIGHT OF ACTION BE CREATED IN THE LAW THAT ALLOWS INDIVIDUALS WHOSE RIGHTS TO BE FREE OF CIVIL AND CRIMINAL PENALTIES FOR PREGNANCY LOSS ARE VIOLATED TO SEEK ACCOUNTABILITY FOR THOSE VIOLATIONS IN THE STATE’S CIVIL COURTS?

SYNOPSIS

This bill seeks to further clarify and strengthen California’s already strong legal protections against civil liability and criminal prosecution of a pregnant person for the death of their unborn fetus, creates a new civil action allowing individuals whose rights under the Reproductive Privacy Act are violated to seek accountability against “state actors” in the civil courts; and allows a civil action under the Bane Act (Civil Code Section 52.1) to be based upon violation of the bill, including for an exercise of prosecutorial discretion. The analysis reviews how existing criminal homicide statutes prohibit prosecution of a pregnant person for the death of their unborn fetus. Existing state law also prohibits a civil cause of action for prenatal torts (civil actions involving an unborn child). The analysis also points out that while other states are adopting increasingly aggressive measures to limit abortions, California continues to protect reproductive rights.

The bill has two main provisions. First, it reiterates, and arguably strengthens, the protections in existing state law that prohibit civil or criminal liability for the acts of a pregnant person in relation to their pregnancy outcomes. Second, it creates a new private right of action for violations of rights protected by the Reproductive Privacy Act. The analysis points out that there are some issues with the wording of Sections 7 of the bill in print (the immunity provision) because it has (1) an unintended impact on child welfare laws; and (2) creates the mistaken and unintended impression that the bill’s immunities could apply to cases where a newborn’s death was the result of a cause that was not related to the parent’s acts or omissions during pregnancy. Similarly, Section 9 of the bill in print (the private right of action) appears to (1) inappropriately dictate the parameters of federal court jurisdiction; (2) provide inadequate remedies to a plaintiff; and (3) inadequately address general and specific forms of governmental immunity. The author proposes amendments to address all of these issues. The amendments are incorporated into the Summary of the bill, below, and explained in the analysis.

The bill is co-sponsored by ACLU California Action, Black Women for Wellness, California Latinas for Reproductive Justice, If/When/How: Lawyering for Reproductive Justice, NARAL Pro-Choice California, and Planned Parenthood Affiliates of California. It is also supported by a large number of reproductive health advocates, public health associations, organizations advocating to improve maternal and infant health, as well as civil rights advocacy organizations. The bill is opposed by a large number of religious organizations, organizations that oppose abortion rights, and numerous individuals.

SUMMARY: Strengthens and clarifies the state's existing prohibitions on imposing civil and criminal penalties for pregnancy loss, creates a new civil action that allows individuals whose rights to be free of civil and criminal penalties for pregnancy loss are violated to seek accountability, and limits the duties of coroners to be consistent with those laws. Specifically, **this bill:**

- 1) Makes the following findings and declarations on the part of the Legislature:
 - a) Reproductive justice is a framework created by Black women in 1994 to address the intersectional and multifaceted issues that women of color and their families face in society.
 - b) Reproductive justice is the human right to control our bodies, sexuality, gender, work, and reproduction. That right can only be achieved when all people, particularly women and girls, have the complete economic, social, and political power and resources to make healthy decisions about their bodies, families, and communities in all areas of their lives. At the core of reproductive justice is the belief in the right to bodily autonomy, the right to have children, the right to not have children, and the right to parent the children we have with dignity and respect in safe and sustainable communities.
 - c) A critical part of realizing reproductive justice for people in California is clarifying that there shall be no civil and criminal penalties for people's actual, potential, or alleged pregnancy outcomes.
 - d) Across the country, people have been criminally prosecuted for having miscarriages or stillbirths or for self-managing an abortion. California has not been exempt. Despite clear law that ending or losing a pregnancy is not a crime, police have investigated and prosecutors have charged people with homicide for pregnancy losses.
 - e) Also across the country, pregnant people are under threat of civil penalties for their actual, potential, or alleged pregnancy outcomes and civil penalties have been threatened against people who aid or assist pregnant people in exercising their rights.
 - f) Pregnancies can end in a range of outcomes. Nationwide, as many as one in five known pregnancies end in miscarriage. In California, as many as 2,365 pregnancies per year end in stillbirth, meaning perinatal loss after 20 weeks gestation. Many pregnancy losses have no known explanation.
 - g) People also need to end pregnancies by abortion, including self-managed abortion, which means ending one's own pregnancy outside of the medical system.

- h) Every Californian should have the right to feel secure that they can seek medical assistance during pregnancy without fear of civil or criminal liability.
 - i) The threat of criminal prosecution of pregnancy outcomes is partly traceable to out-of-date provisions that give coroners a duty to investigate certain abortions and pregnancy losses. Based on these provisions, health care providers and institutions report people to law enforcement for pregnancy losses, leading to harmful investigations and even unlawful prosecutions.
 - j) Civil and criminal penalties imposed on pregnant people is a critical issue for Black, Indigenous, and other people of color, who experience adverse pregnancy outcomes as a result of systemic racial inequities and are more likely to be under scrutiny of state systems like child welfare or immigration.
 - k) The threat of criminal prosecutions or civil penalties on pregnant people through child welfare, immigration, housing, or other legal systems has a harmful effect on individual and public health. When a person fears state action being taken against them related to their pregnancy, they are less likely to seek medical care when they need it. If they do seek care, punishing them for actual, potential, or alleged pregnancy outcomes interferes with professional care and endangers the relationship between providers and patients.
 - l) That is why major medical groups like the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Public Health Association oppose civil and criminal penalties for actual, potential, or alleged pregnancy outcomes.
- 2) Repeals Government Code Section 103000, which provides that. “All other fetal deaths required to be registered under this chapter shall be handled as are deaths without medical attendance.”
 - 3) Removes from existing law, under existing duties of the coroner, the duty to inquire into and determine the circumstances, manner, and cause of all deaths related to or following known or suspected self-induced or criminal abortion.
 - 4) Clarifies that existing law, requiring a coroner to examine a fetus and state on the certificate of fetal death, among other things, the direct causes of the fetal death, the conditions, if any, that gave rise to the cause or causes, shall not be used to establish, bring, or support a criminal prosecution or civil cause of action seeking damages against any person, whether or not they were the person who was pregnant with the fetus. Through its courts and statutes and under its Constitution, California protects the right to reproductive privacy, and it is the intent of the Legislature to reaffirm these protections.
 - 5) States that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.
 - 6) Provides that notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights under this article, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy

outcome, including miscarriage, stillbirth, or abortion, or perinatal death due to a pregnancy-related cause.

- 7) Provides that a person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their rights, based solely on their actions to aid or assist a pregnant person in exercising their rights under this article with the pregnant person's voluntary consent.
- 8) Clarifies that an abortion is unauthorized if it meets all of the criteria specified in existing law *and* it is performed by someone other than the pregnant person.
- 9) Allows a party aggrieved by conduct or regulation in violation of the Reproductive Privacy Act (Sections 123460 – 123468 of the Health & Safety Code) to bring a civil action against an offending state actor in a state superior court.
- 10) States that whoever denies the right protected by this article, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:
 - a) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
 - b) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right protected by this article. An action shall be commenced within three years of the alleged practice in violation of this article.
 - c) Preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this article.
- 11) Provides that, upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to 9), above. In awarding reasonable attorney's fees, the court shall consider the degree to which the relief obtained relates to the relief sought.
- 12) Allows a party aggrieved by conduct or regulation in violation of this article to also bring a civil action pursuant to the Bane Civil Rights Act; and provides that notwithstanding the existing immunities in Section 821.6 of the Government Code, a civil action pursuant to Bane Act may be based upon instituting or prosecuting any judicial or administrative proceeding in violation of this article. Provides, for purpose of establishing liability, that the criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, constitutes "threat, intimidation, or coercion" pursuant to the Bane Act.
- 13) Changes gendered terminology in relevant code sections and eliminates the offensive and outdated "crime against nature" from existing code.
- 14) Specifies that Sections 825, 825.2, 825.4, and 825.6 of the Government Code, which provide for defense and indemnification of an employee or former employee of a public entity, shall

apply to any cause of action brought under this section against an employee or former employee of a public entity.

EXISTING LAW:

- 1) Provides that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state, and that the United States Congress may by general laws prescribe the manner in which such acts, records and proceedings must be proved, and the effect thereof. (U.S. Const. art. IV, sec. 1.)
- 2) Holds that the state cannot interfere with the fundamental right of a woman to control her life and future by restricting the right to obtain an abortion unless and until there is a compelling reason for doing so; and that a compelling interest in protecting the potential life of the fetus cannot be asserted until the fetus is “viable” (usually at the beginning of the last trimester of pregnancy), and even then a woman has to have access to an abortion if it were necessary to preserve her life or health. (*Roe v. Wade* (1973) 410 U.S. 113.)
- 3) Provides that it shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all specified types of death, including but not limited to violent, sudden, or unusual deaths; and deaths related to or following known or suspected self-induced or criminal abortion. Inquiry pursuant to this section does not include those investigative functions usually performed by other law enforcement agencies. (Government Code Section 27491.)
- 4) Requires the coroner, within three days after examination of the fetus, to state on the certificate of fetal death the time of fetal death, the direct causes of the fetal death, the conditions, if any, that gave rise to these causes, and other medical and health section data as may be required on the certificate, and shall sign the certificate in attest to these facts. The coroner shall, within three days after examining the body, deliver the death certificate to the attending funeral director. (Health & Safety Code Section 103005.)
- 5) Provides, in the Reproductive Privacy Act (Health & Safety Code Sections 123460 – 123468), that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that:
 - a) Every individual has the fundamental right to choose or refuse birth control.
 - b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article.
 - c) The state shall not deny or interfere with a woman’s fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.
- 6) Prohibits the State of California from denying or interfering with a woman’s right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman. (Health & Safety Code Section 123466.)

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

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill seeks to further clarify and strengthen California's already strong legal protections against civil liability and criminal prosecution of a pregnant person for the death of their unborn fetus, creates a new civil action allowing individuals whose rights under the Reproductive Privacy Act are violated to seek accountability against "state actors" in the civil courts; and allows a civil action under the Bane Act (Civil Code Section 52.1) to be based upon violation of the bill, including for an exercise of prosecutorial discretion. According to the author:

AB 2223 protects reproductive freedom by clarifying that the Reproductive Privacy Act prohibits pregnancy criminalization, and creates a private right of action for people whose rights have been violated to seek accountability using civil courts. It would also remove outdated provisions requiring coroners to investigate certain pregnancy losses, and ensure that information collected about pregnancy loss is not used to target people through criminal or civil legal systems.

The bill also limits the duties of coroners to be consistent with laws that protect pregnant persons from civil liability and criminal prosecution for the death of their unborn fetus. Because duties of coroners are in the jurisdiction of the Assembly Committee on Health, this analysis will not focus on those issues.

Existing criminal homicide statutes prohibit prosecution of a pregnant person for the death of their unborn fetus. While California's murder statute, Penal Code Section 187, specifically applies to the unlawful killing of a fetus with malice aforethought, by its own terms, it is inapplicable "when the act is solicited, aided, abetted, or consented to by the mother of the fetus." (Penal Code Section 187 (b)(3).) While the Legislature broadened the scope of section 187 to include the unlawful killing of a fetus in specific response to the California Supreme Court's decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619, the revised wording was intended to situations where a third party intended to cause the death of a fetus. In *Keeler*, the defendant was charged with murder after he attacked his pregnant ex-wife, intentionally causing the death of her fetus. The *Keeler* Court held that the then-existing wording of Section 187, defining murder as the unlawful "killing of a 'human being,'" did not encompass the killing of a

fetus. In amending Section 187 in response to *Keeler*, the Legislature intended to criminalize only third-party violence against pregnant persons resulting in fetal death. There is no evidence of legislative intent to extend criminal liability to the mother of the unborn fetus.

Nevertheless, there apparently is confusion among some in law enforcement during the fifty-two years since *Keeler*. On January 6, 2022, Attorney General Rob Bonta issued a Legal Alert (OAG-2021-01) to all California District Attorneys, Police Chiefs, and Sheriffs, regarding “Penal Code 187 and ‘the unlawful killing of . . . a fetus’.” The alert informed law enforcement of the following:

The Attorney General has construed Penal Code section 187 as it relates to the actions or inactions of a person carrying a fetus that are alleged to have caused the death of that fetus. The Attorney General’s construction is contained in court documents filed in multiple cases, including the attached amicus brief filed in *In re Perez*, Case No. 21W-0033A, Kings Co. Sup. Court (June 25, 2021).

In *Perez*, the defendant experienced a stillbirth at 37 weeks gestation attributed to her methamphetamine use. She was charged with murder and pled guilty to the less serious crime of manslaughter, according to transcripts of her plea, “to avoid the possibility of getting the life sentence on the murder case.” However, she could not have been convicted of (and should therefore should not have been charged with) murder pursuant to *Keeler*, given that the fetus was never alive; and there was no factual basis for her plea to manslaughter, given that the killing of a fetus does not constitute manslaughter (*People v. Dennis* (1998) 17 Cal.4th 468, 506). In an amicus brief supporting the release of Perez from prison after **11 years of incarceration**, the AG wrote, “The Attorney General agrees . . . that the text, purpose, and legislative history of California Penal Code section 187 demonstrate that a woman cannot be prosecuted for murder as a result of her own omissions or actions that might result in pregnancy loss.”

The Legislature's purpose in adding the killing of a fetus to Penal Code section 187 was not to punish women who do not--or cannot, because of addiction or resources- follow best practices for prenatal health. Nor did it intend to punish women who might in desperation seek to end their pregnancies outside normal medical channels. Rather, this addition was a focused response to *Keeler v. Superior Court* (1970) 2 Cal.3d 619, holding that the unlawful "killing of a human being" did not encompass a fetus. (See Assem. Com. on Crim. Procedure's Dig., Assem. Bill No. 816 (1970 Reg. Sess.) (July 15, 1970); Review of Selected 1970 California Legislation, Crimes (1971) 2 Pacific L. J. 275, 362-363 [amendment to section 187 "was enacted in response to a June 1970 decision of the California Supreme Court (*Keeler v. Superior Court*, 2 Cal.3d 619)].) *Keeler* was charged with the murder of a fetus after he attacked his pregnant ex-wife, intentionally causing a stillbirth. The court ordered that *Keeler's* prosecution for murder was barred under Section 187 as it was then written. (*Id.* at pp. 628, 631.)

As the AG also points out in his *Perez* amicus brief, the Legislature has repeatedly declined to extend the state’s penal laws to encompass punishment of a pregnant woman who experiences a pregnancy loss. (See Sen. Bill No. 1465 (1989-1990 Reg. Sess.) [proposed bill that would have expanded manslaughter to include substance abuse during pregnancy]; Assem. Bill No. 650 (1990-1991 Reg. Sess.) [proposed bill that would have made substance abuse during pregnancy a misdemeanor].) But under current law and its virtually complete liability shield for the exercise of prosecutorial discretion under Government Code Section 821.6, *Perez* would have no ability

to sue those responsible for unlawfully imprisoning her for 11 years, despite the clearly invalidity of her prosecution and conviction. Her only remedy would be to submit a claim to the state for compensation pursuant to the state fund for erroneously convicted persons. (See Penal Code Sections 4900 *et seq.*) Pursuant to a 2016 amendment, the law provides a flat compensation rate of \$140 per day for each day of incarceration served, including pre-conviction time spent in custody. Obviously, this does not take into account a person's individual damages that could include loss of income, loss of parenting rights, loss of reputation, and personal injuries suffered during incarceration.

Existing state law prohibits a civil cause of action for prenatal torts. A prenatal tort is a tort (a civil cause of action for damages based upon a wrongful act that causes injury) involving an unborn child. Prenatal tort causes of action include personal injury, wrongful birth, wrongful life, and wrongful pregnancy. But at common law, they do not include wrongful death or wrongful injury. Any right to recovery or cause of action belonged only to the mother because “the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her.” (*Dietrich v. Inhabitants of Northampton* (1884) 138 Mass. 14, 17.)

While some states have repudiated the reasoning of *Dietrich* and authorized civil actions for prenatal injuries caused by tortious conduct that occurs prior to birth, California law remains consistent with the theory expressed in *Dietrich*. Under California law, a fetus or embryo not born alive never attains the status of a “person;” and only a “person” can maintain a legal action or be the subject of a wrongful death claim. Thus, whether the alleged tortfeasor is a pregnant person or a third party, a civil cause of action cannot arise under existing California law for injury or death to a fetus if the fetus is never alive outside of the womb. (See *Hegyey v. Unjian Enterprises, Inc.* (1991) 234 CA3d 1103, 1113 [a negligent motorist was found not legally liable to a child conceived after collision occurred].)

Other states are adopting increasingly aggressive measures to limit abortions. Following the appointment of several Supreme Court justices by former President Donald Trump, dozens of states have enacted legislation in an effort to test the limits, or outright overturn, the federally protected right to an abortion granted in the landmark ruling of *Roe v. Wade* (1973) 410 US 113. One of the first states to restrict abortion access was Mississippi, which enacted a ban on abortion after the fifteenth week of pregnancy. The Mississippi law authorizes the state's Attorney General, as well as the Mississippi State Department of Health or the Mississippi State Board of Medical Licensure, to impose professional sanctions, including fines and a loss of licensure, on any physician who performs an abortion after 15 weeks. (MS Code Section 41-41-191.) The constitutionality of that statute is currently under review by the United States Supreme Court, which is expected to rule in the matter of *Dobbs v. Jackson Women's Health Organization* (No. 19-1392) later in 2022.

Although several states have opted to follow Mississippi's lead and enact similar laws, in 2021, the State of Texas adopted a unique and far more menacing approach to restricting abortion access. Rather than directing state regulators or prosecutors to impose criminal or professional sanctions on persons receiving or performing an abortion, the Texas law permits the filing of a civil lawsuit against any person who performs an abortion or “aids or abets” a person receiving an abortion after a “fetal heartbeat” has been detected. (Texas Health and Safety Code Section 171.208.) As of March 2022, more than one dozen other states have moved to introduce their own versions of the Texas law.

This bill. The bill has are two main provisions that are in the jurisdiction of this Committee. First, it reiterates, and arguably strengthens, the protections in existing state law that prohibit civil or criminal liability for the acts of a pregnant person in relation to their pregnancy outcomes. Second it creates a new private right of action for violations of rights protected by the Reproductive Privacy Act.

Prohibition on civil and criminal liability for the acts of a pregnant person in relation to their pregnancy outcomes. In Section 7, the bill in print provides the following protection from liability to a pregnant person relative to their pregnancy outcomes:

(a) Notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death.

(The bill also specifies that a person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their rights.)

Unintended Impact on Child Welfare Laws - Subdivision (a) of Section 7 is arguably overbroad in at least two ways. First, it appears to immunize a pregnant person from not only all civil liability and criminal penalty for their pregnancy outcomes (consistent with existing law), but also from being “otherwise deprived of their rights” for any of their actions with respect to their pregnancy. This is not consistent with current law, given that child welfare laws allow consideration of a parent’s dangerous acts during pregnancy because those acts could affect the welfare of a child who is born after the pregnancy, or other children who are in the person’s household. Thus, a pregnant person’s actions during pregnancy *could* ultimately affect their parenting rights and result in the deprivation of those rights. For example, reunification services are not required to be provided to a parent with a history of extensive, abusive, and chronic use of drugs or alcohol who has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brings a child to the court’s attention. (Welfare & Institutions Code Section 361.5 (b)(13).) Likewise, drug use by a caretaker can be considered in evaluating the welfare of other children in the parent’s custody or care. All States, the District of Columbia, Guam, and the U.S. Virgin Islands have provisions within their child protection statutes, regulations, or policies that address the issue of substance use by parents. (Child Welfare Information Gateway. (2020). *Parental substance use as child abuse*. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau, available at <https://www.childwelfare.gov/pubPDFs/parentalsubstanceuse.pdf>.)

Given that existing law allows a pregnant person’s actions during pregnancy to be considered in a manner that could impact their parenting rights, the grant of immunity in Section 7 of the bill in print arguably is overly broad. However, it should be pointed out that the bill, even as it is now in print, is not so broad that it would prevent CPS or law enforcement investigations of a child’s death. The bill provides that “*a person shall not be subject to civil or criminal liability or penalty . . . based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome[.]*” Therefore, the facts of a child’s death could be investigated (whether it was born alive, when and how it died, etc.) but depending on the outcome of that investigation (whether the death was related to a pregnancy-related cause), further criminal investigation of the parent may be prohibited. In response to a question asked by Americans

United for Life, “If a baby is found in a dumpster can law enforcement investigate the child’s death?” the answer is yes.

In order to clarify that the immunity provided by the bill only extends to the deprivation of rights related to pregnancy, the author proposes the following amendment on Page 7, at line 7: insert the words “*under this article*” after the word “rights”.

“*Perinatal Death*” - Second, the “perinatal death” language could lead to an unintended and undesirable conclusion. As currently in print, it may not be sufficiently clear that “perinatal death” is intended to be the consequence of a pregnancy complication. Thus, the bill could be interpreted to immunize a pregnant person from all criminal penalties for all pregnancy outcomes, including the death of a newborn for any reason during the “perinatal” period after birth, including a cause of death which is not attributable to pregnancy complications, which clearly is not the author’s intent.

While the bill does not define “perinatal,” the term is generally used to describe the period from approximately past 22 (or 28) completed weeks of pregnancy up to 7 completed days of life. (L.S.Bakketeig, P.Bergsjø, “Perinatal Epidemiology.” International Encyclopedia of Public Health (2008), p. 45.) Welfare & Institutions Code Section 13134.5(b) defines perinatal as “the period from the establishment of pregnancy to one month following delivery.”

In order to clarify that the bill’s immunity provision is only intended to apply to a perinatal death after a live birth when the cause of death is directly attributable to pregnancy, the author proposes the following clarifying amendment on Page 7, at line 10: insert “*due to a pregnancy related cause*” at the end of the sentence. Reflecting both of the above-proposed amendments, the entire subdivision would read as follows:

123467. (a) Notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights *under this article*, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death *due to a pregnancy-related cause*.

A new private right of action for violation of rights protected by the Reproductive Privacy Act. In Section 9, the bill in print authorizes a civil action against “an offending state actor” for violating rights protected under the Reproductive Privacy Act and attempts to establish grounds requiring a federal court to exercise its supplemental jurisdiction.

123469. (a) A party aggrieved by conduct or regulation in violation of this article may bring a civil action against an offending state actor in a federal district court or state superior court. A state claim brought in federal district court shall be a supplemental claim to a federal claim.

The language of Section 9 of the bill as it is now in print raises several issues and potential problems.

The bill in print appears to inappropriately dictate the parameters of federal court jurisdiction. The jurisdiction of federal courts is governed exclusively by federal law, primarily the Federal Rules of Civil Procedure. State law cannot supersede federal law to grant jurisdiction over state claims to a federal court. In general, U.S. district courts can exercise subject matter jurisdiction

over a case when either a claim is pled that presents a federal question, or complete diversity exists between the parties and meets a minimum damages threshold. Supplemental jurisdiction over state law claims is just that: a supplement to the claim over which the district court has original jurisdiction, in instances where the state law claims are so closely related to the federal claim that the claims form a part of the same case or controversy. Supplemental jurisdiction is meant to ensure efficient use of judicial resources and to prevent inconsistent outcomes in state and federal cases arising from the same set of facts. These are all procedural considerations that are not raised and cannot be mandated by this bill.

Second, Section 9 provides few remedies to plaintiffs (other than attorney's fees and costs) and fails to address the governmental immunities in existing law that would prohibit most civil actions brought pursuant to the section. While neither the "conduct or regulation" nor the specific "state actor" is specified in the bill, the intent of the bill—as expressed in the bill's intent language set forth in Section 1—is focused on the unlawful criminal prosecution of pregnant women for their pregnancy outcomes. However, a new private right of action would have virtually no chance of success under the bill in print because of both general and specific immunities for public employees in existing state law, as explained in more detail below.

A civil suit based upon a state actor's violation of a plaintiff's fundamental rights granted by the laws or Constitution of the United States, or by the laws or Constitution of the state of California, such as the right to obtain an abortion, could be brought under existing law. The Tom Bane Civil Rights Act is one of the three major civil rights statutes in state law (along with the Unruh Civil Rights Act and the Ralph Act). The Bane Act makes it unlawful for any person, *whether or not acting under color of law*, to interfere, or attempt to interfere, by threat, intimidation, or coercion, with any other person in the exercise of any rights granted by the laws or Constitution of the United States, or by the laws or Constitution of the state of California. There are two important, and sometimes misunderstood points, to make about the Bane Act. First, the Bane Act is similar to Section 1983 of the federal Civil Rights Act of 1871 in that both permit a person to file a lawsuit against someone who interferes with the exercise of their civil and constitutional rights; indeed lawsuits against public employees, including peace officers, and the entities that employ them, often combine a Section 1983 claim and a Bane Act claim. However, there is also a significant difference: while a Section 1983 lawsuit must be filed against someone "acting under the color of law" (under the apparent authority of government), the Bane Act makes it unlawful for *any person* to interfere with the rights of another "whether or not acting under color of law." While this bill is targeted at "state actors," who presumably would be acting under color of law, the Bane Act is not limited to government actors. (*See e.g. Jones v. Kmart Corp.* (1998), 17 Cal. 4th 329 [ultimately finding Kmart not liable but not questioning that it could be a defendant in a Bane Act action].)

Second, the Bane Act is sometimes referred to as a "hate crime" statute, largely due to examples cited in support of the bill when it was enacted in 1987. However, unlike the Unruh Act and the Ralph Act, there is no reference in the Bane Act to "protected characteristics" that are typically required to make something a hate crime. In sum, one does not need to be a member of a protected group to bring an action under the Bane Act, nor does the act of interference need to be based on the targeted person's protected characteristics. Originally, some courts held that the Bane Act required discriminatory animus on the basis of a protected characteristic, but in 2004, the California Supreme Court made clear that it was not the case, as the plain language of the statute, unlike the Unruh and Ralph Acts, does not mention any protected characteristics. (*See Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841-843 ("*Venegas I*") [overturning

prior decisions to the extent that they assumed a Bane Act action needed to be based on animus toward a protected characteristic[.]) In sum, the Bane Act is a broad and potentially powerful civil rights statute that allows *any* person to bring a lawsuit against *any* other *person* (not just a person acting under color of law) who interferes with *any* legal or Constitutional right by means of threats, intimidation, or coercion, or who attempts to interfere with those rights by those means.

The Bane Act and sovereign (governmental) immunity. California’s Government Claims Act (formerly known as the “Tort Claims Act”) codifies the concept of “sovereign immunity,” which essentially shields government from civil lawsuits, except under very limited circumstances. Rooted in the ancient principle that no one can drag the King into court – it was the “King’s Court,” after all – the concept morphed into the idea that even “non-monarchical” governments, and government employees acting within the scope of their duties, should enjoy at least a “qualified immunity” from civil suits. California’s Government Claims Act starts with the broad claim that “a public entity is not liable for an injury” caused by the entity, *except* as otherwise provided by another statute. In short, we start with the assumption that the government is immune from liability *unless* the Legislature enacts a statute providing otherwise. Despite this broad assertion of immunity, the Legislature has used its power to enact exceptions over the years. Most significant, Government Code Section 815.2 (a) provides that a public entity may be liable for injuries caused by an act or omission of its employees acting within the scope of employment, if the employee’s act would subject the employee to liability. However, even where existing law permits an action against a public entity, the Government Claims Act still includes a “presentation” requirement for most causes of action. Although there are important exceptions, as a general rule a person wishing to sue a government entity or government employee must first “present” a claim to the entity and, in many cases, exhaust all administrative remedies before bringing an action in court. (Government Code Section 910 *et seq.*) And even then, specific laws that immunize certain actions (such as a prosecutor’s discretion whether to initiate criminal charges – set forth on Government Code Section 821.6, discussed in more detail below) may preclude the success of a civil action brought under the Bane Act. Therefore, government immunity has been the major stumbling block to persons seeking justice when their rights are violated, sometimes violently and fatally, such as by law enforcement officers.

Last year’s SB 2 (Bradford) Chap. 409, Stats. 2021, amended the Bane Act to expressly provide that actions brought under its provisions are not subject to the government immunity provisions in Sections 821.6, 844.6, and 845.6 of the Government Code when a civil cause of action is “brought against any peace officer or custodial officer”. These sections of the Government Claims Act grant immunity to public employees for injuries caused by instituting or prosecuting a judicial or administrative proceeding, even if the acts are malicious and without probable cause; to public entities for injuries caused to prisoners; to a public employee or a public entity for failure to provide medical care to a person in their custody. In addition, SB 2 specified that the provisions of the Government Claims Act that require public entities to indemnify and defend public employees for claims brought against the employee individually, apply to actions brought against public employees under the Bane Act. It should be pointed out that SB 2 did not affect the very broad immunity under Government Code Section 821.6 that applies to prosecutors and their exercise of prosecutorial discretion.

Prosecutorial Immunity. Government Code Section 821.6 states that, “A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.” This statute has been interpreted to offer extremely broad immunity to prosecutors and their

discretionary acts, including whether to initiate criminal charges. In *Sullivan v. County of Los Angeles* (1974) 12 Cal. 3d 710, the California Supreme Court interpreted section 821.6 as providing immunity of public employees against malicious prosecution claims and noted that “no statute imposes liability on public entities for malicious prosecution.” as “confining its reach to malicious prosecution actions.” (*Id.* at p. 720.)

This is similar to the immunity that prosecutors have under federal law that protects them from liability for exercising their prosecutorial discretion, even when it violates federal civil rights. “State prosecutors are absolutely immune from § 1983 actions when performing functions ‘intimately associated with the judicial phase of the criminal process,’ [Citation omitted] or, phrased differently, “when performing the traditional functions of an advocate.” (*Kalina v. Fletcher* (1997) 522 U.S. 118, 131.) “Prosecutors are entitled to qualified immunity, rather than absolute immunity, when they perform administrative functions, or ‘investigative functions normally performed by a detective or police officer.’” (*Genzler v. Longanbach* (9th Cir. 2005) 410 F.3d 630, 636 [quoting *Kalina*, 522 U.S. at 126].) The rationale is that prosecutors must be able to pursue criminals with courage and independence, and without worrying about the threat of lawsuits. “The common-law immunity of a prosecutor is based upon . . . concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.” (*Imbler v. Pachtman* (1976) 424 U.S. 409, 422-423.)

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

Government Code Section 821.6 has never been amended or modified since it was enacted in 1963, despite the fact that appellate courts have confoundingly managed to expand its meaning beyond the parameters of *Sullivan*. (See, e.g., *Kayfetz v. State* (1984) 156 Cal. App. 3d 491, 497 [“section 821.6 is not limited to suits for damages for malicious prosecution, although that is a principal use of the statute”]; *Amylou R. v. Cty. of Riverside* (1994) 28 Cal. App. 4th 1205, 1211 [explaining that “the section clearly extends to proceedings which were not initiated out of a malicious intent, and thus would not constitute malicious prosecution”].) But that does not mean that Section 821.6 can’t or shouldn’t be amended or modified by the Legislature, just as the immunity for peace officers and custodial officers was modified last year by SB 2. (See also *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, 268 [observing that because Congress could have abrogated prosecutorial immunity in Section 1983, but given that it did not do so explicitly and given the longevity of the concept, courts have assumed that it did intend to do so by implication].)

Arguably there is no public policy rationale for giving prosecutors immunity for acts that clearly are outside the normal scope of prosecutorial discretion, such as fabricating evidence. In fact, the U.S. Supreme Court held as much when it declined to apply absolute immunity to a prosecutor who fabricated evidence of a defendant’s guilt on the basis that evidence gathering (and fabrication) is not a prosecutorial function. “When a prosecutor performs the investigative

functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" (*Buckley*, *supra*, at pp. 273-274.)

Likewise, there is no public policy rationale for granting absolute immunity to prosecutors for a decision to prosecute a pregnant woman for a pregnancy outcome in direct violation of a legislative directive not to do so. Although filing criminal charges is an exercise of prosecutorial discretion, where the law clearly prohibits criminal charges – as existing law does now (and the Reproductive Privacy Act would do in an even more clear and adamant way under the bill) – there is no discretion to file charges. Thus, especially given the extremely narrow scope of the liability under the bill (only for decisions to pregnant women for the loss of their pregnancy when the law prohibiting such prosecutions has clearly prohibited such prosecutions for more than 50 years), modifying the immunity protection offered by Government Code Section 821.6 seems justified and appropriate.

Author's amendments. In order to address the issues about Section 9 of the bill discussed above, the author proposes the following clarifying amendments:

123469. (a) A party aggrieved by conduct or regulation in violation of this article may bring a civil action against an offending state actor in a ~~federal district court or state superior court.~~ A state claim brought in federal district court shall be a supplemental claim to a federal claim.

(b) Whoever denies the right protected by this article, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right protected by this article. An action shall be commenced within three years of the alleged practice violation of this article.

(3) Preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this article.

(4) Upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to this section. In awarding reasonable attorney's fees, the court shall consider the degree to which the relief obtained relates to the relief sought.

(d)(1) A party aggrieved by conduct or regulation in violation of this article may also bring a civil action pursuant to Section 52.1 of the Civil Code. Notwithstanding Section 821.6 of the Government Code, a civil action pursuant to Section 52.1 of the Civil Code may be based upon instituting or prosecuting any judicial or administrative proceeding in violation of this article.

(2) For purpose of establishing liability pursuant to this subdivision, the criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, constitutes "threat, intimidation, or coercion" pursuant to Section 52.1 of the Civil Code.

(e) Sections 825, 825.2, 825.4, and 825.6 of the Government Code, providing for indemnification of an employee or former employee of a public entity, shall apply to any

cause of action brought under this section against an employee or former employee of a public entity.

The damages and other remedies proposed to be added to the bill are identical to those provided in Section 52 of the Civil Code for violations of the Unruh Civil Rights Act (Civil Code Section 51), the Civil Rights Act (Civil Code Section 51.5), and the Gender Tax Repeal Act of 1995 (Civil Code Section 51.6). It seems appropriate that the bill would incorporate those remedies, given that it also seeks to protect and provide remedies for violations of personal rights.

A plaintiff would also be specifically authorized to bring an action under the Bane Act for violations of the Reproductive Privacy Act. And while a plaintiff could do so now, the bill would provide new tools to a future plaintiff in two forms. First, the amendments propose to clarify that the criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome would constitute “threat, intimidation, or coercion” pursuant to Section 52.1 of the Civil Code. It is obvious that a criminal investigation or prosecution, or threat thereof—with its potential impacts on employment, parental rights, social status and reputation, and loss of freedom by imprisonment—is threatening and intimidating. The prospect of criminal punishment can also be highly coercive, as demonstrated in the *Perez* case, where the threat of lifetime punishment was used to extract an admission of guilt to a lesser criminal charge for which there was no factual basis. The proposed amendments would merely clarify the point. The proposed amendments also clarify that if a public employee were sued under the bill, their employer would be obligated to indemnify and defend the employee. The same language was enacted relative to the Bane Act in last year’s SB 2.

Finally, the proposed amendments remove an offensive and obsolete term, “crime against nature,” from Section 27491 of the Government Code.

ARGUMENTS IN SUPPORT: The co-sponsors--ACLU California Action, Black Women for Wellness, California Latinas for Reproductive Justice, If/When/How: Lawyering for Reproductive Justice, NARAL Pro-Choice California, and Planned Parenthood Affiliates of California--all write in support of the bill that it “protects reproductive freedom by ensuring that no one in the State of California will be investigated, prosecuted, or incarcerated for ending a pregnancy or experiencing pregnancy loss.” They observe that although it “is not a crime to have an abortion, miscarriage, or experience pregnancy loss. .. [and] despite clear law forbidding these charges and protecting the right to make decisions about pregnancy, Californians have been charged with homicide offenses for pregnancy losses.” They observe that, “AB 2223 protects reproductive freedom by clarifying that the Reproductive Privacy Act affirms people’s right to be free from investigation, prosecution, and incarceration based on their pregnancy outcomes: whether they have an abortion or experience a pregnancy loss.” Black Women for Wellness Action Project point out that, “This bill is also particularly important to our organization our community, as we know that Black mommas and families are particularly and likely to be targeted.” The California Women’s Law Center observes that, “AB 2223 will protect reproductive freedom in California by clearly delineating that ending or losing a pregnancy is not a crime.”

ARGUMENTS IN OPPOSITION: Americans United for Life writes that, “‘Perinatal’ is not defined in this bill, causing critics to decry AB 2223 as infanticide. Elsewhere in California law, “perinatal care” is defined as “provision of care during pregnancy, labor, delivery, and

postpartum and neonatal periods.” . . . Absent a definition in the bill, it certainly appears that the intent of this legislation is to legalize child abandonment (or worse) in the first weeks after birth. If this is not the bill sponsors’ intent, they should amend the bill to clarify that the official policy of California is not state-sanctioned infanticide.” Virtually all of the groups in opposition express strong opposition to the bill’s current language regarding “perinatal death” and many conclude that it could decriminalize the killing of a newborn. Americans United for Life asks, “If a baby is found in a dumpster can law enforcement investigate the child’s death? Probably not under AB 2223.” California Family Council observes, “California has a Safely Surrendered Baby Law that allows a mother to drop off her newborn baby at a hospital, police department, or fire station with no questions asked. Mothers should not be killing their newborn children when all they have to do is take them safely to a drop-off location.” The Fredrick Douglass Foundation of California writes the following in opposition to the bill: “AB 2223 continues the practice of eugenics on steroids. It targets the very population it pretends to protect, women of color.”

REGISTERED SUPPORT / OPPOSITION:

Support

Access Reproductive Justice
 ACLU California Action (co-sponsor)
 Black Women for Wellness Action Project (co-sponsor)
 California Coalition for Women Prisoners
 California for Safety and Justice
 California Latinas for Reproductive Justice (co-sponsor)
 California Nurse Midwives Association (CNMA)
 California Women's Law Center
 Californians United for A Responsible Budget
 Citizens for Choice
 Courage California
 Disability Rights California
 Ella Baker Center for Human Rights
 If/when/how: Lawyering for Reproductive Justice (co-sponsor)
 Initiate Justice
 Naral Pro-choice California (co-sponsor)
 National Center for Youth Law
 National Health Law Program
 Planned Parenthood Affiliates of California (co-sponsor)
 Smart Justice California
 Survived & Punished
 Urge: Unite for Reproductive & Gender Equity
 Women's Foundation California

Opposition

Americans United for Life
 California Capitol Connection
 California Family Council
 Calvary Chapel of Placerville
 Capitol Resource Institute

Concerned Women for America
Frederick Douglass Foundation of California
Liberty Baptist Church of Norwalk, CA
National Center for Law & Policy
Pacific Justice Institute
Real Impact
Right to Life League of Southern California
Right to Life of Kern County
The Salt & Light Council
Traditional Values for Next Generations
Numerous individuals

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