

Date of Hearing: April 22, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1356 (Bauer-Kahan) – As Amended April 19, 2021

SUBJECT: Reproductive health care services

SUMMARY: This bill would increase penalties for current crimes under the California Freedom of Access to Clinic Act (Act); create new crimes under the Act directed at videotaping, photographing, or recording patients or providers within 100 feet of the facility or disclosing or distributing those images; and would update and expand online privacy laws and peace officer trainings relative to anti-reproduction-rights offenses. Specifically, **this bill would:**

1) Make it a crime to do any of the following:

- Post personal information (PI) on the internet with the intent that another person imminently use that information to commit a crime involving violence or a threat of violence applicable to the PI or image of a reproductive health care services patient, provider, assistant, or other individuals residing at the same home address.
- Intentionally videotape, film, photograph, or record by electronic means, a reproductive health services patient, provider, or assistant within 100 feet of the entrance to, or within, a reproductive health services facility, without that person's consent with the specific intent to intimidate the person or entity, or a class of persons or entities, because that person or entity is a reproductive health services patient, provider, or assistant, or with specific intent to intimidate a the person or entity, or a class of persons or entities, from becoming or remaining a reproductive health services patient, provider, or assistant, and thereby causing the person to be intimidated.
- Distribute a videotape, film, photograph, or recording knowing it was obtained in violation of the prohibition of recording, described above, with the specific intent to intimidate the person, because that person is a reproductive health services patient, provider, or assistant, or with the specific intent to intimidate the person from becoming or remaining a reproductive health services patient, provider, or assistant, and thereby causing the person to be intimidated.

2) Define the following terms:

- “Reproductive health care services patient, provider, or assistant” to mean a person or entity, including, but not limited to, employees, staff, volunteers, and third-party vendors, that is or was involved in obtaining, seeking to obtain, providing, seeking to provide, or assisting or seeking to assist another person, at that person's request, to obtain or provide any services in a reproductive health care services facility, or a person or entity that is or was involved in owning or operating or seeking to own or operate a reproductive health care services facility.

- “Reproductive health care services facility” as including a hospital, clinic, physician’s office, or other facility that provides or seeks to provide reproductive health care services and includes the building or structure in which the facility is located.
- “Personal information” to mean information that identifies, relates to, describes, or is capable of being associated with a reproductive health care services patient, provider, or assistant, including, but not limited to, their name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver’s license or state identification card number, license plate number, employment, employment history, and financial information. “Personal information” does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.
- “Social media” to mean an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations.

EXISTING LAW:

- 1) Specifies, under the federal Health Insurance Portability and Accountability Act (HIPAA), privacy protections for patients’ protected health information and generally provides that a covered entity, as defined (health plan, health care provider, and health care clearing house), may not use or disclose protected health information except as specified or as authorized by the patient in writing. (45 C.F.R. Sec. 164.500 et seq.)
- 2) Provides, under the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const. art. I, Sec. 1.)
- 3) Prohibits, under the Confidentiality of Medical Information Act (CMIA), providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient’s written authorization, subject to certain exceptions. (Civ. Code Sec. 56 et seq.)
- 4) Prohibits a person, business, or association from knowingly publicly posting or displaying on the internet the home address or home telephone number of a provider, employee, volunteer, or patient of a reproductive health care services facility, or of persons residing at the same home address as a provider, employee, volunteer, or patient of a reproductive health care services facility, with the intent to do either of the following:
 - Incite a third person to cause imminent great bodily harm to the person identified in the posting or display, or to a coresident of that person, if the third person is likely to commit this harm; or,
 - Threaten the person identified in the posting or display, or a coresident of that person, in a manner that places the person identified or the coresident in objectively reasonable fear for the person’s or coresident’s personal safety. Establishes a cause of action for damages and declaratory relief for violations. (Govt. Code Sec. 6218(a).)

- 5) Provides that every person who, except a parent or guardian acting towards his or her minor child or ward, commits any of the following acts shall be subject to the punishment, as specified:
- By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant; or
 - By force, threat of force, or physical obstruction that is a crime of violence, intentionally injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
 - By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant; or
 - By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
 - Intentionally damages or destroys the property of a person, entity, or facility, or attempts to do so, because the person, entity, or facility is a reproductive health services client, provider, assistant, or facility; or
 - Intentionally damages or destroys the property of a place of religious worship. (Pen. Code Sec. 423.2.)
- 6) Establishes that it is a crime to intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio (Pen. Code Sec. 632.)
- 7) Establishes that a person is liable for physical invasion of privacy when the person knowingly enters onto the land or into the airspace above the land of another person without permission or otherwise commits a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. (Civ. Code Sec. 1708.8.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Purpose of this bill:** This bill seeks to criminalize the recording of a person who is a patient or a health care provider at a reproductive health care facility within 100 feet of the facility, and to criminalize the distribution of such recordings, in order to prevent harassment of patients and health care providers and to stop violations of their privacy. This bill is sponsored by Planned Parenthood Affiliates of California (PPAC).

2) **Author's Statement:** According to the author:

Reproductive health clinics like Planned Parenthood are a last line of critical care, especially for young and low-income women. These vulnerable patients and providers are facing an onslaught of organized harassment, being attacked online and in person. Our laws are insufficient to protect clinics from the assault against them. AB 1356 updates our outdated laws to protect the essential right to reproductive healthcare.

3) **First Amendment and other considerations reviewed by the Committee of primary jurisdiction:** The Assembly Public Safety Committee first analyzed this bill, and reviewed both its First Amendment implications and other provisions related specifically to the creation of crimes. For a detailed analysis of those provisions, please reference the Assembly Public Safety analysis. This Committee will focus solely on the privacy implications in the bill.

4) **Privacy interest in entering and exiting a medical facility:** Under both state and federal law, a person has a right to privacy in their medical records, and in the conversations they have with their doctor and other medical professionals. A person also has a reasonable expectation of privacy that their private phone and in-person conversations not be recorded. (Pen. Code Sec. 632.) In contrast, a person generally does not have a right to privacy when walking in public spaces. This bill would prohibit a person from recording and distributing a recording of a person within 100 feet of a reproductive health clinic, if the recording is made with the intent to intimidate a person.

According to the bill's sponsor, "this bill will also update penalties for the Freedom of Access to Clinic Entrances (FACE) Act and will prohibit photographing and videotaping individuals outside of a reproductive health center, that are often posted online and used to identify and intimidate reproductive health care providers, volunteers, and patients."

While a prior version of this bill would have applied to anyone who knowingly publicly posting, displaying, disclosing, or distributing the personal information of a reproductive health services patient, provider, or assistant, without that person's consent and with the above-specified intent, recent amendments accepted in the Public Safety Committee narrowed the bill to ensure that it does not prohibit persons who *do not* have the intent to intimidate a person from recording within 100 feet of the buffer zone. For example, under existing privacy laws, the media generally has a right to maintain a physical presence, and to record, outside and immediately inside medical facilities. (*See e.g., Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 232 (1998) (videotaping the scene of an automobile accident did not intrude on the injured person's privacy when taken on a public road and there was no reasonable expectation of privacy).) This is also consistent with guidance from

the Department of Health and Human Services which provides “the HIPAA Privacy Rule does not require health care providers to prevent members of the media from entering areas of their facilities that are otherwise generally accessible to the public, which may include public waiting areas or areas where the public enters or exits the facility.”¹ Similarly, the public generally has a right to enter a medical facility, and can also record and photograph outside and immediately inside the facility.

This bill prohibits only a narrow sector of conduct—conduct aimed at intimidating a person, and at distributing their image across the internet for the purpose of ridiculing, shaming and embarrassing them. Specifically, this bill provides that within 100 feet of an entrance to a reproductive health services facility, a person shall not intentionally videotape, film, photograph, or record a person, without that person’s consent, in order to intimidate a person or entity, or a class of persons or entities because that person is a reproductive health services patient, provider, or assistant, or in intimidate a person or entity from becoming or remaining a reproductive health services patient, provider, or assistant. That said, staff notes that the definition of personal information provided by this bill (which includes “information that identifies, relates to, describes, or is capable of being associated with a reproductive health care services patient, provider, or assistant, including, but not limited to, their name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver’s license or state identification card number, license plate number, employment, employment history, and financial information” is arguably broader than necessary to achieve the bill’s intent. Thus, as this bill moves through the legislative process, the author may wish to consider narrowing the definition to the specific information she intends to protect.

The privacy concerns that this bill seeks to protect serve a compelling government interest in limiting intimidating conduct aimed at preventing a person from giving or receiving lawful medical treatment. This bill does not limit traditional abortion protests that have been protected by the courts; those protestors retain the right to be outside the medical facility and to engage in political speech within the 100 feet buffer zone. The activity that is not permitted is the violation of privacy of filming a person intentionally because that person is obtaining medical services, and distributing to the public images of the person engaged in private activity. Capturing of an image of a person at a reproductive facility necessarily shows that person giving or receiving care from a facility that may provide abortion services; this is exactly the purpose of an anti-abortion protestor who is trying to dox or shame individuals for receiving or giving care at those facilities.

This bill only limits the videotaping, filming, photographing and recording of a person engaged in a private activity, and only if the person recording has an unlawful intent to intimidate. A counterprotestor, for example, could lawfully film within the 100-foot buffer zone established by this bill.² This fact underscores the narrow tailoring of this bill which restricts only speech that harasses a person trying to obtain medical services, which is then distributed online. California law protects individuals engaged in private behavior in a

¹ See, e.g., <https://www.hhs.gov/hipaa/for-professionals/faq/2023/film-and-media/index.html>.

² See Jessica Grose, *The New Abortion Rights Advocates Are on TikTok*, Dec. 10, 2020, New York Times, available at <https://www.nytimes.com/2020/12/10/style/abortion-rights-activists-tiktok.html>; Annie Werner, *How TikTok Made Pro-Choice Activism Cool Again*, Feb. 1, 2021, Elle Magazine, available at <https://www.elle.com/culture/career-politics/a35324135/tiktok-abortion-clinic-defenders/>.

number of situations. Most notably is the “anti-paparazzi” statute enacted in 1998, which prohibits the invasive recording of a person engaged in a personal or familial activity. (Civ. Code Sec. 1708.8.) In 2014, the Legislature expanded the law to include any act by a person to physically obstruct, intimidate, or otherwise interfere with any other person who is attempting to enter or exit a ‘facility,’ defined to mean a school property or health facility. In passing this law, the Senate Judiciary Committee commented, “where the interests and the activities of a free society create dangers to children and to the public in specific scenarios, there is an argument that the government can and should address those dangers in a narrow fashion. The author references, by way of example, situations of crowds preventing ambulances from exiting and/or entering the hospital in the immediate aftermath of reports that Michael Jackson had died and was taken to a hospital, as well as a situation in which paparazzi reportedly jeopardized Britney Spears’ entrance to a hospital, ultimately requiring a police escort to move her through the paparazzi hordes at a reported cost of \$25,000 to Los Angeles taxpayers.” (Sen. Judic. Analysis, AB 1256 (Bloom, Ch. 852, Stats. 2014.)

This bill also modernizes and strengthens protections in the existing law to prevent the sharing of a person’s address based on their status. The Legislature has acted in other contexts, most notably in the Safe at Home Program administered by the Secretary of State. That program allows reproductive health workers, along with victims of domestic violence, sexual assault and stalking, victims of human trafficking, and elderly or dependent abuse victims to keep address and personally identifying information from being publicly shared. (Gov. Code Secs. 6205, 6215.) The law also makes confidential the addresses of judges, elected officials, police chiefs and sheriffs, and others. (Gov. Code 6254.21.)

- 5) **Arguments in support:** According to Planned Parenthood Affiliates of California, the sponsor of this bill:

Acts of violence and harassment against abortion providers have persisted in the decades since *Roe v. Wade* and clinics are seeing an increase in threats and security incidents as anti-abortion extremists have faced little retribution for their escalating tactics. Extremists have blockaded abortion clinics, broken into clinic property, murdered doctors, bombed clinics, harassed patients and providers, and doxed volunteers and providers online. There is a cultural complacency around anti-abortion terrorism that has helped normalize their activity, and a long-standing belief that those who protest abortion are peaceful protestors with moral differences, which is not always, nor has it ever been, the case as the anti-abortion movement is long rooted in white supremacy. In 2019, Planned Parenthood Affiliates in California experienced 1 act of arson, 5 bomb threats, 146 calls to law enforcement, 259 incidences of patient and staff harassment, 2,642 incidences of protester activity, 12 suspicious packages, 35 health center vandalizations, and 173 other disturbances.

With the rise in aggressive tactics, personal security, and new opportunities to harass online, it is necessary that we modernize and update our laws to ensure greater protections for people seeking and providing critical health care services. Doxing, identifying information about an individual on the internet with malicious intent, and other forms of online harassment puts new threats on reproductive health care employees, patients, volunteers, and their families at risk. The personal information shared online and in anti-abortion hate groups could be life-threatening. AB 1356 will update and expand online privacy laws related to reproductive health care providers to better conform with

the current security concerns faced by reproductive health care providers and patients today. This bill will also update penalties for the Freedom of Access to Clinic Entrances (FACE) Act and will prohibit photographing and videotaping individuals outside of a reproductive health center, that are often posted online and used to identify and intimidate reproductive health care providers, volunteers, and patients.”

According to NARAL Pro-Choice of American, “Even when anti-choice protesters do not threaten death and harm, acts of vandalism can cost tens of thousands of dollars to clinics. The presence of anti-choice extremists can also cause delays in care. At just one health center this year, the presence of a protester has caused a 50% drop-off in patients arriving for their appointment. Protestors have also started using the internet to target providers, patients, and volunteers. There are a variety of websites that list abortion provider information, including where they practice, their photo, and other personal information. Anti-choice extremists commonly take photos of providers and patients, and post them online, calling them out by name and location. These practices are not only intimidating but also pose serious personal risk.”

- 6) **Arguments in opposition:** Staff notes that recent amendments taken in the Assembly Public Safety Committee appear to have removed the opposition of American Civil Liberties Union and the California Public Defenders Association. However, at least three pro-life advocacy groups remain opposed to the bill. Among them is Life Legal Defense Foundation, who writes:

We understand the Legislature’s desire to protect abortion workers from violence and threats of violence to their persons, property, and families. Every human being should be free from violence and the fear of violence, and every human being should have the full and equal protection of the laws.

The good news is that the narrative put forward by the sponsors of AB 1356, i.e., that threats and violence against abortion providers and patients is widespread and (always) increasing, is false. In fact, crimes against abortion providers are extremely rare in California. While Planned Parenthood Affiliates of California (PPAC), in its letter supporting AB 1356, claimed that in 2019, it experienced one act of arson, five bomb threats, and 35 incidents of vandalism (as well as hundreds of other untraceable incidents), the Criminal Justice Statistics Center of the California Department of Justice reports that in 2019, there were no arsons and only two vandalisms at reproductive health care facilities.

Organizations such as Planned Parenthood and the National Abortion Federation routinely exaggerate the number, severity, and motives behind incidents at abortion facilities. For example, the National Abortion Federation includes simple, and untraceable, trespass under the heading of violence. Adding a few hundred incidents of trespass to its tabulation every year allows it to claim with the release of each new annual report that “incidents of violence” against abortion providers rose once again, always in response to some current topic: the Planned Parenthood fetal trafficking videos, presidential and midterm elections, new “anti-choice” laws, etc.

The Pacific Justice Institute also remains opposed and argues that AB 1356 “proceeds on the fallacies that abortion-related speech is an exception to the First Amendment, and that pro-

abortion speech merits greater protection than pro-life speech. Both suppositions are fundamentally and constitutionally flawed.” The Pacific Justice Institute continues:

We should all be able to agree that violence is outside the bounds of legitimate political discourse regardless of who perpetrates it. Spirited and vigorous debate and advocacy, on the other hand, on the most controversial issues of our time must not be stifled under the claim that pure expression is threatening or intimidating. Unfortunately, AB 1356 disregards these first principles and attempts to muzzle pro-life speech without comparable limits on pro-abortion speech. It also contains no exceptions for investigative and journalistic work in this area of great public interest and concern.

Staff notes that the Assembly Public Safety Analysis of this bill includes an extensive First Amendment analysis addressing the concerns raised by the Pacific Justice Institute.

- 7) **Prior legislation:** AB 3140 (Bauer-Kahan, 2020) have created additional crimes under the Act and increased penalties. AB 3140 was not heard in the Assembly Public Safety Committee.

SB 1770 (Padilla, Ch. 206, Stats. 2008), among other things, extended the sunset on the Reproductive Rights Law Enforcement Act to January 1, 2014, required a specified report to the Legislature by December 31, 2011.

AB 2251 (Evans, Ch. 486, Stats. 2006), sought to protect the personal safety of reproductive health care providers, employees, volunteers, and patients by prohibiting the posting of such people's PI on the Internet under specified circumstances.

SB 603 (Ortiz, Ch. 481, Stats. 2006) required the Commission on the Status of Women to convene an advisory committee that would be responsible for reporting, as specified, to the Legislature and specified agencies on the implementation of the Reproductive Rights Law Enforcement Act and the effectiveness of the plan developed by the Attorney General.

SB 780 (Ortiz, Ch. 899, Stats. 2001) created the Act, which provided state criminal and civil penalties for interference with rights to reproductive health services and religious worship.

- 8) **Double referral:** This bill was double referred the Assembly Public Safety Committee where it was heard on April 13, 2021 and passed out 6-2.

REGISTERED SUPPORT / OPPOSITION:

Support

Planned Parenthood Affiliates of California (sponsor)
 American College of Obstetricians and Gynecologists District IX
 California Academy of Family Physicians
 Naral Pro-choice California

Opposition

Californians for Life
 Life Legal Defense Foundation

Pacific Justice Institute
Right to Life of Kern County

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