

# Fix the fatal flaw in SCA 10

## Overview

The reproductive choice rights the United States Supreme Court recognized almost fifty years ago rely on two unwritten fundamental rights: to privacy, and liberty interests in retaining control of one's body. With the U.S. Supreme Court poised to abrogate those rights in *Dobbs v. Jackson Women's Health Organization*, Californians will retain their state constitutional rights and statutory protections for reproductive liberty. Yet those California constitutional rights rely on a similar foundation — judicial interpretations of California's textual constitutional privacy right. That leaves the state constitutional protection for reproductive liberty vulnerable to the same judicial reinterpretation that federal abortion doctrine currently faces. Thus, a measure to add reproductive liberty to California's constitution (as SCA 10 would) is the right idea, but it must specify the rights being codified. Otherwise a change in California's bench could bring a state version of *Dobbs*, and we'll be right back where we started.

## Analysis

### **The flaw in SCA 10 — and how to fix it.**

Anticipating a ruling in *Dobbs* that ends federal constitutional protection for abortion, California's legislature responded with a proposed California constitutional amendment. SCA 10 will appear on the November 2022 and recommend the voters add new Article I, section 1.1:

The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.

This is similar to the Vermont legislatively proposed constitutional amendment

(PR.5). As the Politico California Playbook noted, SCA 10 “is sailing toward an appearance on the November ballot after passing the Senate with near Democratic unanimity.”

The primary problem is that section 1.1 creates an interpretation issue for future courts that must consider the new section’s meaning without any supporting federal doctrine. SCA 10 makes no reference to *Griswold v. Connecticut*,<sup>[1]</sup> *Roe v. Wade*,<sup>[2]</sup> or *Planned Parenthood v. Casey*,<sup>[3]</sup> so it neither defines nor incorporates the careful balance those decisions struck between the competing interests. Failing to reference existing law will leave future courts with a conundrum: the voters will (we expect) enact the amendment in November 2022, but *Dobbs* will have done its work months before, so a court cannot conclude that the voters intended to reference nonexistent federal law. That will spark renewed litigation about when the right to choose must give way to the state’s interest in potential life.

Expressly incorporating federal law as it stands now solves that problem: *Casey* sets the line at viability. All SCA 10 needs is language to this effect: “This section is intended to protect and codify existing law as of June 1, 2022.” That incorporates the key federal decisions and their rights-protecting framework as they exist before *Dobbs* invalidates them.

True, California’s Reproductive Privacy Act (RPA) incorporates the constitutional lines drawn in *Casey*, but the proposed constitutional amendment itself does not. Under the RPA, no law may “deny or interfere with a woman’s right to choose or obtain an abortion prior to viability of the fetus[.]”<sup>[4]</sup> Consistent with *Roe* and *Casey*, the RPA defines viability as “a reasonable likelihood of the fetus’ sustained survival outside the uterus without the application of extraordinary medical measures.”<sup>[5]</sup> Even referencing the RPA in SCA 10 would be an improvement. But failing to codify existing law in Article I, section 1.1 creates the risk that a court reviewing the new section could find it unnecessary to confront the constitutional interpretation question because the statutory remedy is adequate. That leaves the new constitutional provision a nullity.

The fact that California already has robust protections for individual liberty and the

right to privacy makes matters worse for SCA 10. That's because *Dobbs* will remove the federal floor on reproductive rights, and SCA 10 adds nothing new to existing California abortion rights. For example, California only prohibits abortions after the point of viability, except in cases where a physician makes a good-faith medical judgement that continuing a pregnancy after the point of viability would pose a risk to the safety or health of the mother.<sup>[6]</sup> SCA 10 says nothing about either codifying or modifying that law, which again leaves a reviewing court with the conclusion that the new section adds nothing to existing California law.

The secondary problem is that the failure to mention existing law untethers the new section from its legal foundation and so jeopardizes other fundamental rights that rely on the same foundation as reproductive rights. California's constitutional abortion rights rest on the same privacy and liberty analysis that federal law currently does. Abrogating the federal doctrine makes it much more likely that a California court will revisit California's doctrine under the state's "cogent reasons" standard, which requires California courts to follow federal constitutional law absent a good reason for departure.<sup>[7]</sup> A future California court could find that California constitutional abortion rights depend on the state's constitutional privacy provision in Article I, section 1 — and then lockstep California constitutional privacy to federal constitutional privacy, which does not support abortion rights. That would end California constitutional abortion rights.

Finally, a tertiary problem is that the same privacy analysis supports the rights to engage in consensual sexual relations and to marry for same sex couples.<sup>[8]</sup> Just as those federal decisions are at risk if federal privacy doctrine changes, so will California decisions that rely on privacy doctrines become suspect.

### **Future federal decisions and laws can be even worse for California abortion rights.**

Even if SCA 10 solved those problems, future U.S. Supreme Court decisions and acts of Congress may still limit abortion rights in California. Federal authority can do so by imposing a ceiling on California law under the Supremacy Clause.<sup>[9]</sup> As a sovereign state California can enshrine individual rights in its constitution. When the

federal constitution confers protection to an analogous individual right that sets a floor, and states may always provide *greater* protection to those individual rights.

Federal law (at least for the next week or so) protects certain abortion rights, and California could use its constitutional rights to privacy and liberty to also recognize reproductive choice rights. Just so, California caselaw provides that the state constitution provides greater protection for a woman's right to choose.<sup>[10]</sup>

But federal law can also impose a ceiling and bar states from further action. It could do so by establishing federal constitutional protection for a fetus. If the U.S. Supreme Court reads the federal constitution to grant fetal rights before viability outside the womb, that would create a federal law ceiling and bar states from using any competing individual interest to grant abortion rights under the California constitution.

The California Supreme Court has already identified and balanced those competing interests in procreative choices.<sup>[11]</sup> Abortion presents a conflict between the individual's right to autonomy and the state's interest in the unborn. Under California law the individual's constitutional rights outweigh the state's interest in the unborn. But if the U.S. Supreme Court adds a new factor — an unborn's federal constitutional right to life — then SCA 10 will fall.<sup>[12]</sup>

### **SCA 10 is at least relatively safe from other challenges.**

The proposed amendment presents some policy and litigation challenges that are significant but unlikely to be fatal. For example, proponents of SCA 10 have embraced and touted the idea of California serving as a sanctuary for women seeking abortion care in restrictive states.<sup>[13]</sup> Critics worry about the potential for California resources to become overburdened as people from other states come to California to seek abortions.<sup>[14]</sup> Once *Roe* and *Casey* are overturned, the number of women for whom the nearest abortion provider would be California could increase by 3,000%, from about 46,000 to 1.4 million.<sup>[15]</sup> That raises two concerns: how will California pay for these services, and can other states impose liability on California

for providing them to their residents?

SB 1142 attempts to solve the funding problem by creating a state-run fund, paid for by donations from private citizens, to pay for women traveling to the state. The bill defines the covered “practical support” as “airfare, lodging, ground transportation, gas money, meals, dependent childcare, doula support, and translation services, to help a person access and obtain an abortion.”<sup>[16]</sup> Even so, many women may still be unable to pay for their medical procedures, leaving California to foot the bill. Governor Gavin Newsom addressed that concern by allocating \$125 million of additional funding in the coming fiscal year for abortion services.<sup>[17]</sup> Of course, California’s record budget surplus this year seems unlikely to repeat next year, so that may be a short-term solution to a longer-term issue.

On the legal issues, it seems unlikely that other states or the federal government would have standing to sue California for providing abortion services to residents of states that have more restrictive abortion laws. Federal lawsuits against California’s sanctuary state policies suggest how such a lawsuit might play out. In February 2020, the U.S. Department of Justice filed a lawsuit against California and two other states over their immigration sanctuary policies, which generally restricted how state and local law enforcement officers shared information with federal authorities regarding a person’s immigration status.<sup>[18]</sup> The Department of Justice argued that California’s sanctuary laws were unconstitutional, superseded by federal immigration laws, and obstructed the federal government’s ability to enforce federal laws. California won the first case filed by the Department of Justice in 2018.<sup>[19]</sup> California won a second case in the Ninth Circuit, and the Supreme Court declined to take the case.<sup>[20]</sup>

And SB 1142 has key differences from California’s sanctuary laws that make it even more defensible. In the immigration context, the “sanctuary” aspect of the law relates to restrictions on state and local law enforcement sharing information with the federal government. SB 1142 would create a state-run fund to collect donations from private citizens to help pay for women to travel to California and fund her legal fees to defend attacks by her home state. The federal government would struggle to

make the same arguments against SB 1142 that it did against the sanctuary laws; for example, assuming *Dobbs* simply removes the federal floor for reproductive rights, the federal government cannot argue that SB 1142 is superseded by federal law.<sup>[21]</sup>

Other states similarly would struggle to escape pleading-stage challenges. The U.S. Supreme Court has exclusive jurisdiction over disputes between states.<sup>[22]</sup> But it is unlikely that the Court would claim jurisdiction over a controversy between California and another state in this context; the Court has declined to hear similar cases where states attempted to enjoin other states from creating and enforcing their own laws and restrictions, even if those laws would have interstate ramifications.<sup>[23]</sup>

### **Conclusion**

SCA 10 needs new language making clear that it codifies *Roe*, *Casey*, and *Griswold*. Failing that, there is a substantial risk that the new California constitutional provision will either be interpreted by courts to have no effect, or that its underpinnings will be erased. The other policy and litigation risks can be overcome. But absent any link to existing abortion law, SCA 10 may be nothing more than an empty promise.

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1. *Griswold v. Connecticut* (1965) 381 U.S. 478. ↑
2. *Roe v. Wade* (1973) 410 U.S. 113. ↑
3. *Planned Parenthood v. Casey* (1992) 505 U.S. 833. ↑
4. Health & Saf. Code § 123466. ↑
5. Health & Saf. Code § 123464, subd. (d). ↑
6. Health & Saf. Code § 123468; ACLU of Southern California, *Abortion Care in California* (June 21, 2022). ↑
7. *East Bay Asian Local Development Corp. v. State of California* (2000) 24

- Cal.4th 693, 719. ↑
8. *Lawrence v. Texas* (2003) 539 U.S. 558 (sexual relations); *Obergefell v. Hodges* (2015) 576 U.S. 644 (marriage). ↑
  9. U.S. Const., art. VI. ↑
  10. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 327-28. ↑
  11. See, e.g., *People v. Davis* (1994) 7 Cal.4th 797. ↑
  12. Some may also see a possible conflict between the criminal offense of the unlawful killing of a fetus (Penal Code § 187) and an individual's fundamental right to choose to have an abortion, as stated in the proposed constitutional amendment. Although SCA 10 (if it codifies existing law) will weigh in favor of an individual's right to privacy before viability and there have been challenges to fetal homicide convictions based on a definition of viability (see, e.g., *Davis*, 7 Cal.4th 797), identifying and balancing the respective interests remain critical. When a woman decides to carry a fetus to term, that decision aligns with the state interest in protecting maternal health. Punishing fetal homicide is consistent with these aligned interests because *another* person's interest in terminating a pregnancy does not outweigh the woman's right to carry out her pregnancy. ↑
  13. Karlamangla & Hubler, *What a Roe v. Wade Repeal Would Mean for California*, N.Y. Times (May 3, 2022). ↑
  14. Helper, *California Thinks It Can Be an Abortion Sanctuary in a Post-Roe Nation. These Battlegrounds Tell a Different Story*, S.F. Chron. (June 19, 2022). ↑
  15. Dembosky, *California Lawmakers Ramp Up Efforts to Become a Sanctuary State for Abortion Rights*, NPR (June 2, 2022). ↑
  16. Sen. Bill No. 1142 (2021-2022 Reg. Sess.). ↑
  17. Colliver, *Newsom Budget Will Bolster California's Abortion-Sanctuary Status*, Politico (May 11, 2022). ↑
  18. Benner, *Justice Dept. Sues Over Sanctuary Laws in California, N.J. and Seattle*, N.Y. Times (Feb. 10, 2020). ↑
  19. Lind, *Jeff Sessions's Lawsuit Against California's "Sanctuary" Laws, Explained*, Vox (Mar. 7, 2018). ↑
  20. Howe, *Court Turns Down Government's "Sanctuary State" Petition*,

SCOTUSblog (Jun. 15, 2020). ↑

21. Rynor, *Bill Helping Pay Women to Travel to California for Abortion Moves Forward*, ABC10 (May 9, 2022). ↑
22. U.S. Const., Art. III, sec. 2; see, e.g., *Missouri v. Illinois & Chicago District* (1901) 180 U.S. 208 (water rights); *Kansas v. Colorado* (1907) 206 U.S. 46 (same); *South Dakota v. North Carolina* (1904) 192 U.S. 286 (bonds). ↑
23. See *Alabama v. Arizona* (1934) 291 U.S. 286, 291-92. ↑