UCLA School of Law
Center on Reproductive Health, Law, and Policy

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The California Reproductive Freedom Amendment

A New Constitutional Standard

Diana Kasdan, Amanda Barrow, Melissa Goodman

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Overview

Who is This Report For?

This report is a resource for advocates, jurists, and policymakers. We intend it as a foundational guide for those who are interpreting, applying, and realizing the equality and reproductive justice promise of California's Reproductive Freedom Amendment (RFA), enshrined in Article 1.1 of the California Constitution.

Why Did We Create It?

This report is the first to offer extensive legal research and analysis that explores how to move this new and expansive right from constitutional principle into enforceable practice. It provides the legal framework for challenging barriers or proposing policy reforms that can ensure reproductive freedom is accessible — in reality, not only in theory — to all people in California, particularly pregnant and birthing people who disproportionately experience discrimination and interventions that infringe on their reproductive autonomy.

What Does It Provide?

Foundational Principles for Interpreting the RFA

The legal analysis is anchored in **four foundational principles** derived from the RFA's unique language and ratification history and California constitutional precedent:

- **A New and Expansive Right:** Article 1.1 guarantees a fundamental right to reproductive freedom that includes but is not limited to abortion and contraception and encompasses bodily and reproductive autonomy more broadly.
- **Interlocking Equality and Autonomy Protections:** The amendment explicitly directs that the rights to reproductive freedom, privacy, and equal protection must work together to enhance and further one another.
- **A Reproductive Justice Purpose:** California public policy recognizes affirmative government support and resources are necessary to fully realize equality and reproductive freedom. The RFA embraces this commitment.
- **RFA Scrutiny:** RFA review demands the most stringent scrutiny. This requires skeptically interrogating any claimed interests in laws and policies challenged under the RFA in light of its interlocking guarantees of reproductive freedom, privacy, and equality.

Original Legal Research and Analysis

The report contains **three key parts** that inform and apply its four guiding principles:

- **The Constitutional History and Meaning of the RFA:** An examination of the RFA's text, structure, and ratification history establishes that it creates a unique right that is distinct and more expansive than reproductive rights established under previous California constitutional precedent.
- **Interpreting the RFA:** Examining and building on existing California precedent, the report proposes a new "RFA Review" standard that makes equality a necessary component of the strictest possible judicial scrutiny for reproductive freedom rights.
- **Applying RFA Review:** To show how RFA review would apply in practice and determine the legality of certain infringements on the equality and autonomy of pregnant people, we examine how the RFA applies to California restrictions on abortion care and to pregnancy policing through the medical and family regulatory systems.

How Can RFA Enforcement Protect the Rights of Pregnant People?

The RFA's constitutional protections are not limited to pregnant and birthing people. But pregnancy often is an explicit and persistent reason for state intervention, reproductive control, and discriminatory treatment. Thus, we direct this initial analysis of how to apply RFA review to certain laws and practices infringing on pregnant people's reproductive freedoms. **We address two areas**:

1. **Abortion Access:** The RFA contains no explicit or implicit fetal viability limit. Current statutory restrictions on post-viability abortion care do not withstand scrutiny under the RFA. Furthermore, the RFA does not permit unnecessary restrictions on who can provide abortion care — such as those on Advanced Practice Clinicians — that interfere with equitable access to abortion care.
2. **Pregnancy Policing and Family Regulation:** The RFA framework applies to pregnancy policing, which disproportionately impacts Black, brown, Native-American, and low-income people. Practices like hospital-based drug testing and reporting to Child Protective Services that deter access to pregnancy and maternal care, involve unconsented medical interventions, tear families apart, and discriminate against pregnant and birthing people should not stand.

What More Does the RFA Require?

Beyond areas we address in this report, the RFA protects the full range of reproductive health decisions and care, from contraception to maternal health and birth care, to assisted reproduction and more. Future research and analysis should apply the principles and frameworks we provide in this report to assess infringements on these and other reproductive freedom rights, especially for populations uniquely vulnerable to state control, including immigrants, people with disabilities, young people, and people who are incarcerated.

A Note on Pathways for Enforcement

To secure the promise of equality and reproductive justice, it is imperative that RFA interpretation, implementation, and enforcement not only happen through the courts, but also guide lawmakers and others involved in developing reproductive health policy. Litigation, administrative engagement, and policy advocacy are some of the pathways for RFA enforcement. Each presents different benefits and challenges, and often they must work hand-in-hand. We do not recommend any one path over the other or suggest which is most likely to succeed — a strategic assessment beyond the aims of this report. We recognize that advocates considering avenues for enforcement will need to consider a mix of factual, political, resource, and other variables beyond the legal analysis offered here. We hope, however, this report offers a valuable starting point for those efforts.

Introduction

In 2022, California voters amended the state constitution to add a new "Reproductive Freedom" provision to the Declaration of Rights. With the addition of the Reproductive Freedom Amendment ("RFA"), voters not only safeguarded an independent state constitutional right to procreative choice long-recognized by California courts, they also enshrined a fundamental right that strengthens and expands constitutional protection for reproductive freedom and equality more broadly.

This additional layer of protection was motivated in significant part by the clear-eyed view of lawmakers and voters alike that after the U.S. Supreme Court overruled *Roe v. Wade*, state-level protections would be even more crucial for safeguarding reproductive freedom. However, in the four years since ratification of the RFA, there have been virtually no court decisions interpreting or enforcing this new constitutional amendment. While not wholly surprising in a state like California, with its abundance of existing judicial opinions and statutory laws protecting reproductive rights, there is still value in, and need for, judicial and policy enforcement of RFA rights.

Rights violations and barriers to reproductive justice in California remain and frequently make the news: religiously-affiliated hospitals repeatedly refusing to provide patients emergency abortion care;[1] local prosecutors pursuing criminal charges against women who experienced stillbirth or pregnancy loss;[2] hospitals drug-testing pregnant people and newborns and reporting results to child protective services — including false-positives;[3] and Black women dying from pregnancy-related deaths at rates three to four times higher than white women.[4]

These examples, far from exhaustive, confirm the urgency of ensuring reproductive freedom and equality are constitutional rights in practice, especially for people and communities most vulnerable to rights

[1] Anya Schultz, *Pregnant in California? What Catholic Hospital Rules Can Mean in an Emergency,* S.F. Standard (Nov. 20, 2025), https://sfstandard.com/2025/11/20/california-catholic-hospitals-religious-rules-deny-maternal-care/; Pam Belluck, *California Sues Hospital for Denying Patient an Emergency Abortion*, N.Y. Times (Sep. 30, 2024), https://www.nytimes.com/2024/09/30/health/california-abortion-lawsuit-st-joseph-hospital.html.

[2] Sam Levin, *She Lost Her Child in a Home Birth. Prosecutors Charged Her with Murder*, Guardian (Apr. 3, 2023), https://www.theguardian.com/us-news/2023/apr/03/pregnancy-birth-murder-charge-kelsey-carpenter-san-diego; Jessica Pishko, California Prosecutions for Pregnancy Loss Spark Outrage, and a Bill to Stop Future Investigations, Bolts (June 6, 2022), https://boltsmag.org/california-pregnancy-prosecutions-kings-county/; Adam Beam, *California Bill Aims To Stop Pregnancy Loss Prosecutions,* Associated Press (Apr. 19, 2022), https://apnews.com/article/health-crime-california-legislature-731ee9f7bc8d297a3696fff4dd9bc12e.

[3] Shoshana Walter, She Ate a Poppy Seed Salad Just Before Giving Birth. *Then They Took Her Baby Away*, Mother Jones (Sep. 9, 2024), https://www.motherjones.com/criminal-justice/2024/09/drug-test-pregnancy-pennsylvania-california/.

[4] Carolyn Johnson & Phil Drechsler, *After His Wife Died, Man Pushing to Change Laws to Protect More Women From Pregnancy-Related Deaths*, NBC L.A. (July 16, 2020), https://www.nbclosangeles.com/investigations/wife-died-giving-birth-change-laws-to-protect-more-women-pregnancy-related-deaths/2395401/; Jessica Washington, *Maternity Ward Shuttering In The Wake of Tragic Death of Black Mother*, The Root (Sep. 11, 2023), https://www.theroot.com/maternity-ward-shuttering-in-the-wake-of-tragic-death-o-1850826857.

deprivations.[5] This report does not attempt to answer every question about how to interpret and apply the RFA to these and other forms of reproductive injustice, but it does offer an important starting point.

We show why courts should consider the rich body of California Supreme Court precedent on abortion, procreative privacy rights, and equal protection as essential to understanding the amendment's baseline protections, but not mechanically transplant legal tests developed in those areas when interpreting the RFA. **As this report proposes, judicial interpretation and policy implementation of the RFA should be guided by four foundational principles:**

First, the RFA, enshrined in Article 1.1 of the California Constitution, unequivocally and expressly guarantees an expansive fundamental right to reproductive freedom that includes *but is not limited to* personal decisions about, and access to, abortion and contraception.

Second, Article 1.1 structurally reinforces and enhances the relationship between reproductive freedom, privacy, and equality by expressly directing that the RFA furthers these multiple state constitutional provisions. This intertwining of related rights recognizes reproductive freedom is a necessary condition of full equality and makes the amendment's protection broader and stronger than existing protection under privacy or equality alone.

Third, California's fundamental public policy of reproductive justice recognizes that the state has a role in supporting reproductive autonomy *and* equality in ways that can be tangibly realized in people's lives, no matter a person's identity or circumstances. The RFA embraces this commitment.

Fourth, because the RFA prohibits denying or diminishing a person's decisional autonomy or reproductive health *and* requires furthering equality, it demands a standard of review that recognizes this relationship. Courts must apply the most stringent scrutiny and skeptically interrogate any claimed interests in laws and policies challenged under the RFA in light of its interlocking guarantees of reproductive freedom, privacy, and equality.

We set out the authority for, and application of, these principles in three parts. In Part I, we substantiate the first three foundational principles. We examine the RFA's constitutional text and structure, legislative and ratification history, and the relevant legal and policy background informing understanding of the

[5] Historically, women, particularly pregnant women, Black, Indigenous, and Latina women, and women with developmental disabilities have been a primary target of reproductive coercion. This informs, but does not constrain, interpretation of the RFA, which protects the reproductive freedom of all people, including transgender men, nonbinary people, and others who do not identify as a women or female, and who can experience reproductive coercion, pregnancy discrimination, and other forms of gender-based and reproductive discrimination. In this report, generally we use the terms woman or women when discussing or quoting laws, cases, judicial opinions, or research that use those terms.

RFA. Applying traditional tools of constitutional interpretation, we show that the RFA both creates a right that is broad in scope and more protective than California's long-recognized constitutional right of procreative choice, and that the voters who ratified it understood it would complement and advance California's reproductive justice policy vision.

In Part II, we develop more fully how courts should interpret the scope of RFA rights and apply a standard of judicial review that is informed by, but distinct from, existing California Supreme Court precedent on procreative choice, privacy, and equal protection. To meet the reproductive justice purpose of the RFA, as set forth in Part I, we propose an interpretive approach and standard of review that would be guided by equality principles and analysis, apply the highest possible standard of judicial scrutiny, recognize RFA claims against private actors, and require affirmative government support when necessary to remedy RFA violations and advance reproductive justice.

Finally, in Part III, we consider some of the ways current California law, policy, or practices interfere with the decisions and autonomy of pregnant and birthing people and how courts should review those if challenged under the RFA. We look at two areas of the law in particular: legal restrictions on abortion decisions and access (after fetal viability and by certain licensed health professionals); and investigations and interventions against people related to pregnancy, pregnancy conduct, and childbirth, often with disproportionate burdens on Black and brown people and for maternal health.

These are by no means the only reproductive health and justice barriers for pregnant and birthing people that require judicial or legislative remedies to fully realize the RFA's promise. But they offer concrete examples of policies and practices ripe for RFA review and reform. Further, while beyond the scope of this report, as Parts I and II address, access to contraception, sterilization, assisted reproduction, and the full range of other sexual and reproductive health care all involve the types of intimate decisions about reproduction that the RFA protects. Any infringements of these reproductive health rights should be subject to the same extremely rigorous standard of RFA review.

I. The Reproductive Freedom Amendment: A New Guarantee for Reproductive Autonomy and Equality Rights

On May 2, 2022, a leaked draft of a majority opinion in the then-pending case of *Dobbs v. Jackson Women's Health Organization* revealed that the U.S. Supreme Court was prepared to overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania. v. Casey*.[6] Foreseeing the fall of the federal right to abortion, and with it a cornerstone of modern substantive liberty and privacy jurisprudence, Californians acted decisively to enshrine an explicit fundamental right of reproductive freedom in the state constitution. By the end of June 2022, California state legislators had introduced and passed a measure to put the proposed constitutional amendment before voters, who overwhelmingly voted to adopt the Reproductive Freedom Amendment in November 2022.

The RFA's unique language and enactment history make clear that the new constitutional amendment was intended to guarantee robust and expansive protections for reproductive autonomy and to broadly advance equality and reproductive justice.

A. California Lawmakers Proposed a New and Explicit Fundamental Right

The very day that the draft *Dobbs* opinion was released, Governor Gavin Newsom and legislative leaders Toni Atkins and Anthony Rendon announced their proposal for an amendment to the state constitution to further safeguard reproductive rights within California.[7] Over the next month, the lawmakers crafted a proposed constitutional amendment with the input and support of reproductive health, rights, and justice organizations, including sponsors ACCESS Reproductive Justice, Black Women for Wellness Action Project, Essential Access Health, NARAL Pro-Choice California, National Health Law Program, and Planned Parenthood Affiliates of California.[8]

[6] Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, Politico (May 3, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[7] Press Release, Gavin Newsom, California Governor, Following Draft SCOTUS Opinion, Legislative Leaders and Governor Newsom Announce Constitutional Amendment to Enshrine the Right to Choose in California (May 2, 2022), https://www.gov.ca.gov/2022/05/02/following-draft-scotus-opinion-legislative-leaders-and-governor-newsom-announce-constitutional-amendment-to-enshrine-the-right-to-choose-in-california/.

[8] Cal. S. Judiciary Comm., Bill Analysis of S.C.A. 10, 2021-2022 Reg Sess. (June 14, 2022). Additional supporters of the measure named in the bill analysis when introduced included ACLU California Action, ACT for Women and Girls, Blue Shield of California, American Association of University Women California, American College of OB/GYN's District IX, California Academy of Family Physicians, California Association of Nurse Practitioners, California Commission on the Status of Women and Girls, California Faculty Association, California Latinas for Reproductive Justice, California Medical Association, California Nurses Association, California Nurses Midwives Association, California Women's Law Center, County of San Diego, Equality California, Feminist Majority Foundation, FPA Women's Health, If/When/How: Lawyering for Reproductive Justice, PLAN C, National Council of Jewish Women CA, TEACH, UCLA Law's Center on Reproductive Health, Law, and Policy, Women's Foundation California, and Women's Health Specialists. *Id.*

On June 8, 2022, Senator Atkins introduced the proposed constitutional amendment in the California Senate.[9] The measure proposed adding Section 1.1 to Article I of the state constitution's Declaration of Rights to provide:

> 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.

In introducing the measure, its authors explained that — in light of the leaked opinion in *Dobbs* — Californians needed to act to not only guarantee the specific rights to choose to have an abortion and use contraception, but also to more generally protect the "privacy and equal protection of a person's reproductive freedom."[10] The measure's authors made clear that the RFA was designed to protect individuals' autonomy over reproductive decision-making broadly — to ensure that "important reproductive health and intimate decisions are left to a person and their providers with the backing of science and evidence-based medicine," and to provide individuals "the freedom to determine what is best for them and their families, giving people the ability to plan their lives and make intimate reproductive decisions without the government interfering."[11]

The authors emphasized that the proposed amendment was intended to incorporate and build upon California's existing protections for procreative autonomy, which had been grounded in court interpretations of the state constitution's privacy and equal protection rights and statutory law.[12] As the measure's authors recognized and as set forth in detail below, *infra* Part II, the California Supreme Court had long held that "the state constitution's express right to privacy extends to an individual's decision about whether or not to have an abortion," and that existing law provided "the fundamental right to choose or refuse birth control."[13] Among other purposes, the RFA was designed to "explicitly guarantee[] in the state constitution what previously was a matter of case law."[14] And, beyond cementing existing

[9] S.C.A. 10, 2021-2022 Reg Sess. (Cal. 2022).

[10] Cal. S. Judiciary Comm., Bill Analysis of S.C.A. 10, at 3 (June 10, 2022).

[11] *Id.*; *see also Hearing on S.C.A. 10 Before the S. Elections and Const. Amend. Comm.*, 2021-2022 Reg Sess. (Cal. June 14, 2022) (statement of Sen. Toni Atkins explaining that abortion must be "a discussion between the patient and their health care provider; no judge, no politician should be in that room or making this decision").

[12] Cal. S. Judiciary Comm., Bill Analysis of S.C.A. 10, at 3, 7 (June 10, 2022).

[13] *Id.* at 2 (citing People v. Belous, 721 Cal. 2d 954 (1969) and Cal. Health & Saf. Code § 123462)).

[14] Cal. Assemb., Floor Analysis of S.C.A. 10, 2021-2022 Reg. Sess. 2 (June 24, 2022).

protections, it was intended to go beyond that foundation and create a *new* fundamental right that "takes the protections in California a step further."[15]

During the hearings on the measure, California lawmakers underscored that the RFA was intended to further principles of liberty and equality. Lawmakers stressed that "true human liberty only exists when people are allowed to make their own decisions about their minds and about their bodies,"[16] and the RFA was intended and needed to advance not only the "right to bodily autonomy [and] right to reproductive health," but also the "right to not feel and be second class citizens."[17] As a testifying legal expert in support of the RFA explained, the proposed constitutional amendment recognized that "reproductive freedom is a necessary precursor to equality," and its protections were aimed at ensuring Californians have "freedom to access reproductive health care and the liberty and equality to make their own decisions about if and when to grow their families."[18] California lawmakers were acutely aware that restrictions on reproductive health care disproportionately impact people historically facing barriers to accessing health care, and specifically intended the RFA to provide protections for "individuals living with disabilities … Black, Latino, indigenous communities … rural communities, [and] working families."[19]

Throughout the legislative hearings, lawmakers also discussed the breadth of the RFA's language and considered whether to qualify or limit the right to reproductive freedom. Lawmakers deliberated over whether to include any text restricting the right to abortion, including when someone may obtain an abortion. They ultimately decided not to, leaving intact its unqualified language guaranteeing the right to reproductive freedom.[20]

On June 24, 2022, while the measure was still under consideration, the U.S. Supreme Court officially issued its opinion in *Dobbs*,[21] adding urgency to lawmakers' call for California voters to add robust and unqualified safeguards for reproductive freedom to the California Constitution. By June 27, 2022, the measure had passed unamended through both chambers with the two-thirds vote necessary for a legislatively referred constitutional amendment.[22]

[15] Cal. S. Rules Comm., Floor Analysis of S.C.A. 10, 2021-2022 Reg. Sess. 10 (June 20, 2022).

[16] *Hearing on S.C.A. 10 Before the S. Floor Sess.*, 2021-2022 Reg Sess. (Cal. June 20, 2022) (statement of Sen. Bob Hertzberg).

[17] *Hearing on S.C.A. 10 Before the Assemb. Floor Sess.*, 2021-2022 Reg Sess. (Cal. June 27, 2022) (statement of Assemb. Mia Bonta).

[18] *Hearing on S.C.A. 10 Before the Assemb. Judiciary Comm.*, 2021-2022 Reg. Sess. (Cal. June 23, 2022) (statement of Professor Lisa Ikemoto).

[19] *Hearing on S.C.A. 10 Before the Assemb. Floor Sess.*, 2021-2022 Reg Sess. (Cal. June 27, 2022) (statement of Assemb. Sabrina Cervantes).

[20] *See infra* Part III.A (discussing California laws, judicial opinions, and RFA history relevant to legal limits on abortion after fetal viability).

[21] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[22] *See Hearing on S.C.A. 10 Before the S. Floor Sess.*, 2021-2022 Reg Sess. (Cal. June 20, 2022) (29 Senators voted Aye and 8 voted No); *Hearing on S.C.A. 10 Before the Assemb. Floor Sess.*, 2021-2022 Reg Sess. (Cal. June 27, 2022) (58 Assemblymembers voted Aye and 17

B. California Voters Overwhelmingly Approved the RFA, Ratifying an Expansive Constitutional Right

After the California legislature passed the measure, the proposed constitutional amendment was put before voters as Proposition 1 in the November 2022 election. The text of the RFA was accompanied on the ballot by an official voter information guide containing a summary prepared by the Attorney General, an analysis prepared by a legislative analyst, and arguments in favor and against the proposed constitutional amendment.[23]

The official summary closely mirrored the language of the RFA, explaining that the amendment was "intended to further the existing California constitutional rights to privacy and equal protection," that then-existing California law provided "that every individual has a fundamental right to privacy in their personal reproductive decisions, which includes the fundamental right to choose to have an abortion and the fundamental right to choose or refuse contraceptives," and the measure "would amend the California Constitution to expressly include these fundamental rights and prohibit the State from denying or interfering with an individual's reproductive freedom in their most intimate decisions."[24]

The legislative analyst's summary offered voters further context about existing California law, including current protections for reproductive freedom and limits on abortion. This analysis indicated that the RFA would "change[] the California Constitution to say that the state cannot deny or interfere with a person's reproductive freedom," and that "people have the fundamental right to choose: [w]hether or not to have an abortion," and "[w]hether or not to use contraceptives."[25] Assessing the fiscal effects of the constitutional amendment, the legislative analyst observed that because rights to reproductive freedom already existed in California, the amendment itself did not impose a direct or immediate impact, but "a court might interpret the [RFA] to expand reproductive rights beyond existing law," which could result in state costs.[26]

In the written debate included within the official voter information guide, opponents of the RFA focused on the amendment's fiscal impact and the absence of any limiting language on the right to abortion.[27]

voted No); *see also* Cal. Const. art. XVIII § 1 (providing that proposed constitutional amendments must pass the legislature with two-thirds of votes before they are put before voters).

[23] *See* Cal. Sec'y. of State, Official Voter Information Guide General Election, Proposition 1: Constitutional Right to Reproductive Freedom. Legislative Constitutional Amendment (2022) [hereinafter Official Voter Information Guide].

[24] *Official Title and Summary* in Official Voter Information Guide, *supra* note 23.

[25] *Analysis by the Legislative Analyst* in Official Voter Information Guide, *supra* note 23.

[26] *Id.*

[27] *Argument Against Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Dr. Anne Marie Adams, Gynecologist, Tak Allen of International Faith Based Coalition, and Assemblymember Jim Patterson) ("Abortions are already legal in California with reasonable limits on late-term abortions ... Proposition 1 will allow late-term abortions at taxpayer expense WITHOUT limitation for any reason at any time up to the moment of birth — even when the mother's life is not in danger, even when the healthy baby could survive outside the womb."); *Rebuttal to Argument in Favor or Proposition 1* in Official Voter Information Guide,

While proponents responded to these points by saying that the RFA did "not change how or when a person can access an abortion in California" they also were clear that it "amends the State Constitution to prohibit interference with individual choices on reproductive health care and the fundamental right to choose to have an abortion."[28] Proponents also urged that to prevent a future state court decision potentially stripping Californians of reproductive rights as they were by the U.S. Supreme Court, the amendment would "keep reproductive medical decisions where they belong — with individuals and their health care providers," and ensure "[a]ccess to affordable [and] comprehensive reproductive health care, including abortion," which "allows people to plan their lives and achieve their dreams."[29]

These same arguments were reiterated in the media as the November 2022 election approached. Much of the discussion leading up to the vote focused on the breadth of the RFA's language, its specific lack of any limitation on the right to abortion, and whether it would permit restrictions on when abortions could be performed.[30] Legal experts repeatedly explained to the press that the RFA's broad wording is consistent with the nature and purpose of constitutional provisions "to articulate general principles and identify basic rights,"[31] and that constitutional amendments are subject to court interpretation, guided by the enactors' intent and precedent.[32]

Ultimately, the concerns raised by the RFA's opponents — including its unqualified language and potential associated state costs — did not sway most voters.[33] On November 6, 2022, Californians overwhelmingly voted to approve the measure, which passed with nearly 67% of the vote.[34]

supra note 23 (prepared by Allison Martinez of California Alliance of Pregnancy Care, Brad Dacus of Pacific Justice Institute, and Dr. Vansen Wong) ("Proposition 1 is NOT needed to protect abortion rights. But it WILL cost California taxpayers millions.").

[28] *Rebuttal to Argument Against Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Sandy Reding, R.N. of the California Nurses Association, Kelly McCue, M.D. of the American College of Obstetricians and Gynecologists, and Cary Franklin, J.D. of the UCLA Law Center on Reproductive Health, Law, and Policy).

[29] *Argument in Favor of Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Shannon Udovic-Constant, M.D. of the California Medical Association, Jodi Hicks of Planned Parenthood Affiliates of California, and Carol Moon Goldberg of League of Women Voters of California).

[30] *See infra* Part III.A (discussing media coverage during the RFA's ballot campaign on how the constitutional amendment may affect legal limits on abortion after fetal viability).

[31] Cary Franklin, *Cement Reproductive Rights in California's Constitution*, CalMatters (Sep. 23, 2022), https://calmatters.org/commentary/2022/09/cement-reproductive-rights-in-californias-constitution/.

[32] George Skelton, *Would California's Abortion Ballot Measure Allow Late-Term Abortions? Its Author Says No*, L.A. Times (July 14, 2022), https://www.latimes.com/california/story/2022-07-14/skelton-california-abortion-ballot-measure-constitutional-amendment.

[33] Thus, voters left open to future judicial interpretation the scope of the express right to abortion and whether restrictions on when in pregnancy someone may obtain an abortion could survive constitutional scrutiny under the RFA. Part III, Section A.1 specifically addresses how courts should interpret and apply the RFA to existing statutory limitations on abortion related to fetal viability.

[34] Ballotpedia, *California Proposition 1, Right to Reproductive Freedom Amendment* (2022), https://ballotpedia.org/California_Proposition_1,_Right_to_Reproductive_Freedom_Amendment_(2022).

C. California Voters Understood "Reproductive Freedom" as a New, More Expansive Guarantee of Reproductive Autonomy, Equality, and Justice

As a constitutional provision enacted by voter initiative, the RFA must be "interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California."[35] In ascertaining the voters' intent, California courts must first look to the text of the constitutional amendment, "ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme."[36] If this does not resolve questions of interpretation, California courts may consider "indicia of the voters' intent other than the language of the provision itself" including "the analysis and arguments contained in the official ballot pamphlet."[37] When interpreting constitutional provisions enacted by voter initiative, courts "generally presume electors are aware of existing law."[38]

The RFA's text makes clear that voters intended to enshrine an explicit fundamental right to "reproductive freedom" — including specific rights to choose to have abortion and to choose or refuse contraception — and to ensure that reproductive freedom, privacy, and equal protection rights would be interpreted to further one another. But the RFA's text alone is unlikely to definitively resolve all questions of interpretation. The full substance of the provision will be shaped by how courts, relying on indicia of voter intent, interpret the meaning of the term "reproductive freedom," and the directive that the provision should further the rights to privacy and equal protection.

1. Voters Ratified an Unqualified and Expansive Right that Protects Both Decision-making and the Ability to Access Care

As discussed above, voters understood from the RFA's plain text and the arguments in the official voter information guide that the RFA enshrined an unqualified and expansive right to reproductive freedom. They also understood that reproductive freedom includes not only the right to *make* decisions about reproduction, but the right to *access* health care to effectuate those decisions and to live as equal citizens.

The RFA's plain language describes the right of "reproductive freedom" as encompassing an individual's "most intimate decisions," including those related to the "fundamental right" to make choices about abortion and contraception.[39] This language echoes numerous California Supreme Court decisions

[35] Hill v. Nat'l Collegiate Athletic Ass'n., 7 Cal. 4th 1, 16 (1994) (interpreting privacy provision added to California constitution by voter initiative).

[36] California Cannabis Coal. v. City of Upland, 3 Cal. 5th 924, 933 (2017), *as modified on denial of reh'g* (Nov. 1, 2017) (interpreting provision limiting local governments' power to tax, which was added to the state constitution by voter initiative).

[37] *Hill*, 7 Cal. 4th at 16 (internal quotations omitted).

[38] *California Cannabis Coal.*, 3 Cal. 5th at 934.

[39] Cal. Const. art. I § 1.1.

considering and recognizing a fundamental right of "procreative" decision-making and autonomy more broadly,[40] of which voters were presumed to be aware. Indeed, California's state constitutional right to procreative choice preceded the U.S. Supreme Court's 1973 decision in *Roe v. Wade*[41] by several years and was reaffirmed and deepened in later cases.[42] Importantly, California precedent recognizes that procreative choice is two-fold, encompassing both a right to autonomy in making intimate decisions about procreation and the right to access reproductive care necessary to protect one's own health and well-being.[43]

The first component, "decisional" or "privacy" autonomy, is about a person's right to make independent, autonomous, and uncoerced decisions about "whether to bear children,"[44] "procreative choice,"[45] and a person's "interest in retaining personal control over the integrity of her own body."[46] These types of decisions are understood as "central to a woman's control not only of her own body, but also to the control of her social role and personal destiny,"[47] and often her "deepest philosophical, moral, and religious concerns."[48] Arguments in favor of the RFA included in the official voter information guide echoed this understanding, stressing that the constitutional amendment was necessary to "allow[] people to plan their lives and achieve their dreams."[49] By incorporating this understanding of decisional autonomy, and by explicitly referencing in the RFA's text existing equal protection guarantees,[50] voters intended to create a right that recognizes reproductive freedom — and the autonomous ability to determine one's life course — as a necessary condition of full equality.

[40] As discussed in detail in Part II, Section A, "California courts repeatedly and uniformly have recognized that our state Constitution has been construed to provide California citizens with privacy protections encompassing procreative decisionmaking." Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 327 (1997) (internal quotations omitted). Moreover, California decisions recognizing independent and expansive protection for procreative autonomy and choice are consistent with the high court's approach to state constitutional interpretation generally. "[I]t is well established that the California Constitution is, and always has been, a document of independent force, and that the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution." *Id.* at 325 (internal citation omitted).

[41] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health, 597 U.S. 215 (2022).

[42] *See infra* Part II.A (citing cases recognizing procreative choice from 1969 through 1997 and discussing stronger standard of review under California precedent).

[43] *Id.* These dual interests underlying California's longstanding constitutional right of procreative choice provide important guardrails for interpreting the scope of RFA rights. In particular, as explored in Part II, Section C, they can help courts and lawmakers distinguish the types of policies and actions that infringe upon RFA rights from those that meet the state's obligation to affirmatively support reproductive autonomy and health.

[44] People v. Belous, 71 Cal. 2d 954, 963 (1969).

[45] Comm. to Def. Reprod. Rts. v. Myers, 29 Cal. 3d 252, 273 (1981).

[46] Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 332-33 (1997).

[47] *Myers*, 29 Cal. 3d at 275.

[48] *Lungren*, 16 Cal. 4th 307, 333.

[49] *Argument in Favor of Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Shannon Udovic-Constant, M.D. of the California Medical Association, Jodi Hicks of Planned Parenthood Affiliates of California, and Carol Moon Goldberg of League of Women Voters of California).

[50] *See infra* Part II.B (discussing the equal protection case law that voters understood would inform interpretation of the RFA).

Equally important to procreative choice is the second component, the right to protect one's own health. As the California Supreme Court has put it, nearly every decision a woman makes about sex, procreation, pregnancy, or childbirth "directly involves the woman's fundamental interest in the preservation of her personal health."[51] Accordingly, in decisions protecting the right to abortion, the court has explained, again and again, that "the right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life)."[52] In recognition of this right to protect one's own health, proponents of the RFA argued throughout the legislative process and in the official voter information guide that one of the crucial purposes of the RFA is to leave reproductive health decisions to individuals in consultation with their health care providers.[53]

This dual understanding of procreative choice — a right of decisional autonomy necessary to equality and a right to access health care for effectuating reproductive health decisions — is embodied in the reproductive freedom right ratified by California voters.

2. Voters Understood Reproductive Justice Requires State Support

California's parallel statutory protections for reproductive freedom also are essential to interpreting the meaning of the term, as understood by voters. The RFA was introduced and ratified alongside advancement of reproductive justice public policy in California law. In June 2022, the same month legislators referred the RFA, they passed Assembly Bill 2223 to enact substantial amendments to the Reproductive Privacy Act (RPA). The first three legislative findings and declarations in the bill set forth its reproductive justice framework and aims. They are worth reading in full:

> ***SECTION 1.***
>
> The Legislature finds and declares all of the following:
>
> (a) Reproductive justice is a framework created by Black women in 1994 to address the intersectional and multifactored 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

[51] *Myers*, 29 Cal. 3d at 274.

[52] *Lungren*, 16 Cal. 4th 307, 332.

[53] *Rebuttal to Argument Against Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Sandy Reding, R.N. of the California Nurses Association, Kelly McCue, M.D. of the American College of Obstetricians and Gynecologists, and Cary Franklin of the UCLA Law Center on Reproductive Health, Law, and Policy) (arguing that "[d]ecisions about abortion and contraception are deeply personal," "are best made with a health care provider," and that "Prop. 1 protects that right").

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.[54]

To advance this reproductive justice vision, the bill made several changes to the Government Code and the Health and Safety Code to eliminate or amend some provisions that had been used to perpetuate criminalization of pregnant people and their families.[55] This bill also expressly stated that under the RPA "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions," including 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."[56] And, it added a private right of action to enforce these rights.[57] These changes speak not only to an understanding of reproductive freedom that includes a full range of decisions related to pregnancy, maternal health care, birth, and post-partum care, but also the legislature's intent that California law must affirmatively protect and support the right to "effectuate decisions" about reproductive health, acknowledging the interdependence of reproductive freedom and an individual's ability to obtain equality in "economic, social, and political power and resources."[58] These laws, enacted before the November 2022 election, informed voters' understanding of reproductive freedom and their intent in approving the RFA to advance and protect California's public policy of reproductive justice.

Finally, because the RFA also explicitly states it 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,"[59] it is appropriate to presume California voters understood that these constitutional guarantees — developed within and outside reproductive rights cases — would inform interpretation

[54] A.B. 2223, 2021-2022 Reg. Sess., § 1 (Cal. 2022).

[55] *See* A.B. 2223, 2021-2022 Reg. Sess., §§ 2-4, 6.5-7 (Cal. 2022) (codified in Cal. Gov. Code § 27491, Cal. Health & Safety Code §§ 103005, 123466-67, repealing Cal. Health & Safety Code 103000). *See generally infra* Part III.B.1 (discussing law reform related to pregnancy policing).

[56] A.B. 2223, 2021-2022 Reg. Sess., § 5 (Cal. 2022) (codified in Cal. Health & Safety Code § 123462).

[57] A.B. 2223, 2021-2022 Reg. Sess., § 9 (Cal. 2022) (codified in Cal. Health & Safety Code § 123469).

[58] A.B. 2223, 2021-2022 Reg. Sess., § 1 (Cal. 2022).

[59] CAL. CONST. art. I § 1.1.

of the RFA. Indeed, California courts "have recognized that the conjunction of multiple clauses may define and deepen a right,"[60] and Californians long enjoyed strong state constitutional protection for procreative choice by virtue of decisions interpreting and applying both the rights of privacy and equal protection. Thus, as we discuss in Part II, principles found in California's privacy and equality cases support a reinforcing rights approach to the RFA and illuminate how courts can interpret and enforce its reproductive justice guarantees.

[60] *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1897 (2023) (citing and discussing California and other state cases). Pozen and Seifter note that courts can consider "how later-added provisions supplement existing rights. For example, Montana's supreme court has recognized that the state constitutional right to privacy, added in the 1970s, 'augments' the earlier-adopted protection against unreasonable searches and seizures." *Id.* at 1898.

II. Interpreting the RFA

For over 50 years, the California Supreme Court has reviewed cases related to reproductive rights and health care access as a question of fundamental rights, procreative choice, privacy, equality, or a combination. This body of precedent is an important starting point for any court interpreting the RFA and offers important tools — free of federal doctrinal constraints — for realizing its equality and reproductive justice purpose.

Importantly, California's high court has firmly adhered to its highly protective and independent constitutional interpretative approach at times when the U.S. Supreme Court has weakened, or eliminated, similar guarantees under the federal constitution. Thus, at a minimum, the compelling interest test, the most rigorous form of judicial scrutiny applied to California constitutional claims, must apply to RFA claims. And there are important ways in which the RFA requires something different and even more protective.[61] The reproductive justice vision animating the RFA, its intertwining of privacy and equality rights, its goal of ensuring rights are accessible in real life, not only in theory, and California constitutional protections against rights invasion by both public and private actors all support an interpretation of the RFA that is capacious in scope and robust in application.

In the next three sections we consider relevant privacy and equal protection cases in and outside of the procreative rights context and propose ways these intersecting lines of constitutional doctrine should be harmonized and applied to reinforce the RFA's reproductive justice vision.

A. California Precedent on Procreative Choice and Privacy

1. The Meaning and Scope of Procreative Choice and Privacy

Years before *Roe* was decided, the California Supreme Court's 1969 decision in *People v. Belous* was foundational for establishing an implicit fundamental right of procreative choice under the state constitution, as well as the compelling interest test for infringements of that right.[62] In *Belous*, the court held a section of the 1967 Penal Code, which criminalized all but life-saving abortions, was unconstitutional. In doing so, it recognized that the "fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right to privacy' or 'liberty' in matters related to marriage, family, and sex."[63] It further held that state

[61] Other courts interpreting and enforcing recently ratified abortion and reproductive freedom amendments post-*Dobbs* have taken this approach. *See, e.g.*, Isaacson v. Ariz., No. 2025-017995, 2026 WL 1009001, at *16 (Ariz. Super. Ct. Feb. 6, 2026) (concluding the new amendment "mandates" review "under a *particularly stringent strict scrutiny standard*," under which "any restrictions" on the abortion right "are presumptively invalid" and the "burden is on the government … to prove that the Challenged Laws are constitutional") (emphasis added). State high courts interpretating state ERAs also have considered the need to apply the highest standard of review, *see infra* notes 108, 110 (discussing state high court decisions).

[62] 71 Cal. 2d 954, 963-64 (1969).

[63] *Id*.

interference in such personal matters could not stand unless "the state has a compelling interest" and does so in a manner that "is narrowly drawn and not of 'unlimited and indiscriminate sweep.'"[64]

Decisions following *Belous* firmly established "procreative choice" as an expansive constitutional right that extends beyond decisions about abortion, to include decisions about contraception and sterilization,[65] and procreation and assisted reproduction.[66]

In 1972, Californians voted to add an explicit privacy right to the state constitution. By adding privacy to the text of the inalienable rights provision of the Declaration of Rights, Article I, Section 1, Californians both enhanced the implicit right already recognized in decisions like *Belous* and further differentiated California's constitutional privacy rights from federal law.[67] In the decades to follow, the court interpreted the explicit right of privacy to protect both "informational privacy" and "autonomy privacy" for intimate personal decisions, including procreative choice.[68] Additionally, unlike the implicit federal right to privacy, the court held that California's constitutional privacy right is enforceable against private, as well as public, actors.[69]

[64] *Id.*; *see also* Ballard v. Anderson, 4 Cal. 3d 873, 881 (1971) (relying on *Belous* in rejecting interpretation of medical consent law that would unconstitutionally "deny to minors life-saving therapeutic abortions for lack of parental consent"); People v. Barksdale, 8 Cal. 3d 320 (1972) (discussing how revised Therapeutic Abortion Act implicated fundamental liberty interests recognized in *Belous*; finding its definitions of therapeutic, or medically indicated, abortions impermissibly vague; and striking down law on due process grounds).

[65] *See* Conservatorship of Valerie N., 40 Cal. 3d 143, 163-64 (1985) (recognizing fundamental right to procreative choice includes "right to elect sterilization as a method of contraception").

[66] Johnson v. Calvert, 5 Cal. 4th 84, 100 (1993) (recognizing "that our state Constitution has been construed to provide California citizens with privacy protections encompassing procreative decision-making — broader, indeed, than those recognized by the federal Constitution," but concluding surrogate who contractually agrees to gestate and deliver a baby for genetic parents "is not exercising her own right to make procreative choices"); Hecht v. Superior Court, 16 Cal. App. 4th 836, 853-54 (1993) (finding "procreative rights" of unmarried partner of decedent must be considered in how probate court determines disposition of decedent's frozen sperm).

[67] Comm. to Def. Reprod. Rts. v. Myers, 29 Cal. 3d 252, 262-63 (1981) (noting that "the people of this state specifically added the right of 'privacy'" as an enumerated inalienable right and it is broader than the unenumerated federal right of privacy); Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 332-34, 342 (1997) (citing its decisions in *Belous, Ballard, Barksdale* and *Myers* as requiring stronger protection than the federal constitution and concluding that California's "fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding 'compelling interest' test"); *Conservatorship of Valerie N.*, 40 Cal. 3d at 164 (concluding that a restriction on sterilization as a form of contraception "must be justified by a compelling state interest under either article I, section 1 [the right of privacy], or under the equal protection guarantee of article I, section 7, of the California Constitution").

[68] *See* Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 35 (1994) (describing "informational privacy" interests in "precluding the dissemination or misuse of sensitive and confidential information" and "autonomy privacy" interests in "making intimate personal decisions or conducting personal activities without observation, intrusion, or interference"); *Lungren*, 16 Cal. 4th at 332 (explaining "we shall confine our analysis to the autonomy privacy interest" that encompasses the right of procreative decision-making and need not determine if there was also infringement on "any informational privacy interest"); *see also* In re M.T. for Change of Name, 106 Cal. App. 5th 322, 341 (2024) (holding information that would reveal whether a transgender person's gender identity conforms with their assigned sex at birth is intimate personal information entitled to protection under the right to privacy); Vinson v. Superior Court, 43 Cal. 3d 833, 841 (1987) (holding that the right to privacy protects information about sexual relations).

[69] *Hill*, 7 Cal. 4th at 16; *Lungren*, 16 Cal. 4th at 329 (noting "*Hill* concluded that the state right of privacy, *unlike its federal counterpart*, is not limited to 'state action'") (emphasis in original). Problematically, however, the *Hill* decision complicated the legal standard for privacy claims outside the procreative choice context. In rejecting student athletes' challenge to the NCAA's drug testing program,

2. Robust Protection of Reproductive Health Decisions and Access

Importantly, the state supreme court has long been emphatic that it must strongly enforce procreative choice and privacy rights. After the U.S. Supreme Court upheld state laws that put abortion out of reach for low-income people and for youth, rendering the federal right to abortion illusory for many, the California Supreme Court twice reaffirmed that the state constitution demands the strictest scrutiny and struck down similar restrictions.

The first of these two seminal California cases was *Committee to Defend Reproductive Rights v. Myers*,[70] decided just one year after the U.S. Supreme Court rejected an equal protection challenge to a federal law barring Medicaid payment for abortion care. In *Myers*, the California Supreme Court roundly rejected the argument, accepted by the U.S. Supreme Court in *Harris v. McRae*,[71] that the state does not infringe upon, or discriminate against, procreative choice when it prohibits use of public funds for abortion, despite covering all other pregnancy care.[72] The California Supreme Court held that the reasoning in *McRae* "cannot be reconciled" with California precedent, which acknowledges "both the practical importance of many governmental benefits to individual recipients and the corresponding likelihood that a discriminatory benefit program will effectively nullify important constitutional rights."[73] In concurrence, Chief Justice Bird pointedly described the reasoning in *McRae* as "sophistry" that enabled the state to "avoid the requirement of establishing a compelling state interest" for discriminatory treatment of the fundamental right to abortion.[74] He further emphasized that "the distinction between prohibitions and

the court introduced a threshold test for weeding out "less central" or disputed informational privacy interests, which shifts the initial burden of proof to plaintiffs and allows for a broader range of interests to justify an intrusion. *See Hill*, 7 Cal. 4th at 34. Justices, scholars, legal practitioners, and privacy rights experts have criticized this contextual balancing test approach for informational privacy as contrary to the purpose of the amendment and called for courts to reconsider *Hill*'s reasoning and assumptions. *See, e.g.*, Nicole Ozer, *Golden State Sword: The History and Future of California's Constitutional Right to Privacy to Defend and Promote Rights, Justice, and Democracy in the Modern Digital Age*, 39 Berkeley Tech. L. J. 961 (2024). Regardless, the reasoning in *Hill* itself, and as recognized in *Lungren*, make clear that infringements on intimate personal decisions about reproduction and family — that is, autonomy privacy interests — satisfy *Hill*'s threshold analysis, requiring application of the compelling interest test: Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g. freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest.'" *Hill*, 7 Cal. 4th 1, 34; *Lungren*, 16 Cal. 4th at 342 (concluding "under the California constitutional privacy clause, a statute that impinges upon the fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding 'compelling interest' test").

[70] 29 Cal. 3d 252 (1981).

[71] 448 U.S. 297 (1980); *see also* Cary Franklin, *The New Class Blindness*, 128 Yale L. J. 2, 48-63 (2018) (discussing *Harris v. McRae*, and the other federal abortion funding cases holding that "the state was not constitutionally obligated to pay for abortion simply because it opted to pay for childbirth").

[72] *Myers*, 29 Cal. 3d at 267-68.

[73] *Id.*

[74] *Id.* at 295 (Bird, C.J., concurring).

benefits arbitrarily separate the existence of a right from the realization and enjoyment of that right," and that California's "traditional constitutional interpretation does not permit such spurious distinctions."[75]

Instead, applying California's established "unconstitutional conditions," test,[76] the California Supreme Court held that the Medi-Cal program's public funding of pregnancy care generally but not for most abortion care was coercive, "impermissibly limits the constitutionally protected choice of female citizens," and was not the least restrictive means of furthering any legitimate state interest.[77]

Just over a decade later, a plurality of the U.S. Supreme Court altogether eliminated strict scrutiny for infringements on the right to abortion, establishing a new balancing test — the "undue burden" standard.[78] In *Planned Parenthood v. Casey,* the Court applied this less stringent test to uphold a Pennsylvania law that, among other requirements, forced minors to obtain parental consent or a judicial authorization for abortion.[79] Five years later, the California Supreme Court again refused to follow suit.

In *American Academy of Pediatrics v. Lungren,*[80] the California Supreme Court struck down a newly enacted California law similar to the Pennsylvania law. It reaffirmed that the state privacy right of procreative choice required application of the compelling interest standard and refused to apply the undue burden standard or follow federal decisions recognizing broader state authority to regulate children, including their access to medical and reproductive health care. As the *Lungren* court explained: "Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent."[81] It held that the state constitution's privacy clause plainly protects "*all people*" and is "intended to apply to *every* Californian, including every man, woman and child in this state."[82] Applying stringent compelling interest review, the court rejected the state's claimed interests in protecting minors' wellness or preserving the parent-child relationship as undermined by the law's underinclusiveness, including the absence of a parental consent requirement

[75] *Id.*

[76] *Id.* at 270 (describing California's three-part "unconstitutional conditions" test, distinct from federal standard, as requiring courts to consider "(1) whether the conditions which are imposed relate to the purposes of the legislation which provide the benefit; (2) whether the utility of the conditions imposed clearly outweighs the resulting impairment of constitutional rights; and (3) whether there are no less offensive alternatives available to achieve the state's objective"). This test "closely parallels the strict judicial scrutiny used to determine whether an enactment which discriminates against the exercise of a fundamental right denies equal protection of the law." *Id.* at 276 n.22.

[77] *Id.* at 283, 285 (recognizing that "when the state finances the costs of childbirth, but will not finance the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she has the constitutional right to refuse to do so").

[78] Planned Parenthood v. Casey, 505 U.S. 833, 846, 874 (1992), *overruled by* Dobbs v. Jackson Women's Health, 597 U.S. 215 (2022).

[79] *Id*. at 874, 899-900.

[80] 16 Cal. 4th 307 (1997).

[81] *Id.* at 336-37 (internal quotations omitted).

[82] *Id.* at 334 (internal quotation marks omitted).

for adoption or receiving other medical care in analogous circumstances.[83] Accordingly, it concluded the state "failed to demonstrate adequate justification for the statute's intrusion upon a pregnant minor's right of privacy under the California Constitution."[84]

Beyond demonstrating that California's procreative choice doctrine has always been more protective than federal doctrine, *Myers and Lungren* are important in at least two other respects. In both, the California Supreme Court — unlike the U.S. Supreme Court — refused to hollow out the right of procreative choice by upholding laws that left some groups of people, such as low-income people and minors, with less protection or access than others. Additionally, *Myers* explicitly recognizes that constitutionally protected exercise of reproductive freedom often requires more than being left alone by the government; it can require affirmative government support and commitment of public resources.

B. California Equal Protection Precedent on Procreative Choice and Sex Equality

California's unique equal protection doctrine recognizes and considers the inextricable relationship between reproductive autonomy and gender equality. In addition to requiring the most searching judicial review, courts applying equal protection analysis have uniformly rejected state interests that rely upon, or reinforce, sex-based stereotypes and assumptions about the capacities, roles, and preferences of people based on their biology or reproductive capacities.

The California Supreme Court applies only two standards of review to state equal protection claims: strict scrutiny or rational basis. Generally, "unequal treatment that is based on suspect classifications or that significantly burdens a fundamental right or interest is subject to strict scrutiny analysis," while all other claims related to differentiation of treatment are subject to rational basis review.[85] "[I]n cases involving 'suspect classifications' or touching on 'fundamental interests,' the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny."[86] This differs significantly from federal doctrine. As the California Supreme Court has explained, while the "United States Supreme Court has applied a third standard — 'intermediate scrutiny' … California decisions, by contrast, have applied the strict scrutiny standard when evaluating discriminatory classifications based

[83] *Id.* at 353-56.

[84] *Id.* at 359.

[85] People v. Cannon, 18 Cal. 5th 497, 517 (2025).

[86] People v. Olivas, 17 Cal. 3d 236, 243 (1976) (cleaned up); *see also* Serrano v. Priest, 18 Cal. 3d 728, 767-68 (1976) ("In applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental.'"); *id.* at 768 ("Under this standard the presumption of constitutionality normally attaching to state legislative classifications falls away, and the state must shoulder the burden of establishing that the classification in question is necessary to achieve a compelling state interest.").

on sex and have not applied an intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classification."[87]

Under California's strict and searching equal protection scrutiny, "the state bears a heavy burden of justification" and must show "the state interest is a *constitutionally compelling* one that justifies the disparate treatment prescribed by the statute in question" and "that the distinctions drawn by the statute (or statutory scheme) are *necessary* to further that interest."[88] California courts have applied this strict scrutiny test in equal protection cases related to procreative choice and reproduction, gender, pregnancy, and sexual orientation.

1. Unequal Treatment Based on Procreative Choice or Sex Triggers Strict Scrutiny

The California Supreme Court's recognition of procreative choice as a fundamental right, necessarily triggers strict scrutiny of laws or actions that discriminate against the exercise of any aspect of reproductive decisions and health care. As the court reasoned in *Conservatorship of Valerie N.,* a case involving the fundamental rights to contraception and sterilization, "[u]nder equal protection analysis we must determine whether the state has a compelling interest in restricting access to sterilization for incompetent developmentally disabled adults, and, if so, whether banning all such sterilization is necessary to accomplish the state purpose."[89]

Additionally, under the suspect classifications prong of equal protection review, laws that impose differential treatment on the basis of sex, gender, and sexual orientation have all been recognized as "suspect" and subject to strict scrutiny.[90] Notably, the California Supreme Court first recognized sex as a suspect class in 1971, when federal sex discrimination law was still taking shape.[91]

In *Sail'er Inn, Inc. v. Kirby,* the court held sex was a suspect class, applied strict scrutiny, and found that a law prohibiting the employment of women as bartenders violated the equal protection clause of the

[87] In re Marriage Cases, 43 Cal. 4th 757, 832 n.55 (2008) (internal citations and quotation marks omitted).

[88] *Id.* at 847 (emphasis in original).

[89] Conservatorship of Valerie N., 40 Cal. 3d 143, 164 (1985) (striking down the statute as overbroad in serving the asserted state interest in preserving the choice for people who later decided to bear children).

[90] *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1 (1971) (holding sex is a suspect class); Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal. 4th 527, 564 (2004) ("We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution (art. I, § 7(a)) and triggers the highest level of scrutiny."); *In re Marriage Cases*, 43 Cal. 4th 757 (holding sexual orientation is a suspect class); *Cal. A.G. 68 Ops. Cal. Atty. Gen. 153* (1985) ("Unlike the United States Supreme Court, the California courts have established the principle that gender-based differentials must be treated as 'suspect classifications' which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the State Constitution.").

[91] *Sail'er Inn*, 5 Cal. 3d at 15-18 & n.15 (discussing U.S. Supreme Court equal protection analysis and noting lower federal courts had started to treat sex as "at least marginally suspect" alongside "growth of public concern about and opposition to sex discrimination").

California Constitution.[92] In explaining the need for strict scrutiny, it said courts must look closely at classifications based on sex "lest outdated social stereotypes result in invidious laws or practices."[93] It also held the law violated California's constitutional anti-discrimination clause, a provision dating back to 1879, that prohibits disqualifying a person from "entering or pursuing a business, profession, vocation, or employment because of sex."[94] Decades after deciding *Sail'er Inn*, the court reaffirmed that the state constitution "unquestionably reflects a fundamental *public policy* against discrimination in employment — public or private — on account of sex."[95] And, as with the explicit privacy clause, courts have recognized that this unique constitutional language, with no federal counterpart, is intended to protect against employment discrimination by both public and private actors.[96]

Thus, as with precedent on procreative choice and privacy rights, California constitutional doctrine on equal protection and equality rights diverges from federal precedent in consequential ways — establishing a more expansive and protective understanding of equality generally and, as discussed *infra,* sex equality in particular.

2. Laws That Reinforce Stereotypes About Biology, Gender Roles, and Reproduction are Sex Discrimination

In describing the ways the state has uniquely regulated and perpetuated inequality for women, the *Sail'er Inn* court explained, that laws "often characterized as 'protective' and beneficial" instead can "disable women from full participation" in society and that the "pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[97] This is particularly true of differential treatment directed specifically at pregnant people, and California courts following *Sail'er*

[92] *Id.* at 14-22; *see also* Arp v. Workers' Comp. Appeals Bd., 19 Cal.3d 395, 400, 406 (1977) (citing *Sail'er Inn* for rule that "the strict scrutiny/compelling state interest test must govern sex discrimination challenges under article I, section 7, of the California Constitution").

[93] *Sail'er Inn*, 5 Cal. 3d at 18.

[94] CAL. CONST. art. I § 8 (as amended and renumbered 1974). At the time *Sail'er Inn* was decided, this constitutional prohibition on employment discrimination "because of sex" lived in Article XX, section 18. *See Sail'er Inn*, 5 Cal. 3d at 8 (quoting language of Section 18). The very first version in the California Constitution of 1879 used the virtually same language: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession. CAL. CONST. art. XX, § 18 (1879 revision, published in 1880).

[95] Rojo v. Kliger, 52 Cal. 3d 65, 90 (1990) (emphasis in original).

[96] *Id.*; Phillips v. St. Mary Regional Medical Center, 96 Cal. App. 4th 218 (2002) (sustaining cause of action for state constitutional sex discrimination claim against nonprofit religious corporation employer); Merrell v. All Seasons Resorts, Inc., 720 F. Supp. 815 (C.D. Cal. 1989) (holding that Article I, Section 8 applies to private as well as state action); *see also* Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Toward Effective Policies,* 8 J. L. & FAM. STUD. 1 (2006) (discussing California cases and statutes addressing pregnancy and sex discrimination); Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination,* 36 RUTGERS L. J. 1201 (2005) (discussing California pregnancy and sex discrimination cases).

[97] *Sail'er Inn*, 5 Cal. 3d at 20.

Inn have held such laws and policies to be unconstitutional sex discrimination.[98] These decisions thus explicitly reject the reasoning of federal precedent like *Geduldig v. Aiello*, in which the United States Court held that California did not discriminate on the basis of sex by excluding pregnancy as a qualifying condition for benefits under the state disability insurance program.[99]

The California high court's reliance on its sex stereotyping analysis in *Sail'er Inn* to recognize sexual orientation as a suspect class also considered the ways stereotypes about sex and gender deny people full equality. In the seminal marriage equality decision, *In re Marriage Cases*, the court reasoned that "sexual orientation, *like gender*, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment."[100] Thus, under California's constitutional understanding of equal protection, expectations and regulation tied to a person's biological and sex-related characteristics, capacities, and choices, including those connected to procreation, pregnancy, and sexual orientation, are suspect.[101]

It is worth noting two other aspects of California's distinctive equality doctrine that diverge significantly from federal equal protection precedent. First, in recognizing sexual orientation as a suspect class, the California Supreme Court explained that "immutability is not invariably required in order for a

[98] *E.g.*, Badih v. Myers, 36 Cal. App. 4th 1289, 1295 (1995) (holding "pregnancy discrimination is a form of sex discrimination under article 1, section 8 of the California Constitution"); *see also Merrell*, 720 F. Supp. at 822 ("This court finds that California law favors the inclusion of pregnancy within the scope of the prohibitions against sex discrimination embodied in the California Constitution. California has accorded gender the broadest possible protection against discrimination, protection that is broader than the federal standard in both right and remedy.").

[99] 417 U.S. 484 (1974). Although California's highest court has not had occasion to decide a case of pregnancy discrimination under the California constitution, criticism and rejection of *Geduldig* was immediate in California as in many states. *See generally* Martha F. Davis, *State Courts Offer Protection Against Pregnancy Discrimination*, State Court Rep. (Apr. 27, 2026), https://statecourtreport.org/our-work/analysis-opinion/state-courts-offer-protection-against-pregnancy-discrimination. Relatedly, as in many other states, *constitutional* sex and pregnancy discrimination case law in California is sparse given the abundance of strong and explicit *statutory* protections. *Id.* ("In the wake of *Geduldig*, some state legislatures revised their state anti-discrimination laws to mirror the [federal] Pregnancy Discrimination Act, and state civil rights commissions simply continued their practice of viewing pregnancy discrimination as within the scope of sex discrimination, so litigation was not necessary."); *Badih*, 36 Cal. App. 4th at 1294-95 (explaining that the California legislature "reacted swiftly" to the U.S. Supreme Court's "roundly disapproved decision" in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), which extended the reasoning of *Geduldig* to Title VII cases).

[100] In re Marriage Cases, 43 Cal. 4th 757, 844 (2008) (emphasis added); *see id.* at 834 (reasoning that policy or law that treats people differently because of their sexual orientation is suspect not because it is commonly understood as "*because of* his or her *gender*" but because of a deeply personal characteristic that is similarly fundamental and "integral an aspect of one's identity") (emphasis in original).

[101] Importantly, this state constitutional approach directly refutes the reasoning of federal precedent that accepts stereotypical views as uncontroverted matters of human nature or biology. *See, e.g.*, U.S. v. Skrmetti, 605 U.S. 495, 518-19 (2025) (relying on *Geduldig* and upholding a ban on medical treatments for transgender youth, reasoning it did not trigger heightened equal protection review); Dobbs v. Jackson Women's Health, 597 U.S. 215, 236-37 (2022) (citing *Geduldig* to support dicta that banning abortion does not discriminate against people on the basis of sex). *See generally* Courtney Megan Cahill, *The Other Footnote:* Geduldig's *Footnote Twenty and the Past, Present, and Future of Sex Equality*, 135 The Yale L. J. 1695, 1695 (2026) (arguing that in decisions like *Dobbs* and *Skrmetti*, the U.S. "Supreme Court is rewriting constitutional sex-equality law through a distorted reading of a long-dormant footnote" in *Geduldig* and re-embracing the 19th Century worldview that biological function and sex discrimination is "the nature of things").

characteristic to be considered a suspect classification for equal protection purposes."[102] Likewise, state regulation or discrimination on the basis of reproductive capacity or choices — a subset of sex-related characteristics that can and do change over a person's lifetime — does not make it less suspect than other forms of sex discrimination. Second, under California precedent, sex discrimination analysis does not always require courts to identify comparator classes. The California Supreme Court has held that when raising equal protection challenges to laws that "draw[] distinctions between identifiable groups or classes of persons," courts do not "need to ask at the threshold whether the two groups are similarly situated for purposes of the law in question. The only pertinent inquiry is whether the challenged difference in treatment is adequately justified under the applicable standard of review."[103]

These two features of California's equal protection analysis stand in contrast to the federal equal protection doctrine, under which the U.S. Supreme Court has rejected sex equality claims related to discriminatory treatment of pregnancy and gender-affirming health care.[104]

In all of these ways, California equal protection and sex equality doctrine offer a meaningful guide for judicial scrutiny of infringements or discrimination related to reproductive choice or capacity under the RFA.[105] Moreover, doing so is necessary for realizing the RFA's purpose to further equal protection by advancing reproductive autonomy and gender equality together.

[102] *In re Marriage Cases*, 43 Cal. 4th at 841. Thus, outmoded reasoning in older cases that may have validated discriminatory treatment based on a real or assumed "immutable physiological fact," and ignores the underlying sex-based expectations and stereotypes at work, is not persuasive. *See, e.g.*, Michael M. v. Superior Court, 25 Cal. 3d 608, 611 (1979) (holding that statutory rape laws that only males can violate are legitimately grounded in the "immutable physiological fact that it is the female exclusively who can become pregnant," which "coupled with the tragic human costs of illegitimate teenage pregnancies, generates a compelling and demonstrable state interest"). As Justice Mosk wrote in dissent in *Michael M.*, "Such notions are obviously vestiges of a bygone era ... the product of conventional sex-stereotypical thinking, and revive an outmoded patriarchial view of 'the woman's role.' Certainly it is permissible for the Legislature to enact statutes for the protection of the moral character of minors of both sexes, and in particular to prevent their sexual exploitation by persons older and more mature than they; but absent a compelling reason for doing so, equal protection forbids the law to foster one standard of socially acceptable conduct for males and another for females." *Id.* at 624-625 (Mosk, J. dissenting).

[103] People v. Hardin, 15 Cal. 5th 834, 850-51 (2024) (noting this rule does "not call into question the established role the similarly situated inquiry plays in ... so-called 'class of one' cases that do not allege differential treatment on the basis of class membership").

[104] *See, e.g.*, *Geduldig*, 417 U.S. at 496 n.20 (recasting the similarly situated groups as "pregnant women" and "nonpregnant persons," both of which contain females, and reasoning that under California's program, disability benefits "accrue to members of both sexes"); *Skrmetti*, 605 U.S. at 566-67 (Alito, J. concurring in part and concurring in the judgment) (opining that under the Court's equal protection precedent "transgender status should not be treated as either a suspect or 'quasi-suspect' class" because "[t]ransgender status is not 'immutable,' and as a result, persons can and do move into and out of the class"); Cahill, *supra* note 101.

[105] This equality-informed interpretation of the RFA — which understands that historically, and still today, reproductive regulation is bound up with stereotypes and prejudices about gender, as well as race and class — also finds support in a rich body of legal scholarship on the relationship of liberty, privacy, and equality for reproductive rights and justice. *See, e.g.*, Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992); Dorothy Roberts, Killing The Black Body: Race, Reproduction, And The Meaning Of Liberty (1997); Reva B. Siegel, Roe's *Roots: The Women's Rights Claims that Engendered Roe*, 90 B. U. L. Rev. 1875 (2010); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 NYU L. Rev. 83 (2010); Khiara M. Bridges, The Poverty of Privacy Rights (2017);

C. Courts Should Interpret and Strictly Apply the RFA Consistent with Its Equality and Reproductive Justice Purpose

California's fundamental public policy of advancing reproductive justice and the RFA's plain language and interlocking approach to reproductive freedom, privacy, and equality invite judicial interpretation that builds on but is distinct from past California precedent discussed above.

1. RFA Review Requires the Strictest Form of Judicial Scrutiny

The RFA does not explicitly prescribe the judicial standard of review for courts tasked with interpreting and applying it. But given California precedent on procreative privacy rights and equal protection, there is no question that a strict compelling interest test is the *minimum* standard of review appropriate under the RFA.

Notably, in creating an explicit right of "reproductive freedom" intended to further privacy and equal protection rights, the amendment's rights-protective phrasing — that "the state shall not deny or infringe" this right — does not simply mirror or adopt the language of either the privacy or equal protection clauses.[106] The RFA's distinct text, particularly its most stringent "shall not" limitation on state authority, brings into focus the need for judicial interpretation that gives the new amendment appropriate force. Thus, rather than mechanically applying legal standards developed by courts applying the pre-existing privacy and equality amendments, courts should adopt an interpretation that is tailored to the RFA's unique purpose, language, and structure and that will not import doctrinal or prudential restraints to robust and rigorous enforcement.[107]

How would this work in practice? Courts should approach RFA review mindful of the foundational principle that reproductive autonomy is necessary for equality. This means that efforts to limit, rather than advance, reproductive freedom, including through regulation of reproduction and health care in ways that entrench gender stereotypes or subjugate people based on their biology, presumptively qualify as infringements. Where laws are challenged on any such grounds, the state carries the high burden of demonstrating that it has a compelling interest and that the challenged law or action is necessary to achieve it.[108] Importantly, the RFA's imperative to further reproductive freedom, privacy, and equality

Cary Franklin, *The New Class Blindness*, 128 Yale L. J. 2 (2018); Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood (2020); Melissa Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025 (2021).

[106] Under the privacy clause, Article I, Section 1, all people have "an inalienable" right to "pursuing and obtaining safety, happiness, and privacy," and under the equal protection clause, Article I, Section 7, "a person may not be ... denied equal protection of the laws."

[107] *See supra* note 69 (discussing why the *Hill* threshold test for identifying infringements sufficient to raise constitutional privacy claims should not, and does not, apply to procreative rights).

[108] Presumptive unconstitutionality tracks how state courts, including the California Supreme Court, have applied their strongest forms of scrutiny for state constitutional sex discrimination claims. In *Arp v. Workers' Comp. Appeals Bd.*, the California Supreme Court explained that "when a statute is sexually discriminatory on its face, and is *unsupported by any clear indication of ameliorative purpose*, when it potentially disadvantages large numbers of the very sex it purports to aid," and is "perpetuating the paternalistic notion"

both shapes judicial scrutiny and necessarily limits what qualifies as a permissible interest in support of a challenged law or policy. Courts would need to closely, and skeptically, scrutinize whether proffered interests actually qualify as compelling — and are not reanimating antiquated or impermissible assumptions about the roles of women, mothers, and parents.[109]

This would not automatically doom *every* regulation of reproductive health. Consistent with the RFA's reproductive justice purpose, affirmative supports for people seeking abortion care or to prevent punitive treatment of pregnant people or to redress maternal health disparities are not "infringements" within the meaning of the RFA. This may include expanded public funding for reproductive health generally, or programs that specifically redress past discrimination or seek to improve reproductive and maternal health outcomes for Black women and others who experience discriminatory treatment or disparate harmful impacts. Courts should recognize such laws as measures that fulfill the state's obligations under the RFA to advance the interlocking guarantees of reproductive freedom, equality, and privacy, including by alleviating the effects of historical and current reproductive inequities.[110] Under this analysis, the state could satisfy its burden by showing why such interests are "compelling" and narrowly tailored to achieve those ends.

In short, under this most searching level of RFA review, a governmental interest or policy that furthers access to reproductive health care, reduces inequitable treatment or disparities, or protects the privacy of reproductive health decisions and information can be found consistent with the purpose of the RFA.

that women are not substantial breadwinners for their families, it cannot be "necessary to the realization of a compelling state goal." 19 Cal. 3d 395, 407 (1977) (emphasis added); *see also* Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A. 3d 808, 891 (Pa. 2024) ("Thus, a challenge to a law as violative of [the ERA] begins with the premise that a sex-based distinction is presumptively unconstitutional. It is the government's burden to rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy."); Doe v. Maher, 515 A. 2d 134, 161-162 (Conn. 1986) (recognizing that the standard of review under Connecticut's ERA is "[a]t the very least ... strict scrutiny," and holding that exclusion of abortion coverage from state public health insurance violated fundamental right to abortion and equal protection). Also, in a decision blocking restrictions on abortion care under Arizona's new abortion rights amendment, an appellate state court held it would be improper to require plaintiffs to initially show an undue burden: "Under Arizona's Constitution, the challenged law need only 'restrict or interfere' with a woman's right to an abortion to trigger strict scrutiny." Isaacson v. Ariz., No. 2025-017995, 2026 WL 1009001, at *3 (Ariz. Super. Ct. Feb. 6, 2026).

[109] *See, e.g.*, *Allegheny Reprod. Health Ctr.*, 309 A. 3d at 955 (Wecht, J., concurring) ("Women's reproductive capacity and their ability to become mothers traditionally has long been used as justification for perpetuating distinctions between the sexes. The state may not constitutionally advance its purported interest in promoting motherhood by pre-ordaining that role for all women.").

[110] This is an approach state courts have taken when interpreting state Equal Rights Amendments to require states to protect and advance gender equality in ways that federal equal protection law has failed to do. *See* Guard v. Jackson, 940 P.2d 642, 664 (Wash. 1997) (interpreting Washington's Equal Rights Amendment to permit state laws that "alleviate effects of past discrimination and attain equality in fact").

2. The State Can Be Held Accountable for Affirmative Supports Necessary to Prevent Infringements of RFA Rights

Additionally, the evolution of California law and public policy to embrace a reproductive justice vision calls for an interpretation that will, in application, hold the government accountable for affirmatively supporting the procreative choices and equality of all people in exercising reproductive freedom rights. California courts have previously recognized that the government may not regulate in ways that fail to protect the exercise of procreative choice rights by certain groups who face special barriers to access, such as minors and people with disabilities,[111] and can be required to fund the actual "realization and enjoyment" of these rights for those who would be unable to access reproductive health care without government support.[112]

Ensuring that RFA review enables redress for the barriers vulnerable groups face in exercising reproductive freedom would go far in overcoming the legal and real-world harm of federal decisions like *Harris v. McRae* that do not take into account systems and conditions that render constitutional rights inaccessible, and disproportionately so for Black, brown, and low-income people.[113] Consistent with this approach, courts engaging in RFA review may consider when unequal government supports, resources, or systems interfere with reproductive freedom and hold the government accountable for financially supporting or otherwise facilitating the exercise of RFA rights.[114]

[111] *See supra* notes 81-82 and 89.

[112] Comm. to Def. Reprod. Rts. v. Myers, 29 Cal. 3d 252, 295 (1981) (Bird, C.J., concurring).

[113] *See supra* notes 70-77 and accompanying text.

[114] *Id.* (discussing *Myers* decision requiring funding of abortions under Medi-Cal). Likewise, under California's traditional equal protection analysis, the state has been required to expend resources and funding in order to remedy unconstitutional discrimination. *See, e.g.*, Del Monte v. Wilson, 1 Cal. 4th 1009 (1992) (holding it violated equal protection to deny state veterans benefits to people who were not California natives or residents at the time they began active military service and ordering extension of benefits to the excluded class); Woods v. Horton, 167 Cal. App. 4th 658 (2008) (finding gender-based classifications in program to support victims of domestic violence violated equal protection and requiring state to extend funding to qualifying men and their children).

III. RFA Review of California Laws and Practices that Infringe on Pregnant and Birthing Peoples' Equality and Reproductive Autonomy

Given the RFA's extremely robust protection for decisional autonomy over procreative choices, including each person's right to protect their health during pregnancy, current laws or practices that infringe or impede exercise of these rights require renewed scrutiny. To be sure, California has come far in modernizing regulation of abortion care to eliminate many of the economic barriers and unnecessary restrictions on access[115] and, likewise, to build more affirmative supports for maternal health and pregnant and birthing people.[116] At the same time, certain long-standing laws and practices interfere with the promise of the RFA. As the California Supreme Court has cautioned: "it plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right" to simply find "that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate" the new and more expansive rights.[117]

In this Part we consider two critical areas for immediate and future RFA enforcement: remaining legal barriers to abortion care; and the health care and family regulatory practices that discriminate against pregnant and birthing people, with disproportionate impacts on Black, brown, Native American, and low-income Californians.[118]

A. Legal Barriers to Abortion Care

Despite the tremendous level of legal and practical support for abortion care in California, certain laws that remain on the books wholly prevent or create obstacles to abortion care for people who have

[115] *See generally* Cal. Future of Abortion Council, *Recommendations to Protect, Strengthen, and Expand Abortion Care in California* (Dec. 2021), https://www.cafabcouncil.org/_files/ugd/ddc900_0beac0c75cb54445a230168863566b55.pdf; Cal. Future of Abortion Council, *2026 Report and Recommendations* (Jan. 2026), https://www.cafabcouncil.org/_files/ugd/ddc900_434b47461ae04ad2a5d0ded5c891c56f.pdf; Cal. Dept. Pub. Health, *California Abortion Access: What California Is Doing to Protect Abortion Access*, https://www.cdph.ca.gov/Programs/OHE/abortion/Pages/your-rights/state-action.aspx (last visited Aug. 14, 2026).

[116] *See generally* Off. of the Cal. Surgeon Gen., *California's Maternal Health Blueprint 2024* (Sep. 2024), https://osg.ca.gov/wp-content/uploads/sites/266/2024/09/CAMaternalHealthBlueprint_web.pdf.

[117] Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 339 (1997) (emphasis in original) (holding past laws requiring parental consent or judicial authorization before a minor could obtain an abortion are unconstitutional and that the reach of the new privacy constitutional amendment protects all people, including children); *see supra* Part I (describing the RFA's legislative and ballot history).

[118] Persistent racial disparities in maternal and infant health outcomes, particularly for Black and Native American women in California, are another urgent concern for advancing reproductive justice. In recent years, a powerful coalition of California reproductive justice and birth justice activists, health providers, researchers and scholars have created greater accountability and solutions for racial disparities in maternal health. *See* Cal. Coal. for Black Birth Just., *The State of Black Birth Equity in California Report* (Aug. 2025), https://www.cablackbirthjustice.com/copy-of-impact-report. Researching the implementation and impacts of these reforms could inform future enforcement of RFA rights in this area. *See infra* Conclusion.

decided to end a pregnancy. Under current statutory language in the Reproductive Privacy Act: "Every pregnant individual or individual who may become pregnant has the fundamental right to choose to bear a child or to choose to have and to obtain an abortion, *except as specifically limited by this article*."[119] Those limitations are primarily found in two sets of statutory provisions that legally circumscribe abortion decisions and access: restrictions on providing abortions after fetal viability and on who is authorized to provide abortions. In this section we apply our guiding principles for interpreting and applying the RFA to each set of restrictions.

1. The Law on "Unauthorized" Abortion After Fetal Viability Violates the RFA

As already discussed, the 2022 amendments to the state Reproductive Privacy Act (RPA) affirmed California's public policy of advancing reproductive justice and shored up certain legal protections for reproductive freedom. But those amendments did not change the historic language and provisions related to viability that interfere with a pregnant person's autonomous decisions about, and access to, abortion.

While the RPA does not place a specific gestational limit on abortion,[120] the law considers abortion of a viable fetus "unauthorized" if in the good faith medical judgment of the physician performing the abortion, "the fetus was viable" and "continuation of the pregnancy posed no risk to [the] life or health of the pregnant person."[121] Under the statute, "viability" is defined as "the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures."[122] Under both California Supreme Court precedent and guidance from the California Attorney General, health of the pregnant person includes both physical health and mental health and well-being.[123]

If a physician provides a statutorily "unauthorized" post-viability abortion, it constitutes "unprofessional conduct" under the Business and Professional Code and may trigger professional discipline, including

[119] Cal. Health & Safety Code § 123462(b) (West 2026) (emphasis added); *see also* Cal. Health & Safety Code § 123462(c) (West 2026) (prohibiting state interference with the right "except as specifically permitted by this article").

[120] The Attorney General recently reaffirmed this in public guidance to ensure pregnant people are not denied emergency care: "California law does not set a specific gestational age limit for abortion. Rather, it allows a pregnant person and their healthcare provider to determine when an abortion is appropriate for the pregnant person and therefore permissible under California's Reproductive Privacy Act." Cal. Dep't of Just. Off. of the Att'y Gen., *California Law Requires Hospitals to Provide Emergency Abortion Care* (Sep. 30, 2024) [hereinafter *Cal. AG Guidance*], https://oag.ca.gov/system/files/attachments/press-docs/CALIFORNIA%20LAW%20REQUIRES%20HOSPITALS%20TO%20PROVIDE%20EMERGENCY%20ABORTION%20CARE.pdf.

[121] Cal. Health & Safety Code § 123468 (West 2026).

[122] Cal. Health & Safety Code § 123464(d) (West 2026).

[123] *See*, *e.g.*, People v. Belous, 71 Cal. 2d 954, 971 (1969) (stating that "further criteria for determining whether an abortion is permissible [under the predecessor to the RPA] is the pregnant woman's physical and mental health," including "whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term"); *Cal. AG Guidance*, *supra* note 120, at 1 ("[T]he Reproductive Privacy Act's reference to 'life or health' is inclusive of a pregnant person's physical and/or mental wellbeing.").

possible suspension or loss of licensure.[124] Thus, even without the threat of criminal penalties, the possibility of temporarily or permanently being unable to practice medicine — a career and livelihood built on years of education, training, and substantial financial investment — chills physicians from providing abortion care to patients.[125]

Indeed, recent studies and publicly available information on hospital-based abortion services indicate that because of these provisions, even after ratification of the RFA, some health care institutions implement policies or practices of limiting abortion care to a particular week of pregnancy, or limiting the circumstances under which providers can help pregnant people who need abortion care later in pregnancy.[126] As a consequence, some pregnant people cannot access the abortion care they need, or even the information necessary to make informed reproductive health care choices.

At least two court decisions predating ratification of the RFA illustrate this. In *Barragan v. Lopez,* a California Court of Appeal considered whether a doctor facing professional negligence claims breached his duty of care when he failed to advise a patient of her right to an abortion post-viability.[127] In holding that the doctor had no duty to advise the patient of her right to an abortion, the court disregarded expert evidence of the serious health risks the plaintiff faced during her pregnancy, concluding that although the patient was experiencing "significant complications," including rupture of her amniotic sac, it would have been "improper" for the doctor even to advise the patient of her right to — much less provide — an abortion.[128] And another California Court of Appeal determined that a doctor's duty of care does not include a duty to advise patients that post-viability abortions are available in other states.[129]

[124] *See* Cal. Bus. & Prof. Code § 2253 (West 2026) (providing that "[f]ailure to comply with the Reproductive Privacy Act … constitutes unprofessional conduct"); Cal. Bus. & Prof. Code § 2227 (providing for discipline for engaging in unprofessional conduct including suspension or loss of license).

[125] *See, e.g.*, Isaacson v. Ariz., No. 2025-017995, 2026 WL 1009001, at *6 (Ariz. Super. Ct. Feb. 6, 2026) (striking down, under new abortion right amendment, professional practice restrictions not tied to criminal penalties: "Failure to comply with these mandates risks severe professional and civil penalties, including loss or suspension of a physician's license.").

[126] *See*, *e.g.*, Nancy F. Berglas et al., *Changes in Availability of Later Abortion Care Before and After* Dobbs v. Jackson Women's Health Organization*,* 145 Obstet. Gynecol. e31, App. 1, at 3 (2025) (finding that the median gestational limit across procedural abortion facilities in California declined between 2021 and 2023 and is lower than those in many other states); Natalie DiCenzo et al., *Exploring How California Obstetrician-Gynecologists Interpret the Fetal Viability Concept*, 160 Contraception 111404, 4 (2026) (finding that some institutions "imposed stricter abortion limits than California law, creating inconsistent abortion access — particularly over 24 weeks — despite legal protections"); UCI Health, *Women's Options Center*, https://www.ucihealth.org/medical-services/programs/womens-options (last visited Aug. 10, 2026) (stating that "[i]n California, surgical abortions are an option from five to 23 completed weeks of pregnancy"); Stanford Med. Health Care, *Family Planning*, https://stanfordhealthcare.org/medical-clinics/family-planning.html (last visited Aug. 10, 2026) (offering "[t]ermination of pregnancy up to 24 weeks"); UCLA Health, *Family Planning, Patient Resources*, https://www.uclahealth.org/medical-services/obgyn/family-planning/patient-resources (last visited Aug. 10, 2026) (offering "[s]urgical abortion during the second trimester (from 14 weeks to 23 weeks and 6 days)").

[127] Barragan v. Lopez, 156 Cal. App. 4th 997, 1003 (2007), as modified (Nov. 8, 2007).

[128] *Id.* at 1003-05 (affirming summary judgment for defendant physician on professional negligence and wrongful life claims).

[129] Daniel C. v. Miller, No. B282595, 2019 WL 5204159, at *3 (Cal. Ct. App. Oct. 16, 2019) (unpublished) (affirming summary judgment for defendant physician in professional negligence case).

The facts of the *Barragan* case are especially concerning. They suggest that even when pregnant people are suffering significant health complications, overcompliance with the current statutory scheme — by both physicians and courts — will reinforce denials of constitutionally protected and statutorily authorized abortion care. But even on its own terms, the statutory viability limit restricts and chills provision of abortion care and denies pregnant people decisional autonomy over their "fundamental right to choose to have an abortion." More specifically, by putting the final decision of whether to continue a pregnancy in the hands of the physician, the law perpetuates the second-class status of women and pregnant people by denying them equal decision-making autonomy. This does not stand up to RFA review. As discussed below, such interference and third-party control over the abortion decision is presumptively unconstitutional and the state cannot carry the burden of showing it is necessary and narrowly tailored to advance a compelling state interest.

a. The RFA's Language and Enactment History Demonstrate There Is No Implicit Viability Limit on the Right to Abortion

The RFA's text along with extrinsic indicia of its purpose do not permit an interpretation of a pregnant person's constitutional right of reproductive freedom that is defined, or limited, by fetal viability. The RFA's text does not include any language regarding fetal life or viability.[130] And given its unequivocal constitutional mandate that the state "shall not deny or interfere" with a person's fundamental intimate decision to have an abortion, courts cannot impose an unwritten or implicit exception to that right. This "no exceptions" interpretive approach is how, nearly 150 years ago, the California Supreme Court interpreted similarly unqualified language in the constitutional provision prohibiting sex discrimination in employment. It squarely rejected the state's argument that it was implicitly understood that this provision embraced certain traditionally held morality-based justifications for sex discrimination.[131]

Likewise, the RFA's legislative history reveals that the option of including a viability limit on abortion was considered, but intentionally not written into the amendment. Lawmakers extensively discussed

[130] In contrast, five new state constitutional amendments include language regarding the state's authority to partially limit the right to abortion after viability. California — along with Colorado, Maryland, New York, and Vermont — is among the five states that do not. *See* Cathren Cohen & Diana Kasdan, *The Promise of State Reproductive Freedom Amendments: An Analysis of State Constitutional Protections and Their Impact on Anti-Abortion Laws,* UCLA L. Ctr. on Reprod. Health, L., & Pol'y 6 (Sep. 2025), https://law.ucla.edu/sites/default/files/PDFs/Center_on_Reproductive_Health/2509%20State%20Constitutions%20FINAL.pdf.

[131] In an 1881 decision interpreting the 1879 California Constitution Article XX, Section 18, a precursor to current Article I, Sec 8, the court explained: "it does establish, as the permanent and settled rule and policy of this State, that there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business.... [T]here are no exceptions in the section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground." In re Maguire, 57 Cal. 604, 608 (1881); *see also* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 8 (1971) ("In explicit and unqualified language, this section makes it clear that sex alone may not be used to bar a person from a vocation, profession or business.... [L]egislative enactments contrary to its provisions are void.").

the decision not to include any restriction on the scope of the abortion right in the RFA.[132] During an Assembly Judiciary Committee hearing, a law professor invited by the bill sponsors to testify on the proposed language explained it "doesn't use [viability] as a reference point," and because of that, "it might mean that we [California] have stronger protections for people to protect themselves in their decisions about their own bodies during the third trimester than you would under federal law."[133] Likewise, not one of the six senate and assembly bill analyses on the purpose and effect of the proposed amendment[134] include fetal viability as a limitation on the proposed reproductive freedom right. To be sure, the bill analyses describe or discuss existing federal and California laws, including those that address abortion and viability.[135] But in sections explaining what the RFA will do and why it is needed, there is no discussion of a viability limitation or description of a corresponding state policy requiring it.[136] The bill analyses consistently express the history and policy of California as a "Reproductive Freedom State"[137] and include arguments in support expressing that the amendment would take "protections

[132] *See, e.g.*, *Hearing on S.C.A. 10 Before the Assemb. Judiciary Comm*., 2021-2022 Reg. Sess. (Cal. June 23, 2022) (statement of Sen. Toni Atkins) (responding to lawmakers' questions regarding the decision to omit from the bill any restrictions on when someone may obtain an abortion and explaining the drafting decision to "leave[] it to the provider and the patient"); *Id.* (statement of Professor Lisa Ikemoto) (observing that "there was certainly a lot of serious consideration" of whether to include the ultimately omitted viability limit); *see also* Melody Gutierrez, *California Constitutional Amendment Securing Abortion, Contraceptive Rights Goes to Voters,* L.A. Times (June 27, 2022), https://www.latimes.com/california/story/2022-06-27/california-voters-decide-abortion-rights-state-constitution (covering the "lengthy partisan debate on SCA 10, [in which] Republicans raised concerns that the measure does not set restrictions to when abortions can be performed").

[133] *Hearing on S.C.A. 10 Before the Assemb. Judiciary Comm*., 2021-2022 Reg. Sess. (Cal. June 23, 2022) (statement of Professor Lisa Ikemoto). Specifically, in answer to the question about whether future legislators would be able to place limits on abortion later in pregnancy, Professor Ikemoto stated: "it's in the scope of the [California] Supreme Court's role … any state restriction would be subject to very rigorous scrutiny." *Id.*

[134] *See* Cal. Leg. Information, S.C.A. 10 *Reproductive freedom (2021-2022): Bill Analysis*, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SCA10 (last visited Aug. 14, 2026) (containing six separate analyses from June 10, 2022, through June 24, 2022); *infra* note 135.

[135] *See, e.g.*, Cal. S. Judiciary Comm., Bill Analysis of S.C.A. 10, 2021-2022 Reg. Sess. 2-7 (June 10, 2022) (describing existing federal law including the ruling in *Roe v. Wade* regarding a state interest in fetal viability and existing California law, including the Reproductive Privacy Act, that "every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions"); Cal. S. Comm. on Elections and Const. Amend., Bill Analysis of S.C.A. 10, 2021-2022 Reg. Sess. 1-2 (June 12, 2022) (describing "[e]xisting state law"); Cal. S. Comm. on Appropriations, Bill Analysis of S.C.A. 10, 2021-2022 Reg. Sess. 1-2 (June 15, 2022) (referencing federal judicial precedent as "Background"); *see also* Cal. S. Rules Comm., Floor Analysis of S.C.A. 10, 2021-2022 Reg. Sess. (June 20, 2022); Cal. Assemb. Comm. on Judiciary, Bill Analysis of S.C.A. 10, 2021-2022 Reg. Sess. (June 22, 2022); Cal. Assemb., Floor Analysis of S.C.A. 10, 2021-2022 Reg. Sess. (June 24, 2022).

[136] *See* Cal. S. Judiciary Comm., Bill Analysis of S.C.A. 10, at 7 (describing what the RFA provides under section titled "California is a Reproductive Freedom State" with no mention of fetal viability limitations); Cal. S. Comm. on Elections and Const. Amend., Bill Analysis of S.C.A. 10, at 5 (describing similar under "Comments"); *Id. at* 6 (emphasizing in a section titled "What Happens Next?" that the amendment "neither narrows or limits" existing state constitutional rights and will "enhance the public policy of the state by expressly guaranteeing" reproductive freedom as a fundamental right in California); *see also* Cal. S. Comm. on Appropriations, Bill Analysis of S.C.A. 10; Cal. S. Rules Comm., Floor Analysis of S.C.A. 10; Cal. Assemb. Comm. on Judiciary, Bill Analysis of S.C.A. 10; Cal. Assemb., Floor Analysis of S.C.A. 10.

[137] *See, e.g.*, Cal. S. Rules Comm., Floor Analysis of S.C.A. 10, at 6.

in California a step further" than federal law and the existing California laws protecting reproductive freedom by "ensuring further protection against" future federal attempts to restrict or ban abortion and "from any state actions that may interfere with this right in the future."[138]

This expression of the RFA's expansive purpose was also communicated in the subsequent ballot campaign and in the Official Voter Guide. During a period of intense media coverage and voter education, the question of how the RFA might impact regulation of abortion, including post-viability abortion, was a frequent topic of debate. In the media coverage leading up to the vote, opponents repeatedly stressed that "since Proposition 1 omits language surrounding viability, there will be no limits to when abortions can be performed in California."[139] Official supporters of the RFA, including a constitutional law professor, explained that while the amendment itself did not change current California laws, or prohibit all regulation of abortion, it did seek to "enshrine basic, fundamental and enduring principles in the Constitution," that would require future court interpretation of any law delineating or restricting reproductive freedom rights.[140] Likewise, none of the official ballot materials and arguments told voters, or suggested, that the RFA addresses or enshrines a state interest in viable fetal life.[141] For

[138] *Id.* at 10 (attributing statement to California Latinas for Reproductive Justice); *see also* Cal. S. Judiciary Comm., Bill Analysis of S.C.A. 10, at 7-8 (including similar statement from NARAL Pro-Choice California and Planned Parenthood Affiliates of California); Cal. Assemb. Comm. on Judiciary, Bill Analysis of S.C.A. 10, at 6-7 (including similar statement from ACLU California Action).

[139] Melody Gutierrez, *California Politics: What Constitutional Law Experts Say About the Abortion Ballot Measure*, L.A. Times (Oct. 14, 2022), https://www.latimes.com/california/newsletter/2022-10-14/california-politics-abortion-measure-gas-taxes-ca-politics (quoting an RFA opponent as stating, "This broadly worded proposal could erase all abortion restrictions in California and require taxpayer-funded abortions up until a baby's due date."); *see also* George Skelton, *Would California's Abortion Ballot Measure Allow Late-Term Abortions? Its Author Says No*, L.A. Times (July 14, 2022), https://www.latimes.com/california/story/2022-07-14/skelton-california-abortion-ballot-measure-constitutional-amendment (noting the RFA's unlimited language, which "seemingly would end current third trimester restrictions," would be a central campaign issue, and interviewing advocates who opposed the RFA because it has "no limit on late-term abortion"); Nate Trela, *Fact Check: California Measure Would Add Abortion Rights to Constitution, Not Define When It Is Allowed*, USA TODAY (Nov. 7, 2022), https://www.usatoday.com/story/news/factcheck/2022/11/07/fact-check-claim-exaggerates-nature-california-abortion-proposal-nine-months-birth/8261432001/ (describing the debate on the RFA among social media users focused on the "broad language of the proposition," which commenters interpreted would "remove all limits to abortion in the state"); Alexei Koseff, *Would Prop. 1 Allow Abortions After Fetal Viability? Legal Experts Say No*, CalMatters (Oct. 31, 2022), https://calmatters.org/politics/2022/10/california-abortion-law-prop-1/ (reporting that an RFA opponent argued that "the expansive text of the measure conflicts with the viability framework and is a stealthy way to legalize abortions after that point," and that "[i]f it didn't intend that, then a sensible statute would have said so").

[140] *See* Trela, *supra* note 139 (quoting Professor Cary Franklin).

[141] *Official Title and Summary, Analysis by the Legislative Analyst*, *Arguments and Rebuttals* in Official Voter Information Guide, *supra* note 23 (Legislative Analyst's summary of Proposition 1 stating, "Proposal: Proposition 1 changes the California Constitution to say that the state cannot deny or interfere with a person's reproductive freedom and that people have the right to choose: Whether or not to have an abortion. Whether or not to use contraceptives."); *Rebuttal to Argument Against Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Sandy Reding, R.N. of the California Nurses Association, Kelly McCue, M.D. of the American College of Obstetricians and Gynecologists, and Cary Franklin, J.D. of the UCLA Law Center on Reproductive Health, Law, and Policy) ("Prop. 1 does not change" existing state law on "how or when a person can access abortion" but "amends the State Constitution to prohibit interference with individual choices on reproductive health care and the fundamental right to choose to have an abortion").

this very reason, opponents directly and clearly argued to voters in the Official Voter Guide: "Read Proposition 1 for yourself. It contains NO language limiting late-term abortions…"; "It allows late-term abortions without limitation…"; "to preserve reasonable limits on late-term abortions, vote 'NO' on Proposition 1."[142] By all accounts, the legislators and voters who passed and ratified the RFA were well aware that the constitutionality of any current abortion restrictions would depend on future judicial interpretation.

Finally, the existence of a statutory viability restriction must be considered within the broader legal context understood at the time of ratification. It was widely known, and celebrated, that California's fundamental public policy was one of supporting and consistently expanding, not narrowing, protections for reproductive freedom.[143] Aligning with that view, it was long established and understood that the state could not advance an interest in fetal life at the expense of the pregnant person's autonomy. Indeed, twenty years prior to passage of the first version of the Reproductive Privacy Act, the California Supreme Court stated that "the state's interest in protecting the fetus cannot be pursued by subordinating the woman's right of procreative choice."[144]

b. The California Supreme Court Has Never Held a State Interest in Preserving Viable Fetal Life — Contrary to a Pregnant Person's Decision — Is Constitutionally Compelling

Legal or factual questions related to fetal viability were at issue in several cases prior to ratification of the RFA. But in those cases, the California Supreme Court never directly held that a state interest in protecting viable fetal life, or persuading a pregnant person to continue a viable pregnancy, was constitutionally compelling.[145] To the contrary, it found that the state interest in protecting pregnant people's health, or the interests of a future parent not an "unborn life," were more likely the motivating state interests in policies related to fetal life and viability.[146]

[142] *See Rebuttal to Argument in Favor of Proposition 1* in Official Voter Information Guide, *supra* note 23 (prepared by Allison Martinez of California Alliance of Pregnancy Care, Brad Dacus of Pacific Justice Institute, and Dr. Vansen Wong) (Proposition 1 would "allow unrestricted late-term abortions").

[143] *See supra* Part II.B-C.

[144] Comm. to Def. Reprod. Rts. v. Myers, 29 Cal. 3d 252, 283 (1981).

[145] For example, in *Lungren,* though not deciding on a state interest in protecting fetal viability, the California Supreme Court theorized in dicta that "an abortion constitutionally could be prohibited" after fetal viability if "completely unrelated to the protection of the life or health of the pregnant woman." Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 342-43 (1997).

[146] *See Myers*, 29 Cal. 3d at 273, 280-81 (noting, "both California and federal authorities establish that, at least prior to viability, the state may not subordinate a woman's own medical interests or her right of procreative choice to the interests of the fetus," and that while federal precedent "recognized a compelling interest in protecting a viable fetus," the California Supreme Court had considered the "state's asserted interest in protecting fetal life" previously and found it was grounded in statutes or rules reflecting interests of the future parent or associated with a live birth); *Id.* at 278 ("As far as the interest in 'encouraging childbirth' is concerned, the California Legislature has not embraced a general policy of encouraging *unwanted* children….") (emphasis in original).

For instance, in *Belous*, the foundational decision establishing California's fundamental constitutional right to abortion, the court considered the state's argument that the criminal ban on all but life-saving abortion was constitutional because it "has a compelling interest in the protection of the embryo and the fetus and that such interest warrants the limitation on the woman's constitutional rights."[147] The court examined the statutes and court rules that the state argued "show that the embryo or fetus is equivalent to a born child," and found, to the contrary, all "require a live birth or reflect the interest of the parents" and that there are "major and decisive areas where the embryo and fetus are not treated as equivalent to the born child."[148] It concluded that the more likely intent of the legislature in passing the law at a time when abortion was a "highly dangerous procedure," was only to permit abortion when "the risk of death due to the abortion was less than the risk of death in childbirth."[149] In other words, the ban at issue sought to promote a state interest in protecting the health and life of pregnant people, not embryos and fetuses. Finally, the court considered whether the then newly enacted Therapeutic Abortion Act limiting abortion to the first 20 weeks for approved health reasons supported the asserted state interest in protecting potential fetal life. It concluded that it did not: "There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo."[150]

Subsequently, in *People v. Barksdale*, the Court invalidated almost all of the revised Therapeutic Abortion Act,[151] but not the provision completely banning abortion after 20 weeks. While speculating in dicta that the legislature had the "unquestionable" power to establish "criteria limiting the decision to terminate a pregnancy … when the fetus is capable of life independent of the body of the woman," it expressly declined to decide that.[152] Moreover, it reiterated its conclusion in *Belous* that "in passing the

[147] People v. Belous, 71 Cal. 2d 954, 967-68 (1969).

[148] *Id.* at 968. In particular, the court found that probate statutes "classifying the unborn child as the same as the born child" require a live birth for the provisions to apply; that tort cases allowing a child to recover for injuries caused before birth are meant to protect the interests of a born child, and only attach after birth not to an embryo or fetus; and that cases asserting rights on behalf of an embryo or fetus before birth are actions brought by prospective parents and "it is their interest that the law protects" *Id.* at 968 n.12 (discussing various statutory code and cases).

[149] *Id.* at 970.

[150] *Id.* at 971.

[151] 8 Cal. 3d 320 (1972).

[152] *Id.* at 335. Indeed, although both parties presented argument on this issue to the court, it decided not to reach it:

> In the instant case we are urged to declare that women have a constitutional right to abortions and that this right stems from and is protected from governmental intervention by the right to privacy. Under this theory it is urged that the state may regulate abortions only to promote the health of a woman by requiring that an abortion be performed by physicians in a medically approved manner and by proscribing an abortion only in those rare instances where it would constitute a greater hazard to the woman than bearing the pregnancy to term. The People urge, to the contrary, that such a right to privacy, if it exists at all in this context, is offset by a compelling state interest in protecting fetuses and embryos. We hold, for reasons hereinafter considered, that the Therapeutic Abortion Act may not be enforced to prohibit abortions not falling within the conceded limits of proper state regulation, and for that reason we need not resolve those issues raised by the claimed right of privacy.

Therapeutic Abortion Act, the Legislature was primarily concerned, not with the protection of the embryo but with the health of the woman involved."[153]

Laws and related court decisions that presume a state interest in protecting fetal life in other contexts also support the principle that such an interest must align — not conflict — with the interests and rights of the pregnant person. This includes cases about third parties prosecuted under "fetal homicide" laws. In such circumstances, the court has emphasized that where "the state's interest in protecting the life of a developing fetus is not counterbalanced against a mother's privacy right to an abortion, or other equivalent interest," there is not an "impediment to our Legislature protecting the 'potentiality of human life'" under a fetal homicide law both before and after viability.[154] Indeed, the state itself has expressed this view. In recent guidance to law enforcement and courts on properly interpreting the crime of an "unlawful killing of a human being, *or a fetus,*" the California Office of the Attorney General explains that the "Legislature intended to target *only* the intentional conduct of third parties" not to punish women believed to have intentionally, or unintentionally, ended their pregnancies — regardless of gestational age or fetal viability.[155]

Thus, under California Supreme Court precedent predating RFA ratification, a generalized state interest or policy of protecting embryonic or fetal life has never been found compelling or sufficient to limit the decisional rights or health of a pregnant person.[156] Likewise, the court has never held that a law intended to protect fetal life was necessary and narrowly tailored to advancing that interest.

Id. at 326-27 n.2. Accordingly, the court left the 20-week ban standing only because: "In the instant case we are presented with a first trimester abortion and a record devoid of evidence that might suggest that the legislative determination was constitutionally impermissible. The validity of the 20-week limitation is not at issue." *Id.* 335.

[153] *Id.* at 326.

[154] People v. Davis, 7 Cal. 4th 797, 807, 810 (1994) (concluding that "when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide," and could criminalize murder of the postembryonic product without the imposition of a viability requirement").

[155] *See* Cal. Dep't of Just. Off. of the Att'y Gen., *Legal Alert: OAG-2021-01 re: Penal Code 187 and "the unlawful killing of … a fetus"* 11 (Jan. 6, 2022), https://oag.ca.gov/system/files/media/legal-alert-oag-2021-01.pdf (emphasis added) (providing notice of statutory construction to all California district attorneys, police chiefs, and sheriffs).

[156] Even if the court had reached that holding in the past, extending it now to the RFA would perpetuate the view that a viable fetus is a separate legal person and that a pregnant person is legally obligated to sustain viable fetal life. That is a view that has recently and emphatically been rejected by the state, *see* Cal. Dep't of Just. Off. of the Att'y Gen., *supra* note 155, and *infra* Part III.B.1, and thus is not compelling. *Cf. In re Marriage Cases*, 43 Cal. 4th 757, 784-85 (2008) (concluding "retention of the traditional definition of marriage" could not constitute a "*compelling* state interest" because it perpetuates a view "now emphatically rejected by this state" — that gay people or same-sex couples may be treated less favorably by the state) (emphasis in original).

c. The Reproductive Privacy Act Does Not Reflect a Public Policy of Preferencing Viable Fetal Life Over Reproductive Freedom

Two decades prior to RFA ratification, the Reproductive Privacy Act (RPA) was first enacted to modernize regulation of abortion, protect reproductive freedom, and better align California's abortion laws with constitutional precedent.

The legislative history of Senate Bill 1301, which introduced the RPA in 2002, indicates that the purpose of the bill was to clean up "cryptic, often inconsistent" California abortion law provisions that were unconstitutional under state or federal precedent, and to "protect privacy rights, now and in the future."[157] The bill also sought to improve access to mifepristone, a new advancement in abortion practice at the time.[158] Further amendments to the RPA in 2013 expanded the types of qualified providers authorized to provide abortion in order to increase access — further demonstrating the state's public policy of supporting personal decision-making regarding reproductive health care.[159] Twenty years later, with passage of Assembly Bill 2223 in 2022, the legislature made its most significant changes to the RPA. This legislation was introduced with strong support from the reproductive health, justice, and rights communities and specifically sought to address instances of pregnancy criminalization in the state, the overturning of *Roe v. Wade*, and concerns that abortion restrictions in other states would negatively impact access and provision of care in California.[160]

A state public policy regarding fetal life is notably absent from this legislative history, and discussion of fetal viability is sparse. The only mention of limiting abortion after fetal viability in the 2002 legislative history is to note that the RPA conforms to the standard of *Roe v. Wade*.[161] The legislative history of the 2022 amendments focused on the need for broad and sweeping protection of pregnant people and those who help them against any civil or criminal penalties for ending a pregnancy, experiencing a pregnancy loss, or any outcomes related to pregnancy.[162] Notably, legislative testimony and legislative analysis emphasized that A.B. 2223 very much sought to prevent the use of fetal homicide or fetal assault laws

[157] Cal. Assemb. Comm. on Health, Bill Analysis of S.B. 1301, 2001-2002 Reg. Sess. 5 (June 27, 2002).

[158] *See, e.g.*, Cal. Assemb. Comm. on Judiciary, Bill Analysis of S.B. 1301, 2001-2002 Reg. Sess. 5 (June 10, 2002).

[159] *See* A.B. 154, 2013-2014 Reg. Sess. (Cal. 2013) (codified in Cal. Bus. & Prof. Code §§ 2253, 2725.4, 3502.4, Cal. Health & Safety Code § 123468).

[160] *See supra* Part I.C.2 (discussing broader reproductive justice vision animating 2022 revisions to RPA).

[161] Cal. Assemb. Comm. on Judiciary, Bill Analysis of S.B. 1301, 2001-2002 Reg. Sess. 8 (June 10, 2002).

[162] A statement of the bill author, Assemblymember Wicks, notes, "a critical part of realizing reproductive justice for people in California is clarifying that nobody will be investigated, prosecuted, or incarcerated for their actual, potential, or alleged pregnancy outcomes.... This bill protects reproductive freedom and decision making by ensuring that no one in the State of California will be prosecuted for ending a pregnancy or experiencing a pregnancy loss." Cal. S. Comm. on Health, Bill Analysis of A.B. 2223, 2021-2022 Reg. Sess. 3 (June 27, 2022). And Senate analyses for A.B. 2223 note that "this bill seeks to ensure that no one in the State of California is investigated, prosecuted, or incarcerated from ending a pregnancy or experiencing a pregnancy loss and that their right to reproductive freedom is protected." Cal. S. R. Comm., Bill Analysis of A.B. 2223, 2021-2022 Reg. Sess. 5 (Aug. 26, 2022).

and the concept of fetal personhood to punish pregnant people.[163] Analysis by the Assembly Committee on the Judiciary specifically states: "Under California law, a fetus or embryo not born alive never attains the status of a 'person.'"[164]

In short, the legislative history of California public policy regarding reproductive freedom does not support a state interest in protecting fetal viability at the expense of a pregnant person's autonomy and equality. To the contrary, the 2022 amendments show that policymakers affirmatively sought to stop the state from using fetal life or personhood as a justification for interfering with reproductive freedom. To use the language of the California Supreme Court over 50 years ago, "in passing the [Reproductive Privacy] Act, the Legislature was primarily concerned, not with the protection of [fetal life] but with the health [and rights] of the woman involved."[165]

d. California's Statutory Viability Restriction Violates the RFA

Given the RFA's plain language, intent, and the legal and policy background at the time of its ratification, the statutory viability restriction on abortion care cannot withstand RFA review. California has not, with the RPA or otherwise, expressed a policy, let alone a compelling reason, for preferencing fetal life over a pregnant person's own decision about their pregnancy. Moreover, even if the state were to assert an interest in encouraging people to continue pregnancies that are viable, it could not carry the burden of demonstrating that the current approach — giving physicians rather than the pregnant person the final decision-making authority — is both compelling and narrowly tailored to achieving that end. Imposing a legal third-party veto rejects the equal capacity of women and pregnant people to make informed and independent decisions about what is best for their health and futures, an outdated stereotype that the state has no interest, let alone a compelling one, in enforcing. Further, by chilling physicians from providing post-viability abortion care, some patients may turn to self-managing later abortions in circumstances when they otherwise would have sought medical care for their own health and well-being — an outcome wholly inconsistent with California's policy of supporting access to reproductive health and justice.[166]

This does not mean that the state could never justify any regulation that relates to pregnancy care post-viability. For example, regulations intended and shown to support and advance the health and choices of pregnant patients in need of more complex post-viability abortion care could survive RFA review. And the state can also regulate in ways that further support the quality of maternal health care and range of birthing options for pregnant people who want to give birth. But unlike those approaches, the current restriction violates the RFA.

[163] *See, e.g.*, Cal. Assemb. Comm. on Health, Bill Analysis of A.B. 2223, 2021-2022 Reg. Sess. 5 (Apr. 15, 2022) (discussing laws in other states, such as "fetal assault" and "fetal homicide" laws, that "are passed under the guise of protecting pregnant people").

[164] Cal. Assemb. Comm. on Judiciary, Bill Analysis of A.B. 2223, 2021-2022 Reg. Sess. 8 (May 16, 2022).

[165] People v. Barksdale, 8 Cal. 3d 320, 326 (1972).

[166] *See supra* Part I.C and *infra* Part III.B.1

2. Restrictions on Advanced Practice Clinicians Infringe on Abortion Access

Advanced Practice Clinicians (APCs) play a critical role in providing safe, supportive, and affirming abortion care, and addressing barriers to access, such as shortages of physicians who provide abortion care, a problem that disproportionately affects people in rural areas and those from marginalized groups.[167] Accordingly, in 2013, the California legislature took steps to expand the types of licensed practitioners authorized to provide abortion care in the state. The licensing and practice codes for abortion care were amended to allow a designated subset of APCs — nurse practitioners, certified nurse midwives, and physician assistants — to perform *some* abortions. Specifically, designated APCs are authorized to provide abortions only in the first trimester of pregnancy and only by "medication or aspiration techniques."[168] Further, APCs authorized to provide abortion care within these limits must achieve clinical competency by completing training that meets a series of statutory requirements.[169] While these provisions do not create independent criminal penalties, noncompliance could expose APCs to criminal liability for unauthorized abortion care: Providing abortion care outside the bounds of this "safe harbor" constitutes a public offense punishable by a fine up to $10,000, imprisonment, or both.[170]

More than a decade since the 2013 amendments, and in the face of a drastically changed legal and medical landscape for obstetrical and abortion care, it is not clear how or if the state can justify these regulations interfering with abortion access and choice of provider. California is experiencing a shortage of obstetrician-gynecologists and decreasing numbers of maternity wards across the state.[171] Barriers to abortion access in rural parts of the state, where some individuals live more than 200 miles from the

[167] *See*, *e.g.*, Am. Coll. of Obstetricians & Gynecologists, *Issue Brief: Advanced Practice Clinicians and Abortion Care Provision* (Oct. 2023), https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-advanced-practice-clinicians-and-abortion-care-provision;
Am. Pub. Health Ass'n, *Policy Statement 20112, Provision of Abortion Care by Advanced Practice Nurses and Physician Assistants* (Nov. 1, 2011), https://www.apha.org/policy-and-advocacy/public-health-policy-briefs/policy-database/2014/07/28/16/00/provision-of-abortion-care-by-advanced-practice-nurses-and-physician-assistants.

[168] A.B 154, 2013-2014 Reg. Sess. (Cal. 2013) (codified in Cal. Bus. & Prof. Code § 2253(b)(2)).

[169] *See* Cal. Bus. & Prof. Code §§ 2253(c), 2725.4, 3502.4 (West 2026). The law was amended in 2022 and 2023 to, among other things, expand the training options for meeting the statutory requirements, and permit physician assistants and nurse practitioners to perform abortions by aspiration technique without the presence of a supervising physician or surgeon. S.B. 1375, 2021-2022 Reg. Sess. (Cal. 2022); S.B. 385, 2032-2024 Reg. Sess. (Cal. 2023).

[170] *See* Cal. Bus. & Prof. Code § 2052(a) (West 2026) (setting forth penalties for medical and health practice without a license or as authorized by some other provision of law); Cal. Bus. & Prof. Code § 2253(b)-(c) (setting forth requirements and exceptions to performing an abortion with or without a physician's license, and providing that a person not satisfying the requirements is subject to Section 2052 penalties).

[171] *See, e.g.*, Cal. Health Care Found., *Cal. Health Care Almanac: Maternity Care in California* 2, 16-18 (Mar. 2026), https://www.chcf.org/wp-content/uploads/2026/03/MaternityCareAlmanac_2026-Edition.pdf; Cal. Hospital Ass'n, *Maternity Care in California: An Environmental Scan* 3-4, 6 (2025), https://calhospital.org/wp-content/uploads/2025/02/CHA_Environmental-Scan_Maternity-Care_Final.pdf.

nearest abortion provider, persist.[172] Especially in this tenuous reproductive health access environment, restricting qualified APCs from offering abortion care within their scope of practice after the first trimester, or by methods other than medication or aspiration techniques, may unnecessarily deny or delay care for patients who face barriers in accessing a physician.

For these reasons, abortion providers, advocates, and courts are taking a closer look at how legal restrictions on APCs impact abortion access. In a number of other states that, like California, recognize a fundamental right to abortion, legal challenges to restrictions on the types of qualified providers for abortion care have been successful, and more are pending in state courts.[173] In Montana, for example, the state high court twice struck down restrictions on the ability of qualified nonphysician clinicians to provide abortion care under its exacting strict scrutiny standard of review.[174] It found that a state law barring advanced practice registered nurses from providing abortions interfered with patients' access to abortion and held this violated the right to seek an abortion "from a health care provider of [one's] choice" as guaranteed by Montana's constitutional right to privacy.[175]

In California, existing restrictions on APCs may likewise be unnecessarily interfering with the ability of pregnant people, particularly in rural parts of the state, to receive safe abortion care from qualified providers. For example, under the code, even if an abortion procedure is within licensed APCs' training and scope of practice, they cannot provide it to patients who are past the first trimester. Additionally, the strict financial and criminal statutory penalties and multi-layered training requirements may be deterring otherwise qualified providers from offering care well within their scope of practice.

[172] *See, e.g.*, Lauren DeLaunay Miller, *Many Rural Californians Still Lack Abortion Access. Here Are Solutions*, Cal. Health Rep. (Oct. 28, 2024), https://www.calhealthreport.org/2024/10/28/many-rural-californians-still-lack-abortion-access-here-are-solutions/; Christine Sennott et al., *The U.S. Reproductive Healthcare Desert Database & Dashboard: Data and Methods*, The RHD Proj., https://rhdproject.org (last visited Aug. 11, 2026). For example, people living in the California counties of Mono or Inyo face a 252-mile or 291-mile drive for abortion care respectively. *Id.*

[173] *See Weems v. State*, 529 P.3d 798, 809-13 (Mont. 2023) (holding that a state law that prohibited advanced practice registered nurses (APRNs) from providing early abortions violated the right to abortion care guaranteed by Montana's constitutional right to privacy); Hodes & Nauser v. Stanek, 551 P.3d 62, 81, 85 (Kan. 2024) (holding that a Kansas law imposing restrictions on the provision of abortion services, including a physician-only requirement, violated the right to personal autonomy, including the right to abortion, under the Kansas Constitution); *see also Gill v. Arizona*, No. CV2026-005011 (Ariz. Super. Ct. Maricopa Cnty., filed Feb. 4, 2026) (challenging Arizona's ban on the provision of abortion by trained advanced practice clinicians); Aria Med. Clinic v. Kan. State Bd. of Nursing, No. SN-2025-CV-000298 (Kan. Dist. Ct. Shawnee Cnty., filed Apr. 22, 2025) (challenging Kansas law and regulations that prevent advanced practice registered nurses from prescribing abortion medication).

[174] Armstrong v. State, 989 P.2d 364, 384 (Mont. 1999) (holding unconstitutional state law prohibiting physician assistants form providing abortions); *Weems*, 529 P.3d at 809-13 (applying *Armstrong* and striking down new regulations restricting APRNs from providing abortions).

[175] *Weems*, 529 P.3d at 809 (quoting *Armstrong*, 989 P.2d at 384). In reaching the conclusion, the court found that the state could not justify a compelling need for these restrictions, especially given the fact that APRNs in Montana were already providing care "identical to, or significantly more complex, than" the early abortion care that they were legally prohibited from providing. *Id.* at 808.

Thus, even though the 2013 amendments regarding APCs originally sought to support access, the relevant question for RFA review is whether the regulatory framework operates to "interfere" with abortion access and choice of qualified provider, or subjects APCs and abortion care to discriminatory treatment. If it does, the regulations almost certainly run afoul of the RFA. Under a presumptively unconstitutional standard, the state must demonstrate this approach is narrowly tailored to satisfy a compelling state interest — such as protecting the safety and health of pregnant people receiving abortion care. As a factual and evidentiary matter, it is not at all clear the state can carry this burden.[176]

For many years, the scientific and medical literature has established the safety of abortion care provided by APCs[177] and numerous medical and professional credentialing associations support provision of abortion care by APCs.[178] Moreover, highly prescriptive legislative requirements conflict with longstanding principles of health care governance. An inflexible statute, tied to severe penalties, imposes legislative judgments on top of the standards, training, and scope of practice traditionally delegated to the licensing boards and professional credentialing organizations, and risks falling behind quickly evolving medical practice and standards of abortion care.[179] Indeed, unlike California, some sister states, including Colorado and Oregon, do not enumerate specific limits on APCs providing care, including for abortion, or, like Washington, explicitly state that APCs can provide abortion care within the scope of their license. According to the Guttmacher Institute's review of state laws regulating APCs and abortion care, APCs in several states generally may lawfully provide abortion care within their scope of practice without special limitations.[180]

[176] *Id.* at 811 ("To determine whether the State has met its burden, we analyze the record and consider whether the State provided a meritorious argument that when APRNS perform abortions, there are exacerbated health risks not present when physicians or PAs perform abortions."); *Hodes & Nauser*, 551 P.3d at 80 (finding "there simply is no evidence in the record from which to conclude the Challenged Laws," including a physician-only requirement, "provide any necessary benefit to the health and safety of women seeking abortions in Kansas").

[177] *See, e.g.,* Lauren Porsch et al., *Advanced Practice Clinicians and Medication Abortion Safety: A 10-Year Retrospective Review*, 101 Contraception 357, 357 (2020) (finding outcomes of medication abortions performed by advanced practice providers are well within established benchmarks for medication abortion effectiveness and safety); Alisa Levi et al., *Training in Aspiration Abortion Care: An Observational Cohort Study of Achieving Procedural Competence,* 88 Int'l J. Nursing Stud. 53, 57 (2018) (finding complication rates for first trimester aspiration abortions performed by advanced practice clinician trainees did not differ significantly from those performed by physician residents); Nat'l Acads. of Scis., Eng & Med., The Safety and Quality of Abortion Care in the United States 14 (2018) (concluding based on comprehensive review of studies, that nurse practitioners, certified nurse midwives, and physician assistants "can provide medication and aspiration abortions safely and effectively" and that induction abortions can be provided by clinicians, including certified nurse midwives, trained in managing labor and delivery).

[178] *See*, *e.g.*, Am. Coll. of Obstetricians & Gynecologists, *supra* note 167; Am. Coll. of Nurse-Midwives, *Midwives as Abortion Providers* (2025), https://midwife.org/wp-content/uploads/2025/04/2025-ps_midwives-as-abortion-providers_amended.pdf; World Health Organization, *Abortion Care Guideline* (Mar. 2022), https://www.who.int/publications/i/item/9789240039483.

[179] *See., e.g., Weems*, 529 P.3d at 807 ("The Montana Board of Medical Examiners does not maintain a list of procedures that physicians may or may not provide. The State, through the Board of Medical Examiners, requires physicians to provide care consistent with their education and training and based on guidance from their professional organizations.").

[180] *See* Guttmacher Inst., *State Laws and Policies, Advanced Practice Clinicians Providing Abortion Care* (Apr. 16, 2026), https://www.guttmacher.org/state-policy/explore/advanced-practice-clinicians-providing-abortion-care (finding 25 states permit advanced

As one potential reform to California's current restrictions on APCs, a bill has been introduced that, if enacted, would permit trained nurse practitioners, certified nurse-midwives, and physician assistants to provide procedural abortions after the first trimester.[181] Given the safety evidence and alternative state models with no, or far less, restrictions on APC provision of abortion care, this proposed revision is not only overdue, it likely is a minimum step for California limits on APCs to survive scrutiny under the RFA.

B. Health Care and Family Regulatory Practices That Police and Discriminate Against Pregnant and Birthing People

Alongside California's recently strengthened statutory protections, the RFA guarantees a constitutional check on laws and practices that penalize or discriminate against people for decisions, conduct, and health care related to their pregnancy or pregnancy outcomes. But state actors and institutional systems police pregnancy and pregnant people in ways that ignore regulatory protections and often escape constitutional review. This includes criminal charges and prosecutions, forced or unconsented medical interventions, and family regulation involving intrusive investigations and separation of parents and newborns.[182] These forms of pregnancy policing disproportionately punish the bodies, lives, and reproductive autonomy and decisions of people who are Black, brown, Native American and low-income.[183]

Even as California has moved to stem pregnancy policing and affirm its public policy of reproductive justice, common practices in the health care and family regulation systems pose continuing infringements on the reproductive freedom, autonomy, and health of pregnant and birthing people. In this section we explore where California law and policy reforms are still falling short and how RFA review and enforcement may offer a further corrective.

practice clinicians to provide abortion care, with no laws specifically restricting APC provision of abortion care in Colorado, Oregon, and Washington, D.C., and citing laws in Maryland, Vermont, and Washington as explicitly allowing provision of abortion care consistent with their scope of practice).

[181] A.B. 1973, 2025 Reg. Sess. (Cal. 2025) (passed in the Assembly and Senate, and enrolled as of Aug. 31, 2026).

[182] *See, e.g.*, Pregnancy Just., *Post-Dobbs Pregnancy Criminal Cases*, https://www.pregnancyjusticeus.org/post-dobbs-pregnancy-criminalization/ (last visited Aug. 11, 2026) (tracking cases of pregnancy criminalization and documenting 412 cases in the first two years after the *Dobbs* decision, from June 2022 to June 2024); Hum. Rts. & Gender Just. Clinic CUNY Sch. of L., *Criminalization and Punishment for Abortion, Stillbirth, Miscarriage, and Adverse Pregnancy Outcomes* (Sep. 12, 2023), https://www.law.cuny.edu/wp-content/uploads/media-assets/2023_Clinic_HRJG_REPORT-U.S.-Criminalization-of-Abortion-and-Pregnancy-Outcomes.pdf; Amy Yurkanin, *They Didn't Want to Have C-Sections. A Judge Would Decide How They Gave Birth*, ProPublica (Mar. 14, 2026), https://www.propublica.org/article/florida-court-ordered-c-sections; A.V. v. Vt. Dep't for Child. and Fams., No. 25-CV-00222 (Vt. Super. Ct. filed Jan. 15, 2025) (challenging a "high risk pregnancy docket" maintained by Vermont's child welfare agency and its actions to force A.V. to delivery by c-section and to take custody of her newborn).

[183] *See* Michelle Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood (2020); Dorothy Roberts, Killing The Black Body: Race, Reproduction, And The Meaning Of Liberty (1997); Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 G.W. L.Rev. 1163 (2017).

1. Recent Legislative Reforms to Address Pregnancy Policing and Family Separation

In 2022, on the heels of high-profile pregnancy criminalization cases in California[184] and nationwide, and with the *Dobbs* decision pending, California lawmakers took action to shore up California's legal protections against pregnancy policing.[185] They amended the Reproductive Privacy Act (RPA) to add a broad immunity section that absolutely prohibits subjecting a person to either criminal *or civil* liability for "actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome."[186] In describing the reproductive justice harms, and pregnancy policing threats the amended law aims to prevent, the legislative findings directly call out the racially unequal "threat of criminal prosecutions *or civil* penalties on pregnant people through *child welfare, immigration, housing, or other legal systems*."[187]

In that same legislative session, changes were made to the California Child Abuse and Neglect Reporting Act (CANRA) of the Penal Code[188] that partially addressed reproductive justice concerns tied to the family regulation system, a system which disproportionately surveils and separates families of color and low-income families.[189] Family separation is a well-founded fear in California, where between 400,000 and 500,000 cases of suspected abuse are reported to California Child Protective Services (CPS) each

[184] In 2020 and 2021, local California prosecutors criminally charged women who experienced stillbirths with murder, alleging that their use of drugs during pregnancy caused the stillbirths. *See* Sam Levin, *She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common*, Guardian (June 4, 2022), https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roe-v-wade; Nigel Duara, *Meth, a Mother, and a Stillbirth: Imprisoned Mom Wants Her 'Manslaughter' Case Reopened*, CalMatters (Feb. 21, 2022, updated May 10, 2022), https://calmatters.org/justice/2022/02/stillbirth-prison-manslaughter/.

[185] *See supra* notes 54-57, 162-64 and accompanying text.

[186] A.B. 2223, 2021-2022 Reg. Sess., § 7 (Cal. 2022) (codified in Cal. Health & Safety Code § 123467(a) (West 2026)). The section also immunizes any person who "aids or assists a pregnant person in exercising their rights" under the RPA. *Id.* (codified in Cal. Health & Safety Code § 123467(b)).

[187] A.B. 2223, 2021-2022 Reg. Sess., § 1 (Cal. 2022) (emphasis added). To further protect against wrongful criminalization in cases of stillbirth or pregnancy loss, other sections of California law also were amended to eliminate the requirement that fetal deaths "unattended" by medical personnel automatically require a coroner's inquest and to prohibit a coroner's certificate registering a case of fetal death, and any medical or health data in it, from being used in support of any criminal or civil actions against any person protected under the RPA immunity provision. *Id.* at §§ 2, 4 (amending Cal. Gov't Code § 27491 and Cal. Health & Safety Code § 103005(b)). However, California still criminalizes the improper disposal of fetal remains "regardless of the duration of the pregnancy." Cal. Penal Code § 643 (West 2026). In California and other states, prosecutors have used such laws to criminally charge people who experience pregnancy loss. *See* Pregnancy Just., *After Pregnancy Loss: An Analysis of How State Laws Could Target Postpartum People* 11-12 (Jan. 2026), https://www.pregnancyjusticeus.org/wp-content/uploads/2026/01/After-Pregnancy-Loss.pdf.

[188] A.B. 2085, 2021-2022 Reg. Sess. (Cal. 2022) (amending Cal. Penal Code §§ 11165.2, 11166, 11167).

[189] *See, e.g.*, Emily Putnam-Hornstein, et al., C*umulative Rates of Child Protection Involvement and Terminations of Parental Rights in a California Birth Cohort 1999-2017*, 111 Am. J. of Pub. Health 1157, 1157 (2021) ("Roughly 1 in 2 Black and Native American children were investigated during childhood. Children receiving public insurance experienced CPS involvement at more than twice the rate of children with private insurance"); Cal. Legis. Analyst's Off., *California's Child Welfare System: Addressing Disproportionalities and Disparities* 20 (Apr. 24, 2024), https://lao.ca.gov/reports/2024/4897/disproportionalities-disparities-child-welfare-042424.pdf ("The proportions of Black and Native American youth in foster care are around four times larger than the proportions of Black and Native American youth in California overall."); *see also* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black

year, with Black, Indigenous, and Latinx children and families much more likely to be reported than white families.[190] Nearly 50% of these reports are made under CANRA's very broad catch-all category of "general neglect," which covers failure to provide adequate food, clothing, shelter, medical care, or supervision of a child.[191] Responding to family advocates' and community members' critique that reports of "general neglect" were overused, discriminatory, and penalizing families living in poverty,[192] the legislature amended the law to explicitly clarify that a parent's economic situation, alone, does not constitute general neglect and is not a basis for reporting or investigation by CPS.[193]

Thus, while these two amendments live in different statutory codes — one in the RPA and one in CANRA — both address reproductive justice concern with discriminatory and punitive enforcement of criminal law and family regulation against Black, brown, Native American, and low-income pregnant and birthing people and families.

2. How Drug Testing, Reporting, and Family Regulation Practices Infringe on RFA Rights of Pregnant and Birthing People

In California, drug testing of pregnant patients and their newborns is not required by law, but it is still a common practice at public and private hospitals.[194] And once hospitals document a positive drug test, or patients disclose a medical history of substance use, it often poses the very harms and rights deprivations that the 2022 amendments to the RPA and CANRA sought to prevent. Years of documentation have consistently shown that criminal investigations and prosecutions for conduct and outcomes related to pregnancy often stem from allegations of substance abuse based on

Families — And How Abolition Can Build a Safer World 23 (2022) (finding that the child welfare system disproportionately punishes and regulates Black families).

[190] *See* Mandated Reporting to Cmty. Supporting Task Force, *Shifting from Reporting Families to Supporting Families, California's Mandated Reporting to Community Supporting Task Force and Recommendations* iv (Sep. 2024), https://www.caltrin.org/wp-content/uploads/2024/08/MRCS-Task-Force-Report-for-09-04-24.pdf. Ultimately, nearly 90% are not substantiated, meaning there is no need for CPS involvement. *Id.*

[191] *See id.* at 8.

[192] *See id*. at 9; Julia Lurie, *Child Protective Services Investigates Half of All Black Children in California*, Mother Jones (Apr. 26, 2021), https://www.motherjones.com/criminal-justice/2021/04/child-protective-services-investigates-half-of-all-black-children-in-california/ (reporting on a "growing movement of reformers" seeking to promote approach of mandatory support instead of mandatory reporting of suspected abuse and neglect).

[193] A.B. 2085, 2021-2022 Reg. Sess., § 1 (Cal. 2022) (amending Cal. Penal Code § 11165.2); S.B. 1085, 2021-2022 Reg. Sess. (Cal. 2022) (amending Cal. Welf. & Inst. Code §§ 300, 300.2); Mandated Reporting to Cmty. Supporting Task Force, *supra* note 190, at 16 ("AB 2085 modified the definition of reportable general neglect by clarifying that 'economic disadvantage' is not general neglect and that a child must be at 'substantial risk' of suffering serious physical harm or illness, while SB 1085 specified that poverty alone is not a reason for the court to take jurisdiction and for a family to enter the child welfare system.").

[194] *See, e.g.*, Walter, *supra* note 3 (describing incident of California woman tested for drugs at birth and quoting health care experts who said reporting of "urine screening is ubiquitous" with "no guarantee that the underlying tests are accurate").

reports from health care and family regulation workers.[195] But even when reports are not made to law enforcement, the involvement of family regulation workers can lead to life-altering interventions that disproportionately impact Black, brown, and Indigenous pregnant and birthing people and families.[196]

While existing California law is explicit that "a positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect,"[197] in practice, some view prenatal drug use of any amount as reasonable grounds for reporting abuse.[198] And an expansive penal law framework for mandatory reporting incentivizes, rather than minimizes, the likelihood of over-reporting. CANRA designates over 45 categories of mandated reporters, including health care workers, therapists, and substance abuse counselors who face criminal and financial penalties for failure to report if they have a reasonable suspicion of abuse.[199] Moreover, required interventions for "maternal substance abuse" flow explicitly from the criminal code, not the health or welfare codes.[200] In short, existing statutory frameworks foster entanglement of the health care, family regulation, and criminal law systems.

[195] *See* Pregnancy Just., *Pre-Dobbs Pregnancy Criminal Cases,* https://www.pregnancyjusticeus.org/pre-dobbs-pregnancy-criminalization/ (last visited Aug. 20, 2026) (finding that in 95.5% of pregnancy criminalization cases where the grounds for arrest were documented, the reasons given for arrest included allegations of substance use, 42.6% of arrests involved family regulation workers, and 33.8% were instigated by a medical professional); Johanna Catherine Maclean et al., *Prenatal Substance Use Policies And Infant Maltreatment Reports,* 41 Health Affairs 703, 708 (2022) (finding that "increased maltreatment reports were primarily driven by reports from medical professionals"); Sara L. Ainsworth & Leigh Goodmark, *Defending Imperfect Victims from Self-Managed Abortion Criminalization: Why Evidence of Intimate Partner Violence* Matters, 97 Univ. of Colo. L. Rev. 1267, 1289 (2026) (describing how self-managed abortion criminalization cases commonly arise from reporting by a care provider, including doctors, nurses, other emergency room staff, and hospital social workers).

[196] *See* Frank Edwards, et al., *Medical Professional Reports and Child Welfare System Infant Investigations: An Analysis of National Child Abuse and Neglect System Data*, 7 Health Equity 653, 659-60 (2023) (finding between 2010-2019 the rates of child welfare investigations of infants stemming from medical professional reports increased with persistent and notable racial inequities for Black and Indigenous families); Talia Gruber, *Beyond Mandated Reporting: Debunking Assumptions to Support Children and Families*, 1 Abolitionists Persp. in Soc. Work 1, 7 (2023) (finding that Black, Latino, and Indigenous children are more likely to interact with the family policing system across professional disciplines); *see generally* Roberts, *supra* note 189.

[197] Cal. Penal Code § 11165.13 (West 2026).

[198] *See infra* notes 220-21 (discussing juvenile dependency cases stemming from reports of maternal drug use). Indeed, the California Supreme Court has held that the term "substance abuse," as used in the welfare code section setting forth reasons a child may come within the jurisdiction of the juvenile court, is based on the "ordinary meaning — essentially, the excessive use of drugs or alcohol." *In re N.R.*, 15 Cal. 5th 520, 531 (2023). Further, the court specifically held that the reporting of substance abuse does not require "a professional diagnosis or satisfaction of the DSM criteria for the pertinent substance abuse disorder." *Id.*

[199] Cal. Penal Code § 11165.7 (West 2026) (defining mandated reporters); *id.* § 11166.01 (West 2026) (setting forth punishments applicable to mandatory reporters for failure to report or impeding or inhibiting a report of abuse or neglect, including imprisonment and fines).

[200] *Compare* Cal. Penal Code § 11165.13 (West 2026) (specifying when "any indication of maternal substance abuse shall lead to an assessment" pursuant to the Health and Safety Code and when reporting abuse is mandated) *with* Cal. Welf. & Inst. Code § 300 (West 2026) (describing the situations in which a child may become a dependent of the court, including when suffering serious physical harm, illness, willful or negligent supervision, or inadequate food and shelter).

This in turn impacts the health and lives of pregnant people and their families — including their pregnancy care decisions. While people may choose not to seek maternal care in hospitals or other medical institutions for any number of personal reasons, such care should be accessible and safe for people who want and need it. But for pregnant people experiencing a substance use disorder, or who experience racially discriminatory treatment in hospitals,[201] the fear of mistreatment and state interventions can push them to delay or forgo prenatal care when it is desired or needed.[202] As leading maternal health and medical groups have uniformly warned, policies and practices that push pregnant people in need of medical, health, and family support away from those services lead to worse outcomes for maternal and infant health.[203]

Additionally, many have good reason to fear that if their child is removed due to reports of substance use, dependency proceedings and mandated rehabilitation requirements could take months or more and potentially lead to termination of parental rights altogether.[204] While only substantiated cases of abuse should be forwarded to the California Department of Justice, unsubstantiated cases reach law enforcement as well. According to The Marshall Project's analysis of state data submitted to the National

[201] *See, e.g.*, Hispanas Organized for Pol. Equal. & Black Women Organized for Pol. Action, *California Equity in Maternal Health Report* 5, 16-17 (2025), https://www.latinas.org/wp-content/uploads/California-Equity-in-Maternal-Health-Report.pdf (finding that nearly half of Black women and Latinas report some level of unfair or adverse treatment during a pregnancy or birthing experience and express low levels of confidence and trust in California's birthing health systems); Carol Sakala et al., *Listening to Mothers in California: A Population-Based Survey of Women's Childbearing Experiences*, Nat'l Partnership for Women & Families 63-69 (Sep. 2018), https://www.chcf.org/wp-content/uploads/2018/09/ListeningMothersCAFullSurveyReport2018.pdf.

[202] *See, e.g.*, Chancey Herbolsheimer & Stephanie Burge, *Afraid to Seek Care? A Fixed Effects Analysis of State Fetal Protection Legislation and Prenatal Healthcare Utilization from 2002 to 2015*, 20 SSM Pop. Health 101273, 2 (2022) (finding that fear of criminal punishment or law enforcement involvement deters individuals from seeking medical care and makes them distrustful of health care providers); Lynn Falletta et al., *Perceptions of Child Protective Services Among Pregnant or Recently Pregnant, Opioid-Using Women in Substance Abuse Treatment*, 79 Child Abuse & Neglect 125, 126 (2018) (describing how "several studies have found feared loss of custody to CPS a potential barrier to prenatal care among women with substance use disorders"); Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 Health & Just. 1, 13 (2015) (finding that among women who fear detection, many "isolated themselves away from others who might report them to authorities, and delayed or avoided prenatal care").

[203] *See, e.g.*, Pregnancy Just., Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant People (June 2023, revised July 2025), https://www.pregnancyjusticeus.org/wp-content/uploads/2025/07/medical-statements.pdf (collecting policy statements of American College of Obstetricians and Gynecologists, American Medical Association, and 13 other associations opposing prosecution and punishment of pregnant people); UCLA Law Ctr. on Reprod. Health, L. & Pol'y, *Widespread Opposition to Abortion Bans and Criminalization of Reproductive Health Care* (2024), https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/widespread-opposition-abortion-bans-and-criminalization-reproductive-health-care (collecting 294 statements by health, medicine, law, education, labor, social science, human rights, private business, religious, and advocate groups opposing restrictions on reproductive health care, including pregnancy and health care criminalization).

[204] *See* Pregnancy Just., *Interrupting Punitive Responses to Substance Use and Pregnancy* 6 (June 2025), https://www.pregnancyjusticeus.org/wp-content/uploads/2025/06/Interrupting-Punitive-Responses.pdf (discussing trauma for both mothers and children of even temporary family separation); Aukje Lamonica & Miriam Boeri, *Stories of Loss: Separation of Children and Mothers Who Use Opioids*, 15 J. Ethnographic & Qualitative Rsch. 63 (2020) (finding that mothers who had children removed from their care because of opioid use struggled to meet CPS and judicial system requirements in order to reunite with their children); *see also* Angélica Meinhofer & Yohanis Angleró-Díaz, *Trends in Foster Care Entry Among Children Removed from Their Homes Because of Parental Drug Use, 2000 to 2017*, 173 JAMA Pediatrics 881 (2019).

Data Archive on Child Abuse and Neglect, from 2018-2023, California CPS referred at least 2,092 cases of alleged substance use during pregnancy to law enforcement — a referral rate of 17%.[205] The Marshall Project data is consistent with other research documenting that the most common source of referrals to law enforcement for pregnancy policing are medical professionals and hospital-based social workers.[206]

Thus, as frontline advocates warn, in California the reality remains that "in practice, mandated reporters continue to report families to child welfare agencies when a pregnant person or newborn tests positive for substances," and pregnant and birthing people, especially those who are Black and brown or struggling with substance use, continue to experience both civil and criminal forms of pregnancy policing.[207]

a. The RFA Prohibits Pregnancy Policing Through Family Regulation

At least one court has considered application of the RFA in a criminal pregnancy policing case that also involved the interplay of substance use disorder and family regulation. In 2023, a California appellate court allowed a criminal prosecution to go forward against Kelsey Carpenter, a mother of two who was charged with murder after her newborn, Kiera, died hours after a homebirth.[208]

Ms. Carpenter was in extreme mental and physical distress before and during her home birth, desperately afraid to go to a hospital because of her past experience with the family regulation system, and unable to secure trusted birthing support.[209] The San Diego District Attorney alleged that Ms. Carpenter's "acts and omissions, including her failure to seek medical assistance after realizing her baby was in distress, caused the baby to bleed to death," and charged her with implied malice murder and felony child endangerment. [210] In support of these charges, the prosecutor relied on evidence that she "intentionally chose an unattended at-home delivery, despite being warned of the dangers, in an effort to evade child welfare services."[211]

Ms. Carpenter sought to set aside the charges, arguing on appeal that she was "immune from prosecution" under the newly amended RPA and also protected by the RFA.[212] In deciding to let the case

[205] *See* The Marshall Project, *How Often Does Child Welfare Call Police in Your State for Positive Drug Tests at Birth?* (Feb. 18, 2026), https://www.themarshallproject.org/2026/02/18/pregnancy-drugs-law-enforcement-referral-data (finding child welfare did *not* find or suspect abuse or neglect in 433 of the referred cases, and another 10,049 cases alleging pregnancy drug use that were not referred to law enforcement in California).

[206] *See supra* note 195.

[207] *See* Minouche Kandel & Kulsoom Ijaz, *Beyond AB 2223: The Ongoing Fight for Reproductive Justice in California – Part Two*, L.A. Law. Mag. (Jan. 24, 2026), https://lacba.org/?pg=LosAngelesLawyerMagazine&pubAction=viewIssue&pubIssueID=64599&pubIssueItemID=421302.

[208] Carpenter v. Superior Ct., 93 Cal. App. 5th 1279 (2023).

[209] *Id.* at 1284-85.

[210] *Id.* at 1285.

[211] *Id.*

[212] *Id.*

go forward, the court reasoned that even though "Carpenter cannot be prosecuted for her decision to have an unattended home birth or any effect that her alleged drug use or lack of prenatal care during pregnancy may have had on her baby,"[213] her pre-birth decisions and conduct related to avoiding hospital delivery and CPS interventions could be used as evidence in prosecuting her and to sustain the murder and felony child endangerment charges.[214] On the heels of this statutory analysis, the court rejected the constitutional RFA claim in a single conclusory paragraph, holding it failed for the very same reasons as the RPA immunity defense.[215]

In reaching this result, the court engaged in questionable reasoning and strayed beyond the issues in the case. First, in tension with the goals of the RPA immunity provision, the decision allowed an undefined category of highly intimate and potentially stigmatizing personal decisions and conduct related to pregnancy and childbirth to serve as evidence to secure a criminal prosecution.[216] Second, the court reasoned that fear of CPS intervention is not a *proper* reason for avoiding pregnancy or hospital care.[217] But reproductive autonomy and equality cannot be conditioned on judgments about the morality or appropriateness of *why* pregnant people seek, or avoid, medical care or particular health settings.[218] Third, reaching an issue not raised in the case, the court asserted that the RPA intentionally preserved the authority of CPS to "remove a child from their parent's custody after they are born *based on conduct that occurred during pregnancy, including drug use*."[219] Finally, even if the court's analysis of the RPA claim did not suffer these flaws, it was inappropriate to substitute interpretation and application of the *statutory* immunity provision for RFA *constitutional* review.

Recent cases in the civil context offer no better guidance. It appears courts directly reviewing CPS interventions related to drug use and other conduct during pregnancy have yet to consider application of the RFA. While those courts have affirmed that under CANRA a finding of prenatal substance use does

[213] *Id.* at 1285.

[214] *Id.* at 1285, 1296-1304.

[215] *Id.* at 1313.

[216] *Id.* at 1299. Introduction of legally protected, yet stigmatized decisions or conduct, risks improperly influencing the trier of fact in a criminal case. For this reason, other appellate courts have reversed the introduction of a person's prior consideration of abortion as evidence in prosecutions for pregnancy loss or stillbirths. *See* Ainsworth & Goodmark, *supra note* 195, at 1330-32 (discussing and citing cases recognizing the highly stigmatizing nature of abortion-related evidence, including in pregnancy criminalization cases).

[217] The court arrived at this conclusion after finding that the legislative history of A.B. 2223 "indicates" that the legislature only "sought to protect pregnant people from criminalization of their pregnancy outcomes, *not those who avoid seeking medical care because they are afraid of having their child removed by [child welfare services].*" *Carpenter*, 93 Cal. App. 5th at 1303 (emphasis added).

[218] It also is flatly contrary to the RPA's language and purpose. *See supra* notes 184-93 and accompanying text (discussing legislative history on preventing "civil" punishment and "child welfare" proceedings as a tool of pregnancy policing).

[219] *Carpenter*, 93 Cal. App. 5th at 1303 (emphasis added). While far from clear, the court seems to suggest that because other existing sections of the code authorize CPS to consider prenatal drug and other prior conduct in making child safety determinations, the RPA as amended does not prevent CPS interventions that interfere with reproductive freedom rights. Not only is this an unfounded leap in logic, the application of the RPA to CPS was not at issue in this homicide case.

not, on its own, trigger statutorily mandated child abuse and neglect reporting,[220] the more recent of these decisions do not address the RPA immunity provision or the constitutional protections of the RFA.[221]

In future cases, courts should consider how the RFA's unique structure and reproductive justice purpose provide a distinct constitutional framework for reviewing and addressing the intertwined roles of private and public actors and institutions in both criminal and civil forms of pregnancy policing.[222]

An RFA challenge could seek constitutional remedy for both public and private[223] hospital drug testing and reporting policies and practices that interfere with people's decisions and conduct in connection with pregnancy, childbirth, and parenting. Whether presented as a claim on behalf of all patients subject to such policies, or a class of Black and brown, low-income, or other people disparately affected, it would trigger the RFA's exacting standard of review.

For example, under the RFA, plaintiffs could challenge policies or practices of drug testing and reporting of results to CPS[224] that have been shown to deter access to pregnancy, obstetrical, and postpartum health care or that otherwise interfere with, rather than support, the reproductive health and autonomy of plaintiffs. Alternatively, they might challenge such practices on the basis that they disproportionately target Black and brown or Native American pregnant patients and families, low-income patients, or other

[220] *See, e.g.*, In re B.D.,103 Cal. App. 5th 315, 325-27 (2024) (holding no jurisdiction for dependency proceeding where newborn tested positive for painkillers and discussing as unpersuasive decisions of "some courts" that have affirmed jurisdiction based only on "a positive toxicology screen at birth"); In Re. J.A., 47 Cal. App. 5th 1036, 1046 (2020) (stating "[t]he law is clear that jurisdiction must be based on substance *abuse*; mere substance *use* is not sufficient for jurisdiction" and holding no dependency jurisdiction based on infant's positive toxicology screen) (emphasis in original).

[221] *See, e.g.*, *In re B.D.*, 103 Cal. App. 5th 315*;* In re K.H., No. B347141, 2026 WL 554412 (Cal. Ct. App. Feb. 27, 2026) (unpublished) (upholding dependency jurisdiction and order of removal where mother used illegal drugs during pregnancy and baby tested positive at birth); In re L.R., No. A170204, 2025 WL 999657 (Cal. Ct. App. Apr. 3, 2025) (unpublished) (affirming dependency determination and removal in case where child was removed from mother's care after CPS found she had not received prenatal care, could not provide stable housing, and tested positive for amphetamines).

[222] In at least two other states with new reproductive freedom amendments, litigants have asked courts to apply those protections in pregnancy policing cases. In a Vermont lawsuit challenging a state practice of surveilling pregnant people in anticipation of intervention by the family regulatory system, the court permitted continued litigation on multiple claims against both the state agency and the private hospital involved, but dismissed the reproductive liberty claim on the grounds that plaintiff lacked standing because she could not show that she would be pregnant again and subject to future surveillance. *See* Order on Pending Motions, A.V. v. Vt. Dep't for Child. and Fams., No. 25-CV-00222, at *10-11 (Vt. Super. Ct. Dec. 17, 2025). The decision recognizes, however, that the amendment is self-executing, *id.* at *9-10, and thus other plaintiffs with standing could bring such a challenge under the amendment. And, in an ongoing criminal pregnancy policing case in Michigan, the defendant filed an appeal to the state supreme court arguing that it violated her rights under Michigan's reproductive freedom amendment when the state introduced evidence related to prenatal conduct in support of a homicide prosecution for experiencing a pregnancy loss over twenty years ago. *See* Nancy Gerwatowski's Interlocutory Application for Leave to Appeal, Michigan v. Nancy Gerwatowski, No. 22-004294-FC (Mich. Sup. Ct. Mar. 31, 2026).

[223] *See* Am. Acad. of Pediatrics v. Lungren*,* 16 Cal. 4th 307, 329 (1997) (noting "*Hill* concluded that the state right of privacy, *unlike its federal counterpart*, is not limited to 'state action'" (emphasis in original)); *supra* Part II.A.1 (discussing California doctrine on constitutional violations by private actors, including for privacy and reproductive freedom rights).

[224] Even in the absence of reporting to or interventions by CPS, unconsented drug testing and disclosures implicate additional procreative decision-making and privacy concerns, raising additional claims under the RFA. *See infra* Part III.B.2.b.

groups who face systemic bias in health care and family regulation, and impermissibly subject these groups to more, and harsher, forms of surveillance and interventions.[225]

Under the RFA, a reviewing court should treat a showing of such interventions or discriminatory treatments as a presumptive infringement, placing on defendants the burden of demonstrating that they are necessary to advance a compelling interest. This fact-intensive determination is not one that defendants could easily meet given evidence of the harms these practices cause, and corresponding lack of proven benefits.[226] At a minimum, a default policy or practice premised on overcompliance with mandatory reporting laws, assumptions about hospital liability,[227] or otherwise not prioritizing patients' health care needs and decision-making autonomy, should not rise to the level of compelling, let alone meet the narrowly tailored requirement.

b. The RFA Prohibits Denying Pregnant and Birthing People Informed Consent and the Right to Refuse Medical Interventions

Apart from impermissible criminal or civil policing consequences, the practice of unconsented drug testing at prenatal visits or for childbirth interferes with people's right to make informed decisions about their health care and to refuse medical treatments and interventions.

Studies and anecdotal reports indicate that California hospitals are not getting, or not documenting, informed consent for such testing.[228] A related concern is that the general informed consent process, even when followed, fails to adequately disclose the purpose of drug testing or how results may interfere with pregnant people's decisions about pregnancy care, birthing, and ultimately care and custody of their newborn.

[225] People of color and low-income families are the most likely to be subjected to the family regulatory system generally, with Black, Native American children and children receiving public insurance investigated at much higher rates than white or privately insured children. *See* Putnam-Hornstein et al., *supra* note 189, at 157; Tarek Ismail, *Family Policing as Welfare Theatre*, 2026 Wis. L. Rev. 273, 276-277 (2026) (discussing the disproportionate focus of child welfare investigations on Black, brown, and poor families and "astonishing[ly]" high percentage of investigations that do not substantiate the allegations being investigated).

[226] *Supra* notes 203-05. In addition to California-specific and national data, evidence from other states may be instructive. For example, in 2020, New York City public hospitals instituted a policy requiring written informed consent before conducting drug testing on pregnant and postpartum patients. By 2024, the total number of substance use related child welfare investigations dropped by 80%, and dropped by 90% for Black parents. *See* NYC Fam.y Pol'y Project, *Newborns and Infants,* https://familypolicynyc.org/data-brief/newborns-and-infants-2023/ (last visited Aug. 12, 2026) (analyzing data from Administration for Children's Services). According to the NYC Family Policy Project, since this change in practice and reduction in investigations, there has been "no evidence that newborns and infants are less safe." *Id.*

[227] *See infra* note 230 and accompanying text (discussing California Hospital Association statement and reasons for opposing legislation mandating informed consent procedures).

[228] *See, e.g.*, Arienne Malekmadani, et al., *Evaluating Bias and Racism in a Risk-Factor-Based Drug Testing Policy in the Labor and Delivery Department*, 1 O&G Open e1, e6 (2024); *supra* note 194 and accompanying text (reporting on drug testing pregnant patients at California hospitals).

Recent efforts to pass bills addressing these concerns have stalled. For example, in the 2023 legislative session, A.B. 1094 sought to explicitly require informed consent for all drug and alcohol testing during pregnancy and for newborns, limit any test to medical necessity, and prohibit medical personnel from denying care to a pregnant person who refuses to consent to the test or screen.[229] The California Hospital Association heavily lobbied against the bill, objecting that "[w]hile physicians are already required to obtain a patient's consent to medical tests, AB 1094 would require a physician to obtain a pregnant patient's *informed* consent" and that process would pose potential delay in provision of care and increased risk of liability in ways that would be "unfair to physicians."[230]

Lack of informed consent to drug testing and disclosure of health information for non-medical reasons raise constitutional concerns on multiple levels.[231] The fundamental right of bodily autonomy and privacy includes an individual's constitutional right to refuse medical treatment.[232] And California courts recognize that obtaining and testing blood or urine for toxicology screens are invasive procedures that patients may refuse and which produce sensitive information patients may expect to be kept confidential and used only for medical care.[233] Thus, if pregnant patients are not receiving adequate informed consent, or the opportunity to refuse drug testing, it implicates their decisional and informational procreative and privacy rights, both protected by the RFA. Moreover, when pregnant patients are denied their right to refuse drug testing or protect their personal and medical information from improper disclosures and uses it upends the RFA's equality promise.

[229] A.B. 1094, 2023-2024 Reg. Sess. (Cal. 2023). Another bill that failed to move forward that same session sought to prevent drug test results from being used as evidence in civil court cases, including dependency proceedings. *See* A.B. 3170, 2023-2024 Reg. Sess. (Cal. 2023).

[230] *See* Cal. Hosp. Ass'n, *AB 1094 (Wicks)–Oppose Unless Amended* 1-2 (Mar. 30, 2023), https://calhospital.org/wp-content/uploads/2023/03/AB-1094-Assem-Health_Final-03302023.pdf (emphasis in original).

[231] They are also inconsistent with California's general medical consent framework. To comply with the duty to obtain informed consent, a physician must disclose to the patient all the material information that a reasonable person in the patient's position should know before accepting or rejecting a medical procedure. *See* Flores v. Liu, 60 Cal. App. 5th 278, 292-93 (2021); *see also* Quintanilla v. Dunkelman, 133 Cal. App. 4th 95, 115-17 (2005) (finding a signed form is not "conclusive proof" that informed consent has been given, and noting patient was "rushed through the admission process without a real opportunity to read the consent form" in a language she could understand).

[232] *See* Conservatorship of Wendland, 26 Cal. 4th 519, 531-33 (2001) (analyzing case law establishing "the right to refuse treatment [as a matter of] common law and of state constitutional law" and holding that as part of the right of privacy and "fundamental interest in personal autonomy" the "right to refuse medical treatment may be safely considered established, at least in California"); Thor v. Super. Ct., 5 Cal. 4th 725, 738 (1993) (discussing "the well- and long-established legal and philosophical underpinnings of the principle of self determination, as well as the broad consensus that it fully embraces all aspects of medical decisionmaking by the competent adult" supporting the right to refuse medical treatment).

[233] *See, e.g.*, Hill v. Nat'l Collegiate Athletic Ass'n., 7 Cal. 4th 1, 41 (1994) (recognizing that collection of urine samples for drug tests implicates both privacy autonomy and informational privacy interests); Leonel v. Am. Airlines, Inc., 400 F.3d 702, 712-14 (9th Cir. 2005) (recognizing, under *Hill,* that plaintiff's state constitutional right to privacy claim based on lack of notice or consent to specific blood test could proceed).

While a common-law malpractice claim is an option to seek personal compensation for unconsented medical treatments, an RFA claim would require a court to consider the specific ways drug testing in connection with pregnancy, birthing, or postpartum care infringes on the right to reproductive health care and deprives pregnant and birthing people of autonomy and equality. Additionally, plaintiffs might seek affirmative class-wide remedies that could lead to more systemic reforms. To adequately protect a class of pregnant, birthing, or postpartum patients, a court could, for example, direct a defendant hospital to implement policies that ensure specific and written informed consent prior to drug testing or additional practices and training to prevent nonconsensual or discriminatory drug-testing.[234] Of course, litigation is not the only strategy to reach this result. The RFA principles and framework also can inform renewed efforts to advance legislative reforms that have previously stalled.

[234] Advocates in New York City achieved results along these lines by bringing a sex discrimination claim under New York's Human Rights Law against a private non-profit hospital conducting urine toxicology screenings without informed consent on all pregnant patients admitted to the labor and delivery department. *See* Notice and Final Order, Crystal H. v. Garnet Health Med. Ctr., No. 10214802, at 20-22, 30 (N.Y. State Div. of Hum. Rts. Jan. 22, 2026). The agency ordered the hospital to "cease and desist from discriminatory practices," and take "affirmative action," including training to prevent future unlawful discrimination. *Id.* at 30-32.

Conclusion

The foundational principles and legal framework of the Reproductive Freedom Amendment provide new guideposts to advocates, jurists, and policymakers in the shared project of interpreting, applying, and realizing California's constitutional promise of equality and reproductive justice.

This report focuses on several areas where we believe courts can remedy active and ongoing state interference with RFA rights and lawmakers have an independent obligation to conform state policy to constitutional requirements. And advocates can demand legislators amend outdated laws or enact new policies to realize the promise of the RFA in all respects — those identified here and others beyond the scope of this report.

For example, there are dramatic inequities in access to, and the quality of available, prenatal and obstetrical care in California, with vast parts of the state having no place for a person to give birth near their home, whether in hospitals or birth centers.[235] Future research and analysis might inform whether regulation of midwives and birth centers, or state involvement with hospital operations, mergers, and closures is happening in ways that are supporting reproductive autonomy and equality, or are contributing to birthing care inequities and maternal health disparities. As demonstrated in this report, RFA review can guide courts and lawmakers alike in remedying these and other barriers people face when seeking safe and supportive health care from a provider of choice during pregnancy and childbirth.[236] Likewise, the RFA can inform further consideration of remaining, or new, barriers to contraception, assisted reproduction, and other reproductive health decisions and needs. And its guarantees must be enforced in ways that protect vulnerable populations subject to distinct forms of state control, including immigrants, people with disabilities, young people, and people who are incarcerated.

With ratification of the RFA, California voters demanded that the constitutional guarantees of equality and reproductive autonomy not only endure but advance reproductive justice. We hope this report informs future interpretation, implementation, and enforcement to move that promise closer to reality.

[235] Kristen Hwang, Ana B. Ibarra & Erica Yee, *No Deliveries*, CalMatters (Nov. 15, 2023-Dec. 2, 2024), https://calmatters.org/series/no-deliveries-maternity-care/. And recent maternity ward closures have particularly impacted Black, brown, and low-income populations. Kristen Hwang et al., *California's Maternity Care Crisis is Worsening as Newsom Decides on Bills to Slow Closures*, CalMatters (Sep. 16, 2024), https://calmatters.org/health/2024/09/new-maternity-care-closures/. Moreover, the problem is expected to grow even worse in the face of recent significant Medicaid changes. *See* Chase Hunter, *Alameda County Hospital System Lays Off Hundreds of Employees to Counter Federal Cuts*, Mercury News (Jan. 8, 2026), https://www.mercurynews.com/2026/01/08/alameda-county-hospital-system-lays-off-hundreds-of-employees-to-counter-federal-cuts/; Jessica Garrison, *This Rural Hospital Closed, Putting Lives at Risk. Is It the Start of a 'Tidal Wave'?*, L.A. Times (Nov. 26, 2025), https://www.latimes.com/california/story/2025-11-26/rural-hospitals-closing-california-lives-at-risk.

[236] For example, in recent years there have been several legal challenges to state restrictions on midwives and birth centers as unjustified, discriminatory, and undermining solutions to the Black maternal health crisis. Notably, none have been litigated with the benefit of an explicit state constitutional reproductive freedom amendment. *See., e.g.*, Amani v. State of Ga., No. 26CV004906 (Ga. Super. Ct. Apr. 2, 2026); Oasis Family Birthing Ctr. V. Ala. Dep't of Pub. Health, No. CL-2025-0419 (Ala. Civ. App. Jan. 9, 2026); Kaho'ohanohano v. State of Haw., No. 1CCV-24-0000269 (Haw. 1st Cir. Ct. Oct. 17, 2025).

Authors

Diana Kasdan, J.D., is the Legal and Policy Director at CRHLP

Amanda Barrow, J.D., is a Senior Staff Attorney at CRHLP

Melissa Goodman, J.D., is the Executive Director at CRHLP

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law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy
crhlp@law.ucla.edu