

SENATE THIRD READING
SB 742 (Pan)
As Amended September 3, 2021
2/3 vote. Urgency

SUMMARY

Makes it a misdemeanor for a person to engage in obstruction, intimidation, harassment, or interference at a vaccination site, as specified.

Major Provisions

- 1) Makes it crime to knowingly approach within 30 feet of any person who is within 100 feet of the entrance of a vaccination site, seeking to enter or exit a vaccination site, or in any occupied motor vehicle seeking entry or exit, for the purpose of obstructing, injuring, harassing, intimidating, or interfering with that person or vehicle occupant in connection with any vaccination services.
- 2) Punishes this crime by a fine not exceeding \$1,000, imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.
- 3) Defines, for purposes of this section:
 - a) "Intimidation" to mean "to make a true threat directed to a person or group of persons with the intent of placing that person or group of persons in fear of bodily harm or death."
 - b) "True threat" "mean a statement where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals regardless of whether the person actually intends to act on the threat."
 - c) "Physical obstruction" to mean "rendering ingress to or egress from a vaccination site, or rendering passage to or from a vaccination site, unreasonably difficult or hazardous."
 - d) "Harass" to mean "the non-consensual and knowing approach within 30 feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in a public way or on a sidewalk area."
 - e) "Interfere with" to mean "to restrict a person's freedom of movement."
 - f) "Vaccination services" to mean "the medical service of administering to an individual a dose of vaccine or other immunizing agent."
 - g) "Vaccination site" to mean "the physical location where vaccination services are provided, including, but not limited to, a hospital, physician's office, clinic, or any retail space or pop-up location made available for vaccination services."
- 4) Provides that the provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

- 5) Provides that these provisions do not prohibit lawful picketing arising out of a labor dispute, as specified.
- 6) Contains an urgency clause.

COMMENTS

First Amendment Jurisprudence Permits Restrictions on Speech and Advocacy When Narrowly Tailored and Sufficiently Justified: The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." (United States (U.S.) Constitution Amendment I, Section 1.) The California Constitution also protects free speech. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (California Constitution Article I, Section 2.) "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.)

This bill implicates the First Amendment by restricting advocacy, including the non-consensual and knowing approach within 30 feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in a public way or on a sidewalk area. This restriction applies within 100 feet of a vaccine site. Thus, this bill limits the public's right to engage in counseling and advocacy. The prior version of this bill also prohibited picketing, but that restriction has been removed.

Definition of True Threat: The definition of "true threat" included in this bill is taken from *Virginia v. Black* (2003) 538 US. 343, 360.

"Knowingly Approach" Standard: This bill would prohibit knowingly approaching a person a person within 30 feet to engage in advocacy, protest, and education within 100 feet of a vaccination site. One purpose, as discussed above, is to prevent the risk of transmission of virus. This standard also recognizes that individuals may feel uncomfortable with unwelcome contact in light of the pandemic. (Melinda Fakuade, *Crowds Might be Anxiety-Inducing After Covid-19. Here's How to Manage It*, Mar. 8, 2021, available at <https://www.vox.com/the-goods/22290011/crowd-avoidance-psychologist-anxiety-pandemic-anniversary>.)

This protects the person who takes care to avoid interacting with others en route to a vaccination site. If a protest draws a police response, law enforcement will have a clear understanding on exactly what distance a person is prohibited from engaging in advocacy. This approach protects speech that does not implicate the concerns that this bill addresses like incidental conversations or people walking near each other without the purpose of advocacy, protest, or education. This standard would also permit stationary advocacy — so long as a person engaging in advocacy within 100 feet of a vaccine site does not proactively approach a person within 30 feet, they would not violate this provision.

"Interfere With:" The definition for "interfere with" comes from the FACE Act, 18 U.S.C. § 248(e)(2).

According to the Author

"SB 742 will protect health care workers and patients seeking COVID-19 vaccinations from facing intimidation, violations of privacy and obstruction by extremist protestors. For over a year, health care workers and scientists have worked side-by-side to develop and distribute effective coronavirus vaccines. The scope of COVID-19 vaccination efforts has required the use of spaces such as stadiums, fairgrounds, and pop-up sites not traditionally utilized for healthcare distribution. Current laws do not adequately balance the rights of individuals seeking healthcare with the First Amendment rights of protesters.

"In January, for example, extremists disrupted vaccination efforts at Dodger Stadium, forcing hundreds of people-- many who had taken time off of work and driven hours for the opportunity to be vaccinated-- to return home without immunization. In Tennessee, a woman plowed through a tent in an effort to disrupt vaccine distribution-- narrowly missing health care workers and national guardsmen who were distributing the COVID-19 vaccine. A Nevada-based vaccination organization had to cancel two in-person events in December after anti-vaccination activists launched an online harassment campaign against it, fearing violence at the demonstrations. These extremists' actions not only physically endanger peoples' lives, but also violate their right to privacy while receiving medical care. As part of their intimidation tactics, protestors often harass and film individuals without their consent— sometimes even following them back to their cars or homes—and publicly post these videos online. The publicity and lack of consequences for anti-vaccine protesters in these incidents has only emboldened these groups to attempt similar disruptions in the future. It is imperative that we provide law enforcement with the tools to ensure safe distribution of vaccines, while preserving protesters' right to free speech.

"Every Californian who chooses to receive the COVID-19 vaccine to protect their health and the health of others or to abide by California state laws requiring proof of vaccination to return to school and the work place, should be able to get immunized safely and with their privacy protected. SB 742 will protect patients and front-line health care providers as they work to bring an end to this pandemic."

Arguments in Support

According to *The California Medical Association*, The CMA "on behalf of the more than 50,000 members, is pleased to support SB 742 (Pan). This bill would make it a misdemeanor for a person to engage in the physical obstruction, intimidation, or picketing target at a vaccination site. SB 742 is an urgent and timely measure which would protect individuals receiving care at vaccinations sites.

"SB 742 seeks to protect people who are getting vaccinations from facing intimidation and obstruction by providing law enforcement tools to act swiftly and decisively to ensure the rights and freedoms of those who choose to get vaccinated; it also preserves the protestors' critical First Amendment right to peacefully assemble and protest at a safe distance. These changes will help Californians get safely vaccinated and remove a potential challenge to an already anxious process for some people.

"In the most publicized incident, Californians simply seeking the COVID-19 vaccine at Dodger Stadium were stopped by a mob of extremists that brought the facility to a halt. Endangering patients and health care workers for nearly an hour, anti-vaxxers worked to intimidate and harass a relatively captive audience. Some participants were in fear during the chaos, as they were in

vehicles, unsure of what was happening as they were being yelled at by anti-vaxxers (none of whom were following any CDC COVID-19 safety guidelines).

"Californians should not be forced to endure harassment and intimidation while they seek care and treatment during a global pandemic. Furthermore, they should not be prevented from receiving care due by those that don't believe in the efficacy of vaccinations."

Arguments in Opposition

According to the *The Right of Life League of Southern California*, "SB-742 IS AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS

"Protections against vagueness are based on due process. To satisfy the constitutional requirement of due process of law, a penal statute must (1) be sufficiently definite to provide adequate notice of the conduct proscribed, and (2) provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. (Tobe, supra, 9 Cal.4th at pp. 1106–1107, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)" *Allen v. City of Sacramento* (2015) 234 Cal. App. 4th 41, as modified on denial of reh'g (Mar. 6, 2015). SB-742 does not meet this standard.

"As written, SB-742 does not define what it means to "knowingly approach." May an advocate stand, holding a sign or offering a pamphlet, while people pass? What if the advocate turns his sign towards a person? Does this fall within the law's definition of "harassment" in subsection (c)(3)?

"As drafted, the bill does not explain how a protester could tell whether "a person is making the approach within 100 feet of the entrance of a vaccination site and is seeking to enter."

"How is this provision enforceable? The wording "making an approach" presumes the person's unspoken and objectively unknowable intent from a minimum of 100 feet away.

Likewise, the phrase "is seeking to enter" is similarly vague and unknowable. Suppose someone is walking down a public sidewalk towards a Walgreens where vaccinations of all sorts routinely take place. May a climate change activist advocate or offer a pamphlet to this person while he walks by? May a Black Lives Matter proponent hold up a sign or extend her fist in the air as the person approaches her? By offering a pamphlet or holding a sign, is the advocate arguably "knowingly" approaching the person while the person is walking towards the Walgreens? Is that sufficient to trigger the violation? Moreover, the walking person's intent to approach or enter a vaccination site might change as the person nears or passes the vaccination site (perhaps he forgot his keys or wallet). How can the climate activist or the BLM proponent know the person's intent?"

FISCAL COMMENTS

According to the Assembly Appropriations Committee:

- 1) Costs (Trial Court Trust Fund) possibly in the low millions of dollars annually to the trial courts to hold bifurcated hearings related to factors in aggravation. One hour of court time costs approximately \$1,000 in staff workload. If 1000 cases annually require a bifurcated hearing resulting in two hours of court time for each case, the cost to the trial courts would be \$2 million.

Although courts are not funded on the basis of workload, increased pressure on the Trial Court Trust Fund and staff workload may create a need for increased funding for courts from the General Fund (GF) to perform existing duties. This is particularly true given that courts have delayed hundreds of trials and civil motions during the COVID-19 pandemic resulting in a serious backlog that must be resolved. The Budget Act of 2021 allocates \$118.3 million from the GF to backfill continued reduction in fine and fee revenue for trial court operations and \$72 million in ongoing GF revenue for trial courts to continue addressing the backlog of cases caused by the pandemic.

- 2) Cost savings (GF) of an unknown amount, but possibly in the tens of millions to even hundreds of millions of dollars, to the California Department of Corrections and Rehabilitation (CDC) in avoided incarceration costs. This bill requires a factor in aggravation to be tried before a judge or jury and in at least some cases, the defendant will prevail. As a result, there may be fewer aggravated sentences beyond the middle term. In many cases, the middle term is two years fewer than the upper term (for example, the sentence for robbery is 2, 3 or 5 years). If this bill results in 100 cases wherein the defendant is sentenced to two less years in prison, at an annual cost per inmate of \$112,000, savings would be approximately \$22 million annually.

VOTES

SENATE FLOOR: 33-4-3

YES: Allen, Archuleta, Atkins, Bates, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Hurtado, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener

NO: Dahle, Grove, Jones, Wilk

ABS, ABST OR NV: Borgeas, Melendez, Nielsen

ASM PUBLIC SAFETY: 6-2-0

YES: Jones-Sawyer, Bauer-Kahan, Lee, Quirk, Santiago, Wicks

NO: Lackey, Seyarto

ASM APPROPRIATIONS: 12-4-0

YES: Lorena Gonzalez, Bryan, Calderon, Carrillo, Chau, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Kalra

NO: Bigelow, Megan Dahle, Davies, Fong

ASSEMBLY FLOOR: 56-14-9

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Cooley, Cooper, Frazier, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Grayson, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Stone, Ting, Villapudua, Ward, Akilah Weber, Wicks, Wood, Rendon

NO: Bigelow, Chen, Cunningham, Davies, Flora, Fong, Gallagher, Kiley, Lackey, Patterson, Seyarto, Valladares, Voepel, Waldron

ABS, ABST OR NV: Choi, Megan Dahle, Daly, Gray, Holden, Mathis, Nguyen, O'Donnell, Smith

UPDATED

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CONSULTANT: Matthew Fleming, Nikki Moore / PUB. S. / (916) 319-3744 FN: 0001695