FULL FAITH AND CREDIT IN THE POST-ROE ERA

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INTRODUCTION

Dr. Alan Braid, a certified obstetrician and gynecologist, provided reproductive care for over four decades in Texas.¹ In medical school, he learned how to save lives, treat pregnant patients, deliver babies, and provide abortion services.² The Supreme Court held that abortion is a constitutional right in its 1973 ruling in Roe v. Wade, which prevented states from limiting abortion services prior to the first trimester of pregnancy and only allowed them to ban the procedure after the second trimester.³ In a September 2021 article, Dr. Braid noted that the majority of his patients seeking abortion services already had children, struggled financially, or were between the ages of eighteen and thirty.⁴ The patients cited a variety of reasons for seeking the procedure, ranging from abusive relationships to it simply being not the right time.⁵

Dr. Braid’s practice changed significantly on September 1, 2021, when Texas’s Senate Bill 8 (S.B. 8), also known as the Texas Heartbeat Act, took effect.⁶ The Act bans nearly all abortions after a fetal heartbeat can be detected,⁷ usually about six weeks into pregnancy.⁸

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² Id.
⁴ Braid, supra note 1.
⁵ Id.
⁷ TEX. HEALTH & SAFETY CODE § 171.204.
⁸ Braid, supra note 1.
The law only provides exceptions for rape, incest, or therapeutic abortions.9 Rather than enforcing penalties through the criminal justice system, the law gives individuals the capacity to sue anyone who performs an abortion or who aids and abets the “performance or inducement” of the procedure in violation of the law.10 Its broad language allows individuals to sue those living in other states, even those where abortion remains legal, if the defendant aided and abetted the conduct necessary for a procedure that is illegal under Texas law.11 There is no injury-in-fact requirement for someone to bring a suit under the law, meaning that an individual who sues under S.B. 8 does not need to have been directly harmed by the defendant.12

Dr. Braid’s article detailed the law’s impact on his patients.13 He had witnessed three teenagers die after procuring illegal abortions, one of whom died from organ failure after developing sepsis.14 On September 6, 2021, Braid decided to knowingly violate the law and perform an abortion on a woman whose fetus had detectable cardiac activity.15 Days later, he faced a lawsuit under the new Texas law.16 Only one of the three plaintiffs resided in Texas.17 Braid responded to the lawsuit by filing an interpleader action in Illinois that October,18 several months before the case was dismissed in Texas due to a lack of standing.19 He claimed, among other arguments, that the Act was unconstitutional under Roe v. Wade.20

9. TEX. HEALTH & SAFETY CODE §§ 171.008(c) & 171.208(j). A therapeutic abortion is an abortion that is necessary for the preservation of the pregnant person’s health.
10. TEX. HEALTH & SAFETY CODE § 171.208(a).
11. See TEX. HEALTH & SAFETY CODE § 171.210 (providing that lawsuits may be brought in counties where “all or a substantial part of the events or omissions giving rise to the claim occurred” or “the county of residence for any one of the natural person defendants at the time the cause of action accrued.”).
12. See TEX. HEALTH & SAFETY CODE § 171.208(a) (“Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who [violates the law].”).
14. Id.
15. Id.
16. See Complaint for Interpleader and Declaratory Judgment at 2, Braid v. Stilley, No. 1:21-cv-05283, 2021 U.S. Dist. LEXIS 259879 (N.D. Ill. Sept. 16, 2022) [hereinafter Complaint] (“Three conflicting SB8 claims have now been asserted against Dr. Braid by three different claimants . . . from three different states in three different suits . . .”).
17. Id. at 3–4.
18. See generally id.
Less than a year later, Dr. Braid’s medical practice changed forever as the abortion debate once again reached the Supreme Court of the United States. On June 24, 2022, the Court issued its landmark opinion in *Dobbs v. Jackson Women’s Health Organization*.\(^{21}\) In upholding Mississippi’s ban on abortions after fifteen weeks of gestation, a divided Court overruled the fifty-year-old decision of *Roe v. Wade*, leaving the question of whether abortion should be legal to the states and declaring that the U.S. Supreme Court no longer viewed abortion as a constitutional right.\(^{22}\) For the first time since the Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to uphold the right to abortion before a fetus could survive outside of the womb, states now can restrict or ban abortions before the fetus reaches the point of viability.\(^{23}\)

In the wake of the *Dobbs* decision, states across the country enacted new laws regarding abortions, ranging from increased protections to total bans.\(^{24}\) Thirteen states had trigger bans in place prior to the decision that automatically banned or severely restricted abortion access once *Roe* was overturned.\(^{25}\) Other state legislatures have since followed suit and placed additional restrictions on abortion.\(^{26}\) Twenty states, by contrast, have laws in place protecting abortion, and many of their legislatures plan to enact new laws protecting this right.\(^{27}\)

Among this new patchwork of state laws, many lawyers and legislators have raised the question as to whether pregnant persons can travel across state lines to obtain the procedure in a state where it is

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22. See *id.* at 2243 (“It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

23. See generally 505 U.S. 833 (1992); see also *id.* at 2270 (“The viability line, which [*Planned Parenthood v. Casey*] termed *Roe’s* central rule, makes no sense . . .”).


25. *Id.* Six of these states—Idaho, Wyoming, North Dakota, Texas, Mississippi, and Tennessee—had trigger laws set to go into effect within a month of the ruling. Eight states—South Dakota, Utah, Missouri, Oklahoma, Kentucky, Arkansas, Alabama, and Louisiana—had bans that went into effect immediately. *Id.* Wisconsin’s 1849 ban also went into effect. *Id.*

26. See *id.* (describing how states have recently changed or amended their laws to restrict abortion access in light of the new Texas law and the Supreme Court’s recent ruling).

27. See *id.* (“At least eight coastal states are set to expand abortion access . . . [and] access will be upheld in at least 12 additional states.”). Eight states, including California, planned to expand their abortion laws beyond the state level through the expansion of services. California’s governor Gavin Newsom also expressed his desire to protect abortion rights in the State constitution. *Id.*
legal, despite residing in a restrictive state. This question, which the majority in *Dobbs* left open-ended, has garnered debate across the nation. Justice Kavanaugh stated in his concurrence that the right to travel between states also protects the right to cross state lines and obtain an abortion. In August 2022, President Biden issued an executive order delineating the federal government’s commitment to protecting the right to travel and obtain abortions in states where it is legal. He has also directed the Department of Health and Human Services to consider the use of Medicaid funding to pay for such travel expenses. On the opposite end of the political spectrum, politicians in conservative states and pro-life organizations have taken steps to prevent their residents from seeking abortions elsewhere. S.B. 8 is in effect in Texas, and the legislatures of several other states have introduced similar legislation allowing for civil penalties.

States seeking to strengthen their abortion protections have responded with legislation that would prevent state court judges from hearing lawsuits originating under these abortion bans. The California, Connecticut, and Washington state legislatures have all proposed or enacted laws that protect those in their states who assist in providing abortion procedures to those who reside in states where it is illegal. Legislation in Connecticut explicitly prevents state courts from issuing subpoenas related to reproductive health that have been requested under laws in another state that restrict or penalize

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28. *See Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) ([M]ay a State bar a resident of that State from traveling to another State to obtain an abortion?").

29. *See id.* (“In my view, the answer [to whether states may ban travel to procure abortions] is no based on the constitutional right to interstate travel.”)


31. Id.


33. The law is in effect alongside a criminal statute known as the Human Life Protection Act, which makes providing an abortion a felony in the second degree, punishable by a criminal fine and civil penalties. *Tex. Health & Safety Code § 170A.004.*


36. Id.
abortion. California passed a similar law, Assembly Bill 2091, which went into effect on September 27, 2022. This law protects medical records and other documents related to abortion procedures from foreign discovery attempts.

California legislators who drafted the bill have expressed concerns that the law may conflict with the Full Faith and Credit Clause of the United States Constitution. The clause, found in Article IV, states that:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In other words, state courts and governments are constitutionally required to recognize judgments and certain court documents originating in other states. While the full meaning of the clause has historically been the subject of debate and litigation, California legislators have recognized that intentionally blocking subpoenas originating under other states' abortion bans will likely lead to widespread litigation. This litigation, in turn, will bring the meaning of the Full Faith and Credit Clause to the forefront of state politics.

This Note addresses the history of the Full Faith and Credit Clause and potential constitutional challenges that may be brought against A.B. 2091. Part II analyzes the history of the Full Faith and Credit Clause and how it has been applied to documents in the past. Part III looks to how American courts apply full faith and credit today, primarily to public acts and records. In Part IV, this Note looks at an important exception that prevents courts from applying full faith and credit to penal laws, including foreign penal civil actions. Finally, Part V analyzes how these doctrines apply to concerns regarding the new California law and to subpoenas arising under the abortion ban in Texas. It is also important to note that similar laws have been

41. U.S. CONST. art. IV, § 1.
42. See Elizabeth Redpath, Note, Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records, 62 EMORY L.J. 639, 650 (2013) (“In the decades following the ratification of the Constitution, the Full Faith and Credit Clause was one of the most litigated clauses, and the primary focus of that litigation was on the Clause’s application to final judgments.”).
implemented beyond these two states. The scope of this Note is limited to A.B. 2091 in California and S.B. 8 in Texas, and the broader principles can then be extracted and applied to conflicts between other jurisdictions. Ultimately, the California statute is most likely to be upheld because subpoenas under S.B. 8 will probably be seen as foreign penal civil actions, which typically cannot be enforced between states, although its open hostility to the Texas statute will pose an additional obstacle. If the subpoenas are viewed as records under the Full Faith and Credit Clause, they are also unlikely to be enforced as a matter of public policy.

I. A HISTORY OF THE FULL FAITH AND CREDIT CLAUSE

This section will examine the history of the Full Faith and Credit Clause, from colonial America through the present. Understanding the clause’s origins and its prior uses is essential for applying it to modern issues involving subpoenas and reproductive rights.

The Full Faith and Credit Clause that appears in the United States Constitution originates from concerns over money judgments in eighteenth-century colonial America.43 English subjects sought to have money judgments from one colony enforced in another so they could recover what rightfully belonged to them.44 Under English law, records and documents between the colonies and different jurisdictions were viewed as official if they bore a Seal of Public Credit, which courts viewed as evidence of the document’s legitimacy.45 This rule “did not apply to foreign seals,” nor to “private seals,” a rule which posed additional difficulties to litigants who wished to bring their “foreign” judgments to other colonial courts and collect the money they were owed.46 Frustrated by the confusing English rules, the Province of Massachusetts Bay enacted a law that would make a judgment in one colony evidence in itself that could be transferred to other colonial jurisdictions.47 This “Law of Evidence” soon “was in constant use” between the American colonies for the purpose of recovering money judgments.48 Other colonies enacted similar statutes for handling

43. See id. at 644 (“Understanding the origins of the Full Faith and Credit Clause requires a quick look through the lens of a Founding-Era creditor seeking — usually in vain—to enforce a money judgment by chasing down his debtor in a foreign colony.”).
44. Id.
46. Id. at 1602–03.
47. Id. at 1606.
48. Id. at 1607–08 (quoting Kurt H. Nadelmann, Full Faith and Credit to Judgments and
foreign judgments.\textsuperscript{49}

An early version of the Full Faith and Credit Clause was included in the Articles of Confederation, though whether that clause “should be understood as elevating state judgments to the status of domestic judgments in other states” was debated at the time.\textsuperscript{50} Judges and politicians disagreed over whether the clause simply served an evidentiary or recognition function, like a seal, or an enforcement function that would allow judgments and records to have conclusive effects between the states.\textsuperscript{51} An evidentiary function only serves to prevent duplicate litigation. Under this view of the clause, recognition refers to the “requirement that the forum court afford a sister-state judgment the same res judicata effect” that would be provided by the original state.\textsuperscript{52} This idea developed as a response to general concerns that the movement of “recalcitrant parties [evading] unfavorable judgments” between colonies would result in ongoing litigation in multiple jurisdictions. The goal of the evidentiary purpose was to prevent repeated litigation in different jurisdictions when individuals avoided paying their debts by moving from state to state.\textsuperscript{53} An “enforcement” or “conclusive effect” function, on the other hand, requires that a state “execute a sister state’s judgment in the same way that the forum court would execute its own judgment.”\textsuperscript{54} In other words, recognition “is controlled by the rendering state’s law,” and enforcement “is controlled by the forum state’s law.”\textsuperscript{55}

The authors of the United States Constitution likely had a more evidentiary purpose in mind when they wrote Article IV.\textsuperscript{56} Changes made as the Founders adapted the clause from the Articles of Confederation further demonstrate the evidentiary intent.\textsuperscript{57} In the


\textsuperscript{50} Id. at 288.

\textsuperscript{51} Id.

\textsuperscript{52} Redpath, \textit{supra} note 42, at 670. A sister-state, in this context, refers to another state whose courts would have the power to review judgments from another state or jurisdiction.

\textsuperscript{53} See Rosin v. Monken, 599 F.3d 574, 577 (7th Cir. 2010) (“The Full Faith and Credit Clause was enacted to preclude the same matters’ being relitigated in different states as recalcitrant parties evade unfavorable judgments by moving elsewhere.”).

\textsuperscript{54} Redpath, \textit{supra} note 42, at 670–71.

\textsuperscript{55} Id. at 671.

\textsuperscript{56} See Stephen E. Sachs, \textit{Full Faith and Credit in the Early Congress}, 95 VA. L. REV. 1201, 1227 ("[The Constitution’s] alterations [to the Clause in the Articles of Confederation] only strengthen the authentication reading.").

\textsuperscript{57} Id.
Constitution, the Full Faith and Credit Clause gives Congress the power to determine the effect of records between states. This power stems from the second sentence of the clause, which states that “the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” The first half of the clause in the Articles of Confederation alone did not grant an enforcement purpose for records between states, so one cannot assume that the similarly worded Clause in the Constitution would have this power. The effect that records would have between states was left to Congress to decide.

Congress quickly enacted a statute further clarifying the Full Faith and Credit Clause. The 1790 Act provides that the “records and judicial proceedings of any court of any such State, Territory or Possession” must be “proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk . . . .” The legislature also provided in the Act that another state’s acts must be authenticated with a seal. While the Act provided methods for authenticating records and transferring them between states, it failed to determine whether the clause should serve an evidentiary or conclusive function.

In 1813, the Supreme Court decided the issue of enforcement versus evidence in *Mills v. Duryee*. Writing for the majority, Justice Joseph Story supported the conclusive effects approach. He reviewed the argument that the Full Faith and Credit Clause and the related statute provide “only for the admission of such records as evidence, but do[ ] not declare the effect of such evidence when admitted,” and found that this interpretation “cannot be supported.” If the document originating in the sister state’s court is valid, then Congress intended that “it must have the same faith and credit in every other Court.” To hold otherwise would render the clause “utterly unimportant and

58. *Id.*
59. U.S. CONST. art. IV, § 1.
60. See Sachs, *supra* note 56, at 1229 (“If the Confederation Clause had given conclusive nationwide effect to state judgments, it would have been of very great importance, and indeed might have obviated the need for Madison’s proposal to allow executions in other states.”).
61. See Redpath, *supra* note 42, at 646.
63. *Id.*
64. See generally 11 U.S. 481, 483 (1813).
65. *Id.*
66. *Id.* at 484 (emphasis added).
67. *Id.*
illusory.” Only Justice Johnson argued for the adoption of the clause’s evidentiary function. The disagreement giving rise to the case was a straightforward money judgment for $150,000 that was given in Pennsylvania and brought to Massachusetts. This type of judgment aligns more with the cases of concern during the colonial period, in which issues regarding the legitimacy of money judgments were particularly pressing. Courts have since used the Mills decision to hold that state courts are required to enforce these types of judgments from other states.

II. WHERE FULL FAITH AND CREDIT LIES TODAY: FINAL JUDGMENTS, PUBLIC ACTS, AND EVERYTHING IN BETWEEN

Decisions of the federal courts have helped draw the line as to which judgments are due full faith and credit under the United States Constitution. Generally, judgments that fall within the Full Faith and Credit Clause’s purview must have been “fully and fairly litigated and finally decided” by the first court. The second court’s inquiry must then confirm that the judgment is valid under these criteria. Courts cannot enforce any “ambiguous, non-final, modifiable, [or] conditional” judgment from the courts of another state.

However, the holding in Mills did not have such a straightforward application to records and public acts. Supreme Court decisions in the following centuries have divided the full faith and credit analysis into three categories: “judicial proceedings” referring to final judgments, “public acts” referring to legislative statutes, and “records” that may fall anywhere in between. These cases have provided additional guidance as to how full faith and credit should apply to each.

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68. Id. at 485.
69. See id. at 486 (Johnson, J., dissenting) (“For faith and credit are terms strictly applicable to evidence.”).
70. Id.
71. See supra text accompanying notes 43–49 (discussing the colonial origins of full faith and credit).
72. See Fauntleroy v. Lum, 210 U.S. 230, 240 (1908) (“The due faith and credit clause it is now decided means that . . . a judgment may be rendered in another state giving effect to such transactions, which judgment it becomes the duty of the state whose laws have been set at defiance to enforce.”).
75. Redpath, supra note 42, at 649.
A. Public Acts and the Public Policy Exception

The need to categorize public acts separately became apparent in the twentieth century when states’ questions about choice-of-law principles became more prevalent.76 Several key Supreme Court decisions impacted the landscape of litigation between states. The Court’s 1938 decision in *Erie Railroad Co. v. Thompson* provided that state substantive law and federal procedural law should apply in diversity-of-citizenship cases, which involve parties from multiple states.77 In *International Shoe Co. v. Washington, Office of Unemployment Compensation & Placement*, the Court further concluded that companies only needed certain minimum contacts in a state to avail themselves to litigation in that forum.78 As interstate litigation became increasingly common, judges needed to decide exactly which laws should apply in interstate litigation and how the Full Faith and Credit Clause would impact these decisions.

Judges also recognized that it is essential for states to have the capacity to enact their own public statutes and policies without interference from sister states. The Supreme Court has declined to read the Full Faith and Credit Clause as compelling “a state to substitute the statutes of other states for its own statutes” when dealing with matters of state law.79 To address this issue, in *Alaska Packers Ass’n v. Industrial Accident Commission*, the Court adopted what is known as the public policy exception to the clause.80 This exception allows forum states to decline to apply public acts from sister states that contradict their own public policy.81

The Court recognized that a literal application of the Full Faith and Credit Clause in every instance “would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”82 In other words, interstate conflicts would only allow forum states to apply the sister state’s law, but not the state’s own statutory or common law that aligns

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76. *Id.* at 651.
77. *See generally* 304 U.S. 64 (1938) (holding that federal courts should apply state substantive law and federal procedural law, and the state law should be from the jurisdiction where the incident giving rise to the suit occurred.).
78. 326 U.S. 310, 316 (1945).
80. *See* 294 U.S. 532, 548 (“[N]ot every statute of another state will override a conflicting statute of the forum by virtue of the Full Faith and Credit Clause.”).
81. *Id.*
82. *Id.* at 547.
with its own public policy. The Court’s solution requires states to appraise “the governmental interests of each jurisdiction” and decide them on the merits of the argument rather than to automatically apply full faith and credit.\footnote{Id.}

As a result of this exception, a forum state is “not required to enforce a law obnoxious to its public policy.”\footnote{Griffin v. McCoach, 313 U.S. 498, 507 (1941).} In some cases, state courts have had the power to refuse to enforce certain judgments that “were entered under particularly offensive circumstances.”\footnote{Rodgers, supra note 74, at 1368–69.} States are not required to enforce “every right which has ripened into a judgment” under another state’s laws.\footnote{Broderick v. Rosner, 294 U.S. 629, 642 (1935).} However, the Supreme Court later clarified that there is “no roving ‘public policy exception’ to the full faith and credit due judgments.”\footnote{Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (quoting Estin v. Estin, 334 U.S. 541, 546 (1948)).} Policy concerns are generally not strong enough to prevent a state from enforcing a money judgment originating from another jurisdiction.\footnote{Id. at 234.} Instead, courts should use another state’s public policy to determine “the law applicable to a controversy.”\footnote{Id. at 233.} The states that implement the judgments at issue also have the ability to determine how judgments should be enforced.\footnote{See id. at 235 (“Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.”.).}

The decisions in Mills and Alaska Packers established two bright-line rules in the application of the Full Faith and Credit Clause. First, the Court held that judgments, especially money judgments, that originate in any state can and must be applied in another state’s courts.\footnote{See supra text accompanying notes 73–75 (describing the effects of the decision in Mills).} Second, the Court held that a state is not required to apply the public acts of another state, especially if they are contrary to that state’s own public policies and preferences.\footnote{See supra text accompanying notes 800–85 (discussing the Court’s treatment of public acts and the public policy exception).} The Court in Baker v. General Motors Corp. further clarified this binary by holding that the public policy exception established in Alaska Packers does not apply to final judgments.\footnote{See Baker, 522 U.S. at 234 (“In assuming the existence of a ubiquitous ‘public policy exception’ permitting one State to resist recognition of another State’s judgment . . . the District Court . . . misread our precedent.”.).} Judgments must be enforced between states, regardless of

\begin{itemize}
  \item \footnote{83. Id.}
  \item \footnote{84. Griffin v. McCoach, 313 U.S. 498, 507 (1941).}
  \item \footnote{85. Rodgers, supra note 74, at 1368–69.}
  \item \footnote{86. Broderick v. Rosner, 294 U.S. 629, 642 (1935).}
  \item \footnote{88. Id. at 234.}
  \item \footnote{89. Id. at 233.}
  \item \footnote{90. See id. at 235 (“Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.”.).}
  \item \footnote{91. See supra text accompanying notes 73–75 (describing the effects of the decision in Mills).}
  \item \footnote{92. See supra text accompanying notes 800–85 (discussing the Court’s treatment of public acts and the public policy exception).}
  \item \footnote{93. See Baker, 522 U.S. at 234 (“In assuming the existence of a ubiquitous ‘public policy exception’ permitting one State to resist recognition of another State’s judgment . . . the District Court . . . misread our precedent.”.).}
\end{itemize}
public policy concerns.\textsuperscript{94} Court opinions seldom address, however, where records fall within this framework.\textsuperscript{95} The failure to address records leaves a glaring gap in constitutional jurisprudence.\textsuperscript{96}

\textbf{B. Full Faith and Credit as Applied to Records}

Guidelines for determining how full faith and credit applies to different records are limited, and they present a question that may be determined by either the Supreme Court\textsuperscript{97} or Congress.\textsuperscript{98} Under the “best evidence rule,” the strongest example of a record that is owed full faith and credit is an original archival court records or a document bearing a seal.\textsuperscript{99} The Supreme Court has confirmed that when a final judgment is valid and a court can apply it in a sister state, the enforcement of that judgment must comply with the forum state’s law.\textsuperscript{100} The method in which a record was created may also influence its transferability between states. In \textit{Baker}, the Court determined that a disputed injunction appeared to be an agreement between parties rather than a final judgment, so it fell outside the scope of the Full Faith and Credit Clause.\textsuperscript{101} Therefore, the Michigan injunction present in the case could not prevent an individual from being compelled to testify by a subpoena issued in Missouri.\textsuperscript{102}

As political leanings change and states become increasingly divided on significant public policy issues, federal courts have continued to adapt their views of the Full Faith and Credit Clause and its application in various circumstances. In \textit{Adar v. Smith}, the Fifth Circuit addressed

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\item[94.] See \textit{id}. (“We are aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.”) (quoting Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943)).
\item[95.] It should be noted that Congress amended the 1790 statute in 1804 to include non-judicial records within the scope of the Full Faith and Credit Clause. See Act of Mar. 27, 1804, ch. 56, 2 Stat. 298.
\item[96.] Very few, if any, court cases address other types of records in the context of full faith and credit. See Redpath, \textit{supra} note 42, at 655–66 (“Other types of records [beyond final judgments and public acts] have been neglected in full faith and credit jurisprudence and scholarship. This void is a source of underlying tension in contemporary full faith and credit cases.”).
\item[97.] See \textit{infra} discussion p. 19 (discussing Justice Gray’s determination that the Supreme Court may interpret questions related to the Full Faith and Credit Clause).
\item[98.] See Sachs, \textit{supra} note 56, at 1207 (“Today’s Congress remains entirely free to determine the effect of state records in other states.”).
\item[99.] Id. at 1211.
\item[100.] See M’Elmoyle v. Cohen, 38 U.S. 312, 325 (“It must be conceded, that the judgment of a state Court cannot be enforced out of the state by an execution issued within it.”).
\item[102.] Id.
\end{enumerate}
\end{footnotesize}
laws concerning birth certificates in adoptions by same-sex couples. A New York couple adopted a child from Louisiana and sought to amend her birth certificate. The Registrar declined to do so because it was not an option under Louisiana law at the time. The court held that the Full Faith and Credit Clause did not obligate Louisiana “to confer particular benefits on unmarried adoptive parents contrary to its law.” The infant’s official birth records in this case are not considered final judgments under the Mills interpretation because a judicial state actor did not issue them. Therefore, this case addresses the “manner in which [Louisiana] enforces out-of-state adoptions,” and there is no conflict with the Full Faith and Credit Clause. The Supreme Court denied the petition for a writ of certiorari, so the Fifth Circuit’s interpretation still stands.

Much uncertainty remains around the enforcement of other types of records between sister states. In particular, subpoenas seem to fall within the definition of “records,” and it remains unclear what status they have under the Full Faith and Credit Clause. The Court provided only limited guidance in Baker, ruling that an injunction cannot defeat a subpoena. Some lower courts have also sought to provide guidance on the topic. Although not a conclusive authority, the Supreme Court of New York, Appellate Division has clarified that administrative subpoenas, as opposed to court-ordered subpoenas, cannot be enforced between states. Some circuit courts have concluded that federal courts are not required to enforce state court subpoenas. Generally, however, courts remain unclear as to whether one state must enforce a subpoena issued by another state, even if it contradicts that state’s public policy. The question will likely turn on whether the federal courts will regard subpoenas as judicial actions or orders in equity.

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103. See generally Adar II, 639 F.3d 146 (5th Cir. 2011) (en banc).
104. Id. at 151.
105. Id.
106. Id. at 161.
107. See id. at 154 (“Consequently, since the duty of affording full faith and credit to a judgment falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors.”).
108. Id. at 161.
112. See, e.g., Giza v. Sec’y of Health, Educ. & Welfare, 628 F.2d 748, 752 (1st Cir. 1980) (“But we are aware of no authority interpreting this statute so as to place an affirmative obligation on, and vest jurisdiction in, a federal court to enforce a state court subpoena . . . .”).
C. Potential for Future Litigation: Hostility Between States

One other factor that may impact the application of the Full Faith and Credit Clause, despite having a limited judicial history, is when one state is intentionally hostile to another state’s public policies. The U.S. Supreme Court has repeatedly held that the argument to apply the clause is weaker in cases where the forum state does not have a “policy of hostility” to the public acts of another state.\textsuperscript{113} Such a policy of hostility is one that goes beyond giving “affirmative relief for an action arising within its borders,” and instead aims to frustrate enforcement of another state’s law.\textsuperscript{114} If there is a policy of hostility, then full faith and credit is more likely to be applied, and the hostile state must enforce a sister state’s law.\textsuperscript{115}

This interpretation likely originates from the Court’s ruling in\textit{Hughes v. Fetter} in 1951.\textsuperscript{116} The case arose under Wisconsin’s wrongful death statute, which only applied to deaths that occurred within the state.\textsuperscript{117} The Court held that Wisconsin’s policy of dismissing lawsuits originally brought under another state’s wrongful death statute was in violation of the Full Faith and Credit Clause.\textsuperscript{118} Litigation regarding policies of hostility remains limited but may become more thoroughly developed in future decisions.

III. AN IMPORTANT EXCEPTION: FULL FAITH AND CREDIT AS APPLIED TO FOREIGN PENAL CIVIL ACTIONS

It has been long established that full faith and credit must apply to the final judgments of courts in other states.\textsuperscript{119} Several cases, however, have necessitated exceptions to this rule. First, in an 1825 case known as\textit{The Antelope}, the Supreme Court determined that the United States’s courts cannot enforce the penal laws of other nations.\textsuperscript{120}

\textsuperscript{113} See Carroll v. Lanza, 349 U.S. 408, 413 (1955). (“The present case is a much weaker one for application of the Full Faith and Credit Clause. Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri.”); see also Franchise Tax Bd. of California v. Hyatt, 139 S.Ct. 1485, 1497 (2019) (“The Court’s Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from ‘adopt[ing] any policy of hostility to the public Acts’ of other States.”) (quoting Hyatt II, 136 S.Ct. 1277, 1281 (2016)).
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} 341 U.S. 609, 611 (1951).
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 613.
\textsuperscript{119} Supra discussion in Part II.
\textsuperscript{120} 25 U.S. 66, 123 (1825).
Second, about half a century later, the Court held in *Huntington v. Attrill* that the Full Faith and Credit Clause does not apply between states to civil laws that function as penal statutes in disguise.121 A penal law is one whose primary purpose is “expressly enforceable by fine, imprisonment, forfeiture, certain types of civil recoveries, or similar punishment.”122 Typically, a penal statute “contains some sanction to compel obedience beyond mere redress to an individual for injuries received.”123 The doctrine introduced in *Huntington* could have significant implications on the enforcement of records arising under pro-life legislation if the legislators’ true intentions are to punish those who have aided and abetted in abortion procedures.

**A. Enforceability of Penal Actions**

The first cases to examine the applicability of penal actions between jurisdictions originated under international law. Chief Justice Marshall confirmed that the penal law doctrine applied to American courts in *The Antelope*.124 This case involved a European slave ship seized by pirates in the Atlantic Ocean.125 The enslaved individuals were recaptured by an American ship and brought to Savannah, Georgia.126 The original Spanish and Portuguese ships demanded that the enslaved individuals be returned to them, while the United States argued that they were now free men because the trans-Atlantic slave trade was illegal under American law.127 Marshall reasoned that even though the slave trade was illegal and punishable under American law, that did not mean that American punishments could be extended to citizens of other nations.128 An international treaty would be required in order to enforce them.129 The Spanish ships were accordingly entitled to ownership of the enslaved Africans they could prove they owned, while the remaining individuals obtained their freedom under U.S. law.130

*The Antelope* set the stage for how the United States would treat foreign penal laws. Marshall succinctly ruled that “[t]he Courts of no

121. *See generally* 146 U.S. 657 (1892).
123. *Id.*
125. *Id.*
126. *Id.* at 67–68.
127. *Id.* at 71.
128. *Id.* at 104–05.
129. *Id.* at 105.
130. *Id.* at 132–33.
country execute the penal laws of another.”\textsuperscript{131} In the decades following \textit{The Antelope}, courts in England and the United States held that penal laws did not reach beyond the country in which they originated, “except when extended by express treaty or statute to offences committed abroad by [that country’s] own citizens.”\textsuperscript{132} Additionally, these laws could only be enforced by the courts of their country of origin rather than where the offense took place.\textsuperscript{133} These rulings extended beyond prosecutions and sentences to include monetary penalties for the violation of “statutes for the protection of [the State’s] revenue, or other municipal laws, and to all judgments for such penalties.”\textsuperscript{134} The case law held that, while American courts can hear foreign lawsuits, they may only be those “of a strictly civil nature.”\textsuperscript{135} The Supreme Court then needed to decide how to distinguish between civil and penal cases and how to apply the penal law doctrine between individual states.

\textit{B. The Landmark Case of Huntington v. Attrill}

The penal law doctrine has evolved over time to encompass conflict of laws issues between states as well as between nations. In 1892, the Supreme Court determined in \textit{Huntington v. Attrill} that when a judgment is carried over state lines, the enforcing court should decide whether it would be enforcing a penal statute.\textsuperscript{136} If the court determines that the statute is penal, it should refrain from awarding the judgment full faith and credit because it would violate the principle that it cannot enforce another jurisdiction’s penal law.\textsuperscript{137} Justice Gray based the opinion on the treatment of penal laws internationally. He wrote that if a suit is brought to enforce a judgment from one state to a sister state, the enforcing state “must determine for itself whether the original cause of action is penal in the international sense.”\textsuperscript{138} He analogized the “settled rules of public and international law” with interstate civil litigation to determine that suits of a “penal nature” only hold weight

\textsuperscript{131} Id. at 123.
\textsuperscript{133} Id. at 290.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 657, 682 (1892). In the case, a New York plaintiff went to recover a judgment from a Canadian defendant. The plaintiff filed an action in Maryland, and the defendant’s daughter claimed that this was unconstitutional due to the penal law doctrine. \textit{See generally id.}
\textsuperscript{137} Id. at 682–83 (“Were any other principle to guide its decision, a court might find itself . . . in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.”).
\textsuperscript{138} Id. at 683–84.
Next, Justice Gray concluded that the Supreme Court has the authority to determine issues arising under the Full Faith and Credit Clause. He reasoned that the Court does not have the power to determine whether the initial judgment was valid, but it does have jurisdiction to determine if full faith and credit ought to be awarded. This is similar to principles of contract law, because a state supreme court has the power to determine a contract’s validity, but the United States Supreme Court may still review state laws affecting contracts in general. Unless and until Congress chooses to pass new legislation under the Full Faith and Credit Clause, the Supreme Court retains the authority to interpret its meaning.

Perhaps the most significant result of Huntington was the holding that a civil law with the intention of punishing wrongdoers could be considered a penal statute. The decision authorizes courts to determine whether an action awards a civil remedy or provides a foreign penal civil action. If it is the latter, a state court should refuse to grant the foreign penal civil action full faith and credit. The Court recognized that a statute which would allow a plaintiff to recover through a civil suit may be considered equivalent to a criminal statute for purposes of applying full faith and credit “because they are equally brought to enforce the criminal law of the State.” In other words, both civil and criminal statutes may be considered penal and therefore unenforceable between states if the consequence is to punish “an offender, and not for the benefit of any other person. . . .” A state’s law is penal if it is intended to “punish an offence against the public justice of the State,” and it is civil if its goal is to “afford a private remedy to a person injured by the wrongful act.” This test applies regardless of whether the law originates from the common law or a

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139. *Id.* at 685.
140. *Id.* at 684.
141. *Id.*
142. *See id.* (“Whether the Court of Appeals . . . gave full faith and credit to the judgment recovered by this plaintiff in New York depends upon the true construction of the provisions of the Constitution and of the act of Congress upon that subject.”).
143. *Id.* at 673.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 674.
statute.149

The test described in Huntington has been used over the last century to determine when civil actions are owed full faith and credit between states. Even though the Court has yet to declare a civil law as penal, the doctrine remains in effect.150 In Atchison, T. & S.F.Ry. Co. v. Nichols, the Court applied the test to hold that a New Mexico law allowing for personal injury claims in train accidents was civil in nature and could be enforced in a California court.151 In Milwaukee County v. M. E. White Co., the Court also found that a judgment for taxes was owed full faith and credit between jurisdictions.152 However, some courts still struggle to find the distinction between civil and penal laws.153 For example, the Ninth Circuit has provided guidance for how courts should interpret a statute whose nature is “hybrid, with elements that cut both ways.”154 Dictionary definitions describing the meaning of a term used in a statute are not sufficient in such a situation.155 If this is the case, a court should search beyond the face of the statute and look to the intentions of the legislators and the effect of the law to decide on which side it ultimately falls.156

The exception for foreign penal civil actions adds significant clarification to the application of the Full Faith and Credit Clause. Interpretations of this exception, along with other full faith and credit doctrines, will likely affect how courts implement the abortion laws that are developing across the country in the wake of the Dobbs decision.

IV. THE IMPACT OF THE FULL FAITH AND CREDIT CLAUSE ON A.B.

149. See id. ("It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it, is in any manner dependent or the question whether it is a statutory right or a common law right." (quoting Dennick v. Cent. R. Co. of N.J., 103 U.S. 11, 17 (1880))).
150. See Reproductive Health and Privacy: Hearing on A.B. 2091 Before the Assemb. Comm. on Judiciary, 2021-22 Reg. Sess. 7 (Cal. 2022) (“Although the Supreme Court has never deemed a state law to be a ‘penal statute’ the Huntington decision was just the first of a series of cases in which the court did examine whether or not a statute was aimed at civilly punishing a party for violating the ‘public justice.’") (quoting Milwaukee County v. M. E. White Company, 296 U.S. 268 (1935)).
151. 264 U.S. 348, 352 (1924).
152. 296 U.S. 268, 279 (1935).
153. See generally de Fontbrune v. Wofsy, 838 F.3d 992, 1002 (9th Cir. 2016).
154. Id.
155. See id. (“Dictionaries may be a starting point, but in this case are of limited utility in looking beneath the surface to determine the “essential character and effect” of the foreign judgment.” (quoting Huntington v. Attrill, 146 U.S. 657, 683 (1892))).
156. Id.
American courts have yet to determine whether the Full Faith and Credit Clause applies to subpoenas. The California legislature recognized this as a concern when drafting Assembly Bill 2091. The Assembly Committee on the Judiciary believes that subpoenas arising out of S.B. 8 and similar laws are “likely to implicate the provisions of the Full Faith and Credit Clause” because they are “judicial actions.” The Committee reasoned that even if the Full Faith and Credit Clause likely applies, several recognized exceptions to the clause will likely allow the California law to remain in effect. Therefore, to decide whether full faith and credit impacts A.B. 2091, the doctrines that have evolved around the clause must be applied individually to the bill’s provisions.

A. Subpoenas as Public Policy Conflicts

Extensive and well-established Supreme Court jurisprudence has made it clear that full faith and credit will apply to final judgments regardless of the sister state’s public policy, but public acts aren’t necessarily owed the same courtesy. Although the California legislature believes it is “likely” that federal courts will determine subpoenas are final judgments of the courts, there is a lack of substantial precedent in this area. It is therefore necessary to explore how the public policy exception applies to the present legislation. If subpoenas are not viewed as final judgments, then courts will likely find that California is not required to give full faith and credit to subpoenas arising under S.B. 8 because that law is averse to California’s public policy.

California has repeatedly stated that the protection of reproductive rights is integral to its public policy. Its Supreme Court first recognized an individual’s right to reproductive choice in 1967, and by 1972 the right to privacy, which implies the right to abortion, was enshrined in

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157. See supra text accompanying notes 110–112 (discussing the application of the Full Faith and Credit clause to subpoenas).
159. Id.
160. Id.
161. See supra text accompanying notes 71–75 (discussing historical applications of the clause).
163. See Roe v. Wade, 410 U.S. 113, 153 (1973) (“This right of privacy . . . is broad enough to
the first article of its Constitution.\textsuperscript{164} This section of the California Constitution was amended in 2022 to explicitly protect the right to abortion from state interference.\textsuperscript{165} In 2002, the legislature passed the Reproductive Privacy Act, which amended the state’s Health and Safety Code to protect abortion.\textsuperscript{166} The Code explicitly states that it is the state’s “public policy” that protecting a pregnant person’s choice have a child or to obtain an abortion is a “fundamental right.”\textsuperscript{167} It also clarifies that the state cannot “deny or interfere with” this fundamental right outside of any limitations imposed by pre-existing laws and regulations.\textsuperscript{168}

Governor Gavin Newsom has also made efforts to protect reproductive rights in the state. In 2019, he issued the “Proclamation on Reproductive Freedom.”\textsuperscript{169} Although this document was largely symbolic, it listed California’s expansive laws protecting abortion, including the constitutional guarantee of privacy, the promise to allow young women to seek abortions without parental consent, the right to insurance coverage for the procedure by state-regulated private health plans, and the right to confidentiality when making this choice.\textsuperscript{170} Assembly Bill 2091 itself strengthens this sentiment. In Section 11, the bill states that actions in other states that inhibit a person’s right to have an abortion, including foreign penal civil actions, are “contrary to the public policy” of California and shall not be enforced.\textsuperscript{171}

These actions taken in California signify that laws inhibiting access to abortion are averse to its public policy. This certainly includes S.B. 8 in Texas and similar laws enacted in other states. It would also be fair to say that these laws are “obnoxious” to California’s public policy, meaning that the state is “not required to enforce them” under the public policy doctrine.\textsuperscript{172} The test for applying the public policy

\begin{footnotesize}
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\item 164. \textit{CAL. CONST.} art. I, § 1.1.
\item 165. \textit{Id.}
\item 167. \textit{CAL. HEALTH & SAFETY CODE} § 123462(b).
\item 168. \textit{CAL. HEALTH & SAFETY CODE} § 123462(c).
\item 170. \textit{Id.}
\item 172. See Griffin v. McCouch, 313 U.S. 498, 507 (1941) (“Where this Court has required the
\end{itemize}
\end{footnotesize}
exception is triggered when there is “an inescapable conflict of interest of the two states,” and the interstate conflict “involves a forbidden infringement of some legitimate domestic interest of the other.” The threshold is clearly reached in this instance.

California’s interest in protecting reproductive rights is not only significant, but also long-standing. The State has stated in no uncertain terms that it will limit government interference affecting the right to choose as much as possible. This would necessarily encompass access to medical records that could help determine whether an abortion took place, and it directly conflicts with extraterritorial acts that penalize aiding and abetting abortions. Requiring California courts to enforce subpoenas from Texas would therefore infringe on the State’s right to protect its own domestic interests and would be unacceptable under the public policy exception to the Full Faith and Credit Clause.

It is important to note that it remains uncertain whether the public policy exception will apply. Baker added significant limitations to this exception by limiting the “roving” public policy exception when applied to judgments. It specified that if there is a public policy exception, it is mainly intended to apply to public acts. Courts have remained vague as to where subpoenas fall under the Full Faith and Credit Clause doctrine and whether they are judgments or records. Although a court-ordered subpoena closely resembles a final judgment or other judicial action, there remains room for debate. Therefore, this exception will only apply if courts determine that subpoenas are records, not final judgments.

B. Subpoenas as Foreign Penal Civil Actions

The strongest argument supporting the California legislature’s belief that full faith and credit does not impact the validity of Assembly Bill 2091 is that a subpoena issued under S.B. 8 would be a foreign penal civil action. If it is, then any subpoenas issued under it would be unenforceable in California under the test described in Huntington v. state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy. ”); see also supra note 84.”

174. CAL. HEALTH & SAFETY CODE § 123462(c).
176. Id.
177. See supra text accompanying notes 110–12 (discussing the application of the Full Faith and Credit clause to subpoenas).
Attrill. The California Assembly Committee on the Judiciary recognized the significance of the Huntington test. The legislature responded by drafting the bill in a way to make it clear that such foreign penal civil actions would not be recognized under California law and would not receive full faith and credit. Although this doctrine is less developed than the public policy exception, it is still in effect and provides a strong defense.

Under the test laid out in Huntington v. Attrill, S.B. 8 is clearly a penal law, regardless of the civil penalties it imposes, and it should not be awarded full faith and credit between states. Although the act is civil on its face, allowing enforcement through private civil actions as opposed to government intervention, the intent of the statute is to deter individuals from assisting in abortion procedures. Notably, the law lacks any requirement for harm to the plaintiff, which is typically required for a civil action against a defendant. The law allows virtually anyone to bring a suit for violation of the law, regardless of whether they have any connection to the defendant or even reside in Texas. Any court award for injunctive relief must be “sufficient to prevent the defendant from” engaging in any act that would aid or abet abortions in violation of the statute. These high awards further demonstrate that the intent is penal in nature. The law even goes so far as to disallow reliance on Roe v. Wade or Planned Parenthood v. Casey as a defense, even if the abortion took place before those rulings were

178. See generally 146 U.S. 657 (1892).
179. Reproductive Health and Privacy: Hearing on A.B. 2091 Before the Assemb. Comm. on Judiciary, 2021-22 Reg. Sess. 4 (Cal. 2022) (“Outside of California, several laws have been enacted that effectively ban abortion by diffusing responsibility for the enforcement of abortion restrictions to non-state actors. These laws establish that nearly anyone may sue an individual for acts pertaining to obtaining, or assisting with obtaining, an abortion. These novel rights of action could be characterized as “foreign penal civil actions.”).
181. Although the Huntington v. Attrill standard is still in effect, the Court has never declared a civil law to be penal in nature and therefore unenforceable. See supra note 150.
182. See 146 U.S. 657, 673–74 (1892) (describing the test to determine whether a statute is penal in nature).
183. TEX. HEALTH & SAFETY CODE § 171.207.
184. TEX. HEALTH & SAFETY CODE § 171.208(b).
185. Reproductive Health and Privacy: Hearing on A.B. 2091 Before the Assemb. Comm. on Judiciary, 2021-22 Reg. Sess. 7 (Cal. 2022) (“When examining statutes like the Texas fetal “heartbeat” law, one can indeed see the “penal” nature of those statutes. For example, the statute requires no showing of an individual harm on the part of the plaintiff which is generally required for a civil action . . . .”).
187. TEX. HEALTH & SAFETY CODE § 171.208(b).
The defendant has the burden of proving any viable defenses, such as whether they acted to save the patient’s life.\(^{189}\) According to the *Huntington* test, a law imposes a civil penalty if its primary remedy is to “afford a private remedy to a person injured by the wrongful act.”\(^{190}\) Such a remedy is not required by the Texas statute. The definitions in the statute are incredibly broad and do not require the plaintiff to be directly harmed by the abortion procedure.\(^{191}\) In fact, the statute is construed so broadly that Dr. Braid, the Texas obstetrician, was sued by three separate individuals, including residents of Arkansas and Illinois.\(^{192}\) Not a single plaintiff had any connection with Dr. Braid prior to the lawsuit.\(^{193}\) It thus cannot be said that any of these three plaintiffs were personally injured by Dr. Braid’s actions.

Statements by Texas lobbyists and politicians also illuminate the true intentions of the Texas statute.\(^{194}\) The statements of John Seago, legislative director of Texas Right to Life and one of the law’s primary proponents, further confirmed the law’s punitive intent.\(^{195}\) In an interview reported in *The Atlantic*, Seago explicitly stated that the purpose of the civil liability law was to work around district attorneys in Texas who had agreed not to prosecute abortion providers.\(^{196}\) When he and other lawmakers realized that district attorneys would foil their plans to prosecute abortions, they utilized civil penalties as “the best way to get a pro-life policy into effect.”\(^{197}\) The intent to punish is present, just not in the form of a criminal statute.

Furthermore, when comparing pregnant individuals to abortion providers, he seems to believe that it is unethical to penalize women

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188. See Tex. Health & Safety Code § 171.209(e)(3) ("The affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 171.208 occurred before the Supreme Court overruled either of those decisions.").
191. Texas Heartbeat Act, supra note 6.
192. Complaint, supra note 166, at 3.
193. Id. at 3–4.
194. The Ninth Circuit has previously held that, in determining whether a law is civil or penal, if the law appears to be a hybrid of the two, courts may look to the legislative history. de Fonbrune v. Wofsy, 838 F.3d 992, 1002 (9th Cir. 2016).
196. See id. ("[D]istrict attorneys from around the country . . . said that even if *Roe v. Wade* is overturned, they are not going to use resources holding the abortion industry to account.").
197. Id.
who seek abortions:

There’s a question of morality: Is it ethical to penalize women seeking abortions in Texas? We have categorically argued that women need to be treated differently than abortionists. Even with civil liability, we say that women cannot be the defendants. That’s not the goal.198

This ethical dilemma, he rationalizes, means that the law should separate its treatment of pregnant women and abortion providers. This rationale was codified by S.B. 8, which only authorizes civil penalties for those who aid and abet abortion,199 but is silent on penalties for those who elect to undergo the procedure. This carefully laid out distinction further emphasizes a desire to punish those who violate the Texas statute. By expressing a desire to avoid punishing a specific group by leaving them out of S.B. 8’s scope, Seago implies that the goal of the law is to punish violators, making this a penal law that is not due full faith and credit between states.

Because there is no intention in the statute to afford a private remedy to an injured party whatsoever, the statute’s purpose must be to “punish an offense against the public justice of the state.”200 The legislature created S.B. 8 with the intent to supplement criminal abortion laws already in place.201 Furthermore, its provisions allow for civil lawsuits to be brought by those who were not directly harmed by a defendant.202 These factors imply that the law must be penal in nature. Such laws are not due full faith and credit under Article IV of the United States Constitution.

A.B. 2091 is uniquely tailored to block foreign subpoenas issued under laws that intentionally penalize violators. The legislators assume that subpoenas issued under the Texas statute will most likely be considered final judgments of a penal nature.203 Prior to A.B. 2091, California made it easy for a litigant to bring a foreign subpoena into its courts. The state has adopted the Interstate and International Depositions and Discovery Act, which simplifies the process of obtaining information with a foreign subpoena.204 One way to accomplish this is to submit the foreign subpoena to the clerk of the

198. Id.
199. TEX. HEALTH & SAFETY CODE § 171.208(a).
201. Texas Heartbeat Act, supra note 6, at 1.
202. TEX. HEALTH & SAFETY CODE § 171.208(a).
204. Id. at 6.
superior court, who will then issue a subpoena within the state. The legislature was well aware of this, along with the exception for foreign penal civil actions described in Huntington, when it crafted the law. The Assembly Committee on the Judiciary has clarified that its intent was to make it more difficult for courts to issue certain subpoenas by targeting these penal laws in disguise:

> [T]his bill introduces and defines foreign penal civil actions and prohibits the issuance of subpoenas based on such actions. Given that California can credibly argue that SB 8 and its progeny are purely penal in nature, in keeping with the Supreme Court’s indication that a state need not enforce judgments from penal statutes, California can also opt to refuse to validate a foreign subpoena issued in civil actions arising under those laws. By codifying the definition of a foreign penal civil action, this bill protects Californians from the whims of out-of-state legislators and their desire to regulate the conduct of Californians through overly broad civil actions.

A.B. 2091 amended Section 2029 of the California Code of Civil Procedure to define a “foreign penal civil action” as “a civil action authorized by the law of a state other than this state in which the sole purpose is to punish an offense against the public justice of that state.” This aligns with the definition provided by the Court in Huntington. The provisions added to the California Codes by A.B. 2091 center on this definition and further clarify the law’s intent. The statute prohibits any “provider of health care, health care service plan, contractor, or employer” from giving information requested by a subpoena based on such an action. The statute also prohibits a clerk of the court or an attorney from issuing any subpoena that “relates to a foreign penal civil action” and would require a party to disclose “information related to sensitive services.”

A.B. 2091 further protects pregnant people by prohibiting any state

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205. Id.
206. Id. at 6–7.
208. CAL. CIV. PROC. CODE § 2029.200.
209. See Huntington v. Attrill, 146 U.S. 657, 673–74 (1892) (describing a foreign penal civil action as one that is intended to “punish an offense against the public justice of the state.”).
210. CAL. CIV. PROC. CODE § 56.108.
211. CAL. CIV. PROC. CODE §§ 2029.300(c)(2); 2029.350(c). The California Code defines “sensitive services” to include “all health care services related to . . . sexual and reproductive health.” CAL. INS. CODE § 791.02(ac).
or local government from sharing information that might identify “an individual who has sought or obtained an abortion if the information is being requested based on either another state’s laws [that interfere with the person’s reproductive rights] . . . or a foreign penal civil action.”212 Any health insurer who violates the law is subject to a fine.213 Finally, the law prohibits prison officials from disclosing such information about incarcerated persons who have sought or obtained abortions.214

The law has a broad intent to protect the “fundamental right of privacy with respect to . . . personal reproductive decisions” and to supplement existing laws that protect health privacy.215 By defining a “foreign penal civil action” in a way that aligns with the definition in Huntington and likely encompasses the provisions and intent of the Texas Heartbeat Act, the California legislature has most likely managed to avoid giving full faith and credit to any foreign subpoena that is based on S.B. 8 or similar laws. These statutory changes will likely succeed in limiting the reach of foreign penal civil actions intended to interfere with abortion access and reproductive rights.216 If litigation arises to challenge the statute, which is probable given the contentious nature of laws related to abortion, a court will probably find that under the exception for foreign penal civil actions, A.B. 2091 does not violate the Full Faith and Credit Clause of the Constitution.

C. A Potential Hurdle: A.B. 2091 as an Intentionally Hostile Act

As this area of law continues to develop, it is possible that a court may find that the California law is hostile to the Texas Heartbeat Act. If this occurs, a court may be more likely to hold that A.B. 2091 conflicts with the Full Faith and Credit Clause. The Supreme Court has previously hinted that the clause may not allow a state court to avoid giving full faith and credit to a statute when the forum state is intentionally hostile to the other state’s policies.217 States must apply the laws of another state so long as there are “no sufficient policy

212. CAL. HEALTH AND SAFETY CODE § 123466(b) (emphasis added).
213. CAL. INS. CODE § 791.29.
214. CAL. PEN. CODE § 3408(r).
217. See Carroll v. Lanza, 349 U.S. 408, 413 (1955) (stating that the Full Faith and Credit Clause precludes states from adopting policies that are hostile to the public acts of other states).
considerations to warrant such refusal.”\footnote{Id.} It is permissible for a state to apply its own laws if the goal is to “give affirmative relief for an action arising within its borders.”\footnote{Id.}

A court may find the language used in the California statute and legislative history to be directly hostile to S.B. 8, which could be a possible violation of the Full Faith and Credit Clause, although this area of law is not fully developed enough for the outcome to be certain. The legislative history directly refers to S.B. 8 and contrasts it to California’s robust abortion protection and privacy laws.\footnote{Reproductive Health and Privacy: Hearing on A.B. 2091 Before the Assemb. Comm. on Judiciary, 2021-22 Reg. Sess. 1 (Cal. 2022).} Supporters of the Texas law may argue these specific references to S.B. 8 or similar statutes in other states make the California statute hostile to their public policies of protecting the unborn by punishing those who aid and abet abortion procedures. California’s refusal to issue subpoenas in cases arising under S.B. 8 will support that claim.\footnote{CAL. CIV. PROC. CODE § 56.108.}

In response, it is possible for California to claim that there are “sufficient policy considerations to warrant such refusal.”\footnote{Carroll, 349 U.S. at 413.} California’s Constitution demonstrates an unwavering commitment to protecting reproductive rights, including the right of an individual to receive an abortion.\footnote{CAL. CONST. art. I, § 1.1.} A.B. 2091 expanded upon this right by strengthening protections for abortion providers.\footnote{CAL. CIV. PROC. CODE § 56.108.} One can argue that protecting the right to assist individuals who seek abortions is integral to California’s Constitution and provides a strong enough policy consideration to override the “policy of hostility” exception to the full faith and credit doctrine.

If the act of assisting an abortion occurs “within [the forum state’s] borders,”\footnote{Carroll, 349 U.S. at 413.} a court may be even more likely to uphold the California law, because the policy would not appear hostile to S.B. 8 if the aiding and abetting did not occur within Texas’s boundaries. For example, such a situation might arise if a pregnant Texas resident travels to California for an abortion. It appears more probable that a subpoena from Texas would be awarded full faith and credit in a situation where the aiding and abetting took place within Texas, because there is a stronger
connection between the action committed and the interests of Texas legislators. This could arise if, for example, an abortion provider assists a pregnant person by sending pills to induce an abortion across state lines or travels to Texas to perform the procedure. While a claim under the hostility exception by S.B. 8’s supporters would certainly have some merit, it is possible that the overall goal of defending California policy will protect the statute in the event of a legal challenge.

CONCLUSION

The overruling of Roe v. Wade was not the end of Dr. Braid’s story. He had to close his Texas practice, and he plans to provide abortion care in Illinois and New Mexico.226 Although the Texas district court dismissed the lawsuit against him on the issue of standing, the holding itself was vague and open-ended,227 meaning that S.B. 8 remains in place. Litigation has continued to surface under S.B. 8, and courts are allowing this litigation to proceed in the wake of the Dobbs ruling. As recently as March 2023, a court has gone so far as to allow a man to sue his wife’s friends because they helped her obtain pills for an abortion.228 S.B. 8 will remain in effect for the foreseeable future, making the laws that limit its reach even more significant.

Legal challenges will probably arise under both A.B. 2091 and S.B. 8. Several layers of constitutional doctrine work together to insulate A.B. 2091 from legal challenge. The public policy exception to the Full Faith and Credit Clause is arguably one of the most developed doctrines affecting public acts and records, which may impact the treatment of subpoenas between states. California’s policies have steadfastly protected abortion rights for nearly half a century, and this policy seems unlikely to change anytime soon. However, this policy also has its limits, and if a court with binding authority over California determines subpoenas are final judgments, the public policy exception cannot apply. Nevertheless, the penal law exception as clarified in Huntington ensures the validity of A.B. 2091 as it acts to prevent the issuance of subpoenas issued under foreign penal civil actions. S.B. 8’s provisions meet the criteria of a punitive law rather than the provision

of a civil remedy, so these subpoenas probably cannot be enforced in courts outside of Texas. Although litigants in support of S.B. 8 may argue that A.B. 2091 is hostile to Texas’s policies and cannot be enforced under the doctrine of intentionally hostile acts, California’s policy considerations seem to outweigh the need for Texas to issue subpoenas. This is especially true if the majority of events in a case occur within California’s borders.

Many legal questions remain unanswered in the aftermath of the Supreme Court’s decision to overturn *Roe v. Wade*. As long as the right to travel across state lines to procure an abortion remains unanswered by a Supreme Court majority, new legal challenges will be presented as states legislate near the current bounds of the law. Future court decisions will determine how individual states address issues regarding abortion. As of now, it is reasonably clear that the limitations imposed under the Full Faith and Credit Clause and its exceptions should allow California to protect abortion-related records by blocking subpoenas issued under S.B. 8 and similar statutes.

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229. *See supra* notes 28–29 (discussing how Justice Kavanaugh stated in his concurring opinion in *Dobbs v. Jackson Women’s Health Organization* that the right to travel to procure an abortion would be protected by the constitutional right to travel, but the majority has not confirmed this).