

Senate Finance Committee
SB 786 – Reproductive Health – Protected Information and Insurance Requirements
March 1, 2023
Favorable

I am a professor of at University of Connecticut School of Law who studies the privacy of medical records. I write to support SB786 because, as I have argued elsewhere, states that wish to maintain significant access to abortion within their borders and to protect in-state providers and others who help facilitate abortion need to take action to protect those medical records from being widely and near-automatically shared across state boundaries in ways that can put patients and those who help them at risk. For a more detailed analysis of these problems and potential solutions, see my recent article in the Yale Law Journal, *The Abortion Interoperability Trap*, <https://www.yalelawjournal.org/forum/the-abortion-interoperability-trap>.

The bottom line is that better protections for electronic medical records related to abortion (and other potentially at-risk care, including miscarriage management and various forms of assisted reproduction) are necessary to protect both patients and providers. State legislatures like Maryland's are especially well-situated to address the problem within their borders. In the absence of statutes like SB786, private entities face incentives to err on the side of *sharing* medical information even when it might pose risks to patients and providers.

Medical information—including the details of abortion procedures or medication—travels very widely throughout our medical system. Medical records move much more freely now than even a few years ago, because electronic records are far more interoperable thanks in part to recent federal regulations intended to promote widespread sharing. This means that if you receive an abortion in, say, Maryland, and subsequently go to a hospital in, say, Texas, for care, there is a good chance that the medical record for abortions will follow you and be accessible to a wide array of providers and treatment-adjacent practitioners (e.g. lab technicians, etc.) in Texas. Since there are significant forces that are seeking to go after out-of-state or cross-state abortions via creative litigation and prosecution (and those forces may well be strengthened after this spring legislative session), that easy flow of medical information is a problem for both patients and providers who might be targeted (pursuant to out-of-state laws) for performing or assisting with abortions that were legal in-state. This is especially important as travel for abortion-related care has significantly increased since *Dobbs*.

Requiring health information exchanges as well as the state health commission to take steps to protect information about protected reproductive care is an appropriate intervention that will protect patients and make it less likely for in-state providers and practitioners to find themselves in the cross-hairs of out-of-state vigilantes who seek to eliminate and punish abortion everywhere.

I do have one concern about the bill as currently drafted---Section 4-305 seems to expressly permit the sharing of private medical information in out-of-state investigations into abortions that are legal in Maryland. That seems out of keeping with the spirit of the rest of the statute. Section 4-305 reads “(b) a health care provider may disclose a medical record without the authorization of a person in interest . . . (2) If the person given access to the medical records

signs an acknowledgment of the duty under this Act not to redisclose any patient identifying information, to a person for . . . (iv) an out-of-state investigation of legally protected health care provided in the State.” This may be intended to enable providers to defend themselves in investigations by showing that what they did was lawful in a particular case. But I am concerned that it is currently phrased broadly enough that it would allow bounty-hunters under SB8-type statutes, or other future litigants to have a stronger argument for obtaining patient records than they would absent this language. It would seem more consistent with the statute's overall apparent purpose to more specifically clarify the circumstances under which such disclosures would be acceptable. But it might better protect providers and patients to eliminate this altogether.

That said, I am highly supportive of the statute’s overall effort to protect patient and provider personal information from exposure.

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