

Date of Hearing: June 1, 2022

Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 836 (Wiener) – As Amended February 18, 2022

SUMMARY: Restores lapsed statutes prohibiting the disclosure of a person's immigration status in open court by a party or their attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing. Specifically, **this bill:**

- 1) Prohibits the disclosure of a person's immigration status in open court in a criminal case by a party or their attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure.
- 2) States that this prohibition does not do any of the following:
 - a) Apply to cases in which a person's immigration status is necessary to prove an element of an offense or an affirmative defense;
 - b) Limit discovery in a criminal action; or,
 - c) Prohibit a person or their attorney from voluntarily revealing the person's immigration status to the court.
- 3) Provides that these provisions do not change a prosecutor's existing obligation to disclose exculpatory evidence.
- 4) Prohibits the disclosure of a person's immigration status in open court by a party or their attorney in a civil action other than a personal injury or wrongful death action (where evidence of immigration status is never admissible) unless the judge presiding over the matter first determines that the evidence is admissible at an in camera hearing.
- 5) States that this prohibition does not do any of the following:
 - a) Apply to cases in which a person's immigration status is necessary to prove an element of a claim or an affirmative defense;
 - b) Impact otherwise applicable laws governing the relevance of immigration status to liability or the standards applicable to inquiries regarding immigration status in discovery or proceedings in a civil action; or,
 - c) Prohibit a person or their attorney from voluntarily revealing the person's immigration status to the court.
- 6) Contains an urgency clause.

EXISTING LAW:

- 1) States that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, §§ 350, 351.)
- 2) Provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory rule of evidence relating to privilege or hearsay, or inadmissibility. (Cal. Const., art. I, § 28.)
- 3) Defines “relevant evidence” as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)
- 4) Authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)
- 5) Allows the credibility of a witness to be attacked or supported by any party including the party calling the witness. (Evid. Code, § 785.)
- 6) Establishes that in determining the credibility of a witness and except as otherwise provided by law, the court or jury may consider any matter that has any tendency to prove or disprove the truthfulness of the witness' testimony, including but not limited to:
 - a) The demeanor of the witness while testifying and the manner in which the witness testifies;
 - b) The character of the witness's testimony;
 - c) The extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which the witness testifies;
 - d) The extent of the witness's opportunity to perceive any matter about which the witness testifies;
 - e) The witness's character for honesty or veracity or their opposites;
 - f) The existence or nonexistence of a bias, interest, or other motive;
 - g) Any statement previously made by the witness that is consistent with the witness's testimony at the hearing;
 - h) Any statement made by the witness that is inconsistent with any part of the witness's testimony at the hearing;
 - i) The existence or nonexistence of any fact testified to by the witness;

- j) The witness's attitude toward the action in which the witness testifies or toward the giving of testimony; or,
 - k) The witness's admission of untruthfulness. (Evid. Code, § 780.)
- 7) Provides that in a civil action for personal injury or wrongful death, evidence of a person's immigration status shall not be admitted into evidence, nor shall discovery into a person's immigration status be permitted. (Evid. Code, § 351.2.)
- 8) Provides that for purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law. (Civ. Code, § 3339, subd. (b); Gov. Code, § 7285, subd. (b); Health & Saf. Code, § 24000, subd. (b); Lab. Code, § 1171.5, subd. (b).)

FISCAL EFFECT:

COMMENTS:

- 1) **Author's Statement:** "Senate Bill 836 re-enacts provisions which protected a person's immigration status in a public court record, unless the presiding judge determined that immigration status was relevant information. Senate Bill 785 (Wiener, Chapter 12, Statutes of 2018) was enacted to keep immigration status private in public court records, but it expired on January 1, 2022. SB 836 ensures that public courts continue to protect a person's immigration status.

"SB 785 prohibited the inclusion of evidence of a person's immigration status in a public court record -- unless the party seeking its inclusion obtained a ruling by the presiding judge at an in-camera hearing that the evidence was relevant -- until January 1, 2022. SB 785 guaranteed a procedural requirement that protected a person's immigration status from being exposed in open court prior to review by the presiding judge. Immigration status was only considered admissible evidence when a judge ruled it to be so at an in camera hearing. Only then could it be part of public court records. SB 785 did not prohibit an individual from voluntarily revealing their own immigration status in court. The protections established by SB 785 also applied to both civil and criminal cases.

"In March 2017, California Chief Supreme Court Justice Tani Cantil-Sakauye sent a letter to U.S. Former Attorney General Jeff Sessions and Former Homeland Security Secretary John Kelly expressing concern over reports of immigration agents stalking undocumented immigrants in California courthouses. Chief Justice Cantil-Sakauye said, 'Our courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws.'

"Prior to SB 785 becoming law, there were numerous documented examples of defense attorneys exposing the immigration status of witnesses and victims of crimes in California courthouses. In addition, there were reports of immigration agents throughout the country monitoring and detaining individuals at courthouses.

“The protections guaranteed by SB 785 ended on January 1, 2022. Many immigrants continue to feel apprehension in court settings for fear of being targeted and arrested by Immigration and Customs Enforcement (ICE) agents. Every day that passes without these protections puts immigrants at risk.”

- 2) **Need for this Bill:** The fair and effective administration of justice requires that all participants in the process feel free and secure to present their case or provide their testimony before the court. Unfortunately, some undocumented immigrants may be reluctant to do so because taking part in the formal legal system might expose their immigration status.

In recognition of this dynamic, California enacted several laws to ensure that designed to ensure that undocumented immigrants feel safe participating in the legal system. Of particular relevance to this bill, California enacted SB 785 (Wiener) Chapter 12, Statutes of 2018) prohibiting the disclosure of evidence about immigration status in open court unless pre-approved by a judge during a closed hearing on the matter. SB 785 established a system for avoiding the exposure of immigration status information in court unless and until a judge determined that the information was relevant and admissible. Specifically, rather than permitting parties to begin questioning or discussing the immigration status of any other party or witness in open court, SB 785 required the party seeking to introduce the evidence to request a confidential, in camera hearing during which the judge makes a determination as to whether or not the evidence is relevant and admissible. If the judge ruled the immigration status evidence to be relevant and admissible, the case proceeds accordingly. If the judge rules that the immigration status evidence is not relevant, both the evidence itself, and the discussion about whether to admit it remains confidential. However, SB 785 contained a sunset clause that caused it to expire on December 31, 2021.

This bill would reenact these provisions of law.

- 3) **Immigration Arrests at Courthouses:** The purpose of the original law that this bill seeks to reenact was to provide protection to immigrants in courtrooms who may be targeted by Immigration and Customs Enforcement (ICE) agents for deportation. Under the Trump Administration, there were increased reports of ICE agents arresting immigrants in courthouses which raised concerns by local jurisdictions that the practice had a chilling effect on immigrants’ participation in prosecuting criminals as victims and witnesses. In response to states’ concerns over these arrests, the Departments of Justice and Homeland Security (DHS) defended the practice stating that immigration agents will continue to make arrests at courthouses and encouraged cities to revoke their sanctuary policies if they object. (Kopan, *Trump Administration Says ICE Courthouse Arrests Will Continue*, CNN, Mar. 31, 2017 <<http://www.cnn.com/2017/03/31/politics/ice-arrests-courthouses-sessions-kelly>> [as of May 18, 2022].)

In January of 2018, ICE issued guidelines on arrests at courthouses which stated that the ICE would continue to take “actions against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted aliens are present at that specific location.” (ICE, Directive No. 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018),

<https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> [as of May 18, 2022].) The directive noted that “[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband. Accordingly, civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents.” (*Ibid.*) The directive also stated that “courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails.” (*Ibid.*)

In April of 2021, DHS under the Biden Administration issued new guidelines that limited when immigration arrests could take place in courthouses. The new policy allows for immigration arrests at courthouses to occur when: (1) it involves a national security matter, (2) there is an imminent risk of death, violence, or physical harm to any person, (3) it involves hot pursuit of an individual who poses a threat to public safety, or (4) there is an imminent risk of destruction of evidence material to a criminal case. The guidelines specify however that arrests may be made based on public safety threats in the absence of hot pursuit where necessary and with prior approval. (See <https://www.dhs.gov/news/2021/04/27/dhs-announces-new-guidance-limit-ice-and-cbp-civil-enforcement-actions-or-near> [as of May 18, 2022].)

- 4) **Argument in Support:** According to the *Coalition for Humane Immigrant Rights* (CHIRLA), a co-sponsor of this bill, “We believe SB 836 is an important and necessary bill to make court rooms and our judicial system a place where everyone, regardless of their immigration status, can participate safely. SB 836 removes the sunset date on Senate Bill 785, which protected a person’s immigration status from disclosure in a public court record, unless the presiding judge determined that immigration status information was admissible. Senate Bill 785 (Wiener, Chapter 12, Statutes of 2018) was enacted to keep immigration status private in public court records, but it expired on January 1, 2022. CHIRLA supported this original legislation. SB 836 ensures that courts continue to protect a person’s immigration status from unnecessary disclosure.

“In March 2017, California Chief Supreme Court Justice Tani Cantil-Sakauye sent a letter to then U.S. Attorney General Jeff Sessions and Homeland Security John Kelly expressing concern over reports of immigration agents stalking undocumented immigrants in California courthouses. Chief Justice Cantil-Sakauye said, ‘Our courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country’s immigration laws.’ Prior to SB 785 becoming law, there were numerous documented examples of defense attorneys exposing the immigration status of witnesses and victims of crimes in California courthouses. In addition, there were reports of immigration agents throughout the country monitoring and detaining individuals at courthouses. Despite the change in federal administrations, courthouses continue to be accessible to immigration agents and a future administration could return to widespread courthouse immigration enforcement.

“Moreover, even absent immigration agents being present in courthouses, numerous courts in California and across the country have long recognized the intimidating and chilling effect disclosure of immigration status in court proceedings has on immigrants’ ability to enforce their rights or participate more generally in court proceedings.

“The protections guaranteed by SB 785 ended on January 1, 2022. Many immigrants continue to feel apprehension in court settings for fear of being targeted and arrested by Immigration and Customs Enforcement (ICE) agents. SB 836 is essential to prevent immigration status from being wielded as a tool of intimidation as immigrant individuals go to court to reclaim wages, keep their housing, and ensure their basic rights are not being violated. Every day that passes without these protections puts immigrants and their broader communities at risk.”

5) **Argument in Opposition:** None submitted.

6) **Prior Legislation:**

- a) SB 785 (Wiener), Chapter 12, Statutes of 2018, was nearly identical to this bill. SB 785 contained a sunset clause which expired on December 31, 2021.
- b) AB 1690 (Assembly Committee on the Judiciary), Chapter 160, Statutes of 2017, codified case law indicating that evidence of immigration status is irrelevant for the purposes of establishing liability when enforcing state labor, employment, civil rights, consumer protection, and housing laws, and that no inquiry shall be permitted into a person’s immigration status, unless it is necessary in order to comply with federal immigration laws.
- c) AB 2159 (Gonzalez), Chapter 132, Statutes of 2016, established that, in civil actions for personal injury or wrongful death, evidence of a person’s immigration status is not admissible and discovery of a person’s immigration status is not permitted.
- d) AB 560 (Gomez), Chapter 151, Statutes of 2015, provided that the immigration status of a minor child seeking recovery under any applicable law is irrelevant to the issues of liability or remedy and prohibited discovery or other inquiry in a civil action or proceeding into a minor child’s immigration status.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Co-Sponsor)
Asian Americans Advancing Justice - California
California Employment Lawyers Association
California for Safety and Justice
California Immigrant Policy Center
California Partnership to End Domestic Violence
California Rural Legal Assistance Foundation, INC.
Center for Workers' Rights
Centro Legal De LA Raza
Coalition for Humane Immigrant Rights (CHIRLA)
Disability Rights California
Ella Baker Center for Human Rights
Equal Rights Advocates
Family Violence Appellate Project

Friends Committee on Legislation of California
LA Raza Centro Legal
Legal Aid At Work
National Association of Social Workers, California Chapter
Oakland Privacy
Pico California
Prosecutors Alliance California
Prosecutors Alliance of California
San Diego County District Attorney's Office
San Francisco District Attorney's Office
UC Hastings Community Justice Clinics
Warehouse Worker Resource Center

Opposition

None submitted

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