



April 29, 2022

The Honorable Chris R. Holden
Chair, Appropriations Committee
State Capitol
1021 O Street, Suite 5650
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Tel. (916) 319-2041

Dear Chair Holden:

It has come to our attention that on April 20, 2022, Assembly Bill (“AB”) 2223 passed a vote in the Committee on Health and was subsequently referred to your Committee on Appropriations. We are also aware that your Committee has scheduled AB 2223 for a hearing on May 4, 2022. As such, we are writing this letter to draw to your attention some serious legal issues that this bill presents, and have provided our legal analysis below. Due to these grave issues with the language of the bill, we respectfully request that you do everything in your power to keep this bill from advancing out of your Committee. The American Center for Law and Justice (“ACLJ”) sends this letter opposing AB 2223 on behalf of itself and over 440,000 of its members, including 43,221 California residents, who value the sanctity of human life.¹

By way of introduction, the ACLJ is a national nonprofit organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. Counsel for the ACLJ have presented expert testimony before state and federal legislative bodies, and have presented oral argument, represented parties, and submitted amicus briefs before the Supreme Court of the United States and numerous state and federal courts in cases involving a variety of issues, including the right to life. *See, e.g., Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); *Dobbs v. Jackson Women’s Health Org.*, No. 19-1393 (Sup. Ct.).

On February 15, 2022, AB 2223 was introduced by Assembly Member Wicks. It was amended and referred to the Health and Judiciary Committees on March 17, 2022. The Judiciary

¹*Stop Barbaric New Abortion Laws*, ACLJ.ORG, <https://aclj.org/pro-life/stop-barbaric-new-abortion-laws> (last visited Mar. 31, 2022).



Committee amended the bill, passed it, and re-referred it to the Health Committee on April 5, 2022. The Health Committee then, passed AB 2223 on April 19, 2022 and referred it to your Committee where it now waits to be scheduled for hearing. We respectfully request that you reject AB 2223 and the unnecessary and radical threat it poses to both existing and future laws that value both life and conscience.

Legal Analysis of AB 2223

I. Background

Assembly Bill 2223 has been proffered by Assembly Member Wicks as necessary because “across the country, pregnant people are under threat of civil penalties for their actual, potential, or alleged pregnancy outcomes and civil penalties have been threatened against people who aid or assist pregnant people in exercising their rights.”² Moreover, the bill has been posed as necessary to protect women from civil or criminal penalties for “miscarriages or stillbirths,” though the evidence to support this supposedly grave “threat” is substantially lacking, and a careful legal analysis of the bill reveals that it creates a host of deeply troubling legal issues in its attempt to solve a problem that does not in fact exist.

In fact, the legal analysis prepared by the Chief Counsel for the Committee on Judiciary addressed some of these legal concerns, including the concern that

the “perinatal death” language [included in the original bill] could lead to an unintended and undesirable conclusion [that] the bill could be interpreted to immunize a pregnant person from all criminal penalties *for all pregnancy outcomes, including the death of a newborn for any reason during the ‘perinatal’ period after birth, including a cause of death which is not attributable to pregnancy complications.*³

In other words, it could effectively legalize infanticide up to 28 days after the baby is born (the perinatal period) “for any reason.”

Subsequent to testimony and legal analysis opposing this bill, and in conjunction with the analysis prepared for the Committee on Judiciary, Assembly Member Wicks made several

²AB-2223 *Reproductive Health*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202120220AB2223 (last visited Apr. 27, 2022).

³*Id.*

amendments to the bill.⁴ Those amendments and their effect on the bill, discussed in detail below, do little to nothing, however, to address or fix the legal concerns that this bill will effectively legalize infanticide in some instances.

II. Legal Issues with AB 2223

The amendments to AB 2223 made by Assembly Member Wicks and adopted by both the Committee on Health and Committee on Judiciary are bolded in the following text:

123467.

- (a) Notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights ***under this article***, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death ***due to a pregnancy-related cause***.

After our thorough legal review of this amended bill, we have concluded that the amendments do not resolve the original issues with the bill, and it still could allow infanticide in a number of ways.

a. "Under This Article"

The first amendment "under this article" was added because the Committee staff analysis of the bill determined that the bill could be interpreted to

immunize a pregnant person from not only all civil liability and criminal penalty for their pregnancy outcomes (consistent with existing law), but also from being "otherwise deprived of their rights" for any of their actions with respect to their pregnancy.

The analysis of the bill also noted that "existing law allows a pregnant person's actions during pregnancy [such as drug use] to be considered in a manner that could impact their parenting rights," and that the bill, as written, could affect those laws. Thus, Assembly Member Wicks added "under this article" to the text. However, that amendment does not impact our original analysis of specifically concerning the removal of criminal and civil penalties for pregnancy "outcomes," which is unaffected by the addition of "under this article," and is still problematic.

⁴*AB-2223 Reproductive Health: Today's Law as Amended*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2223&showamends=false (last visited Apr. 27, 2022).

b. “Due to a Pregnancy-Related Cause”

The second amendment, the addition of “due to a pregnancy-related cause,” does little to alleviate the concerns we have that this bill could effectively legalize some instances of infanticide. This is true for three different reasons.

First, the bill, as written and amended, states: “Notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty . . . based on their **actions or omissions** with respect to their . . . **pregnancy outcome.**”

The term “pregnancy outcome” has a specific meaning and is used in reference to both preborn children and newborns.⁵ A pregnancy outcome includes full-term birth, premature birth, spontaneous miscarriage, and abortion.⁶ Under each of these categories are subcategories that include: vaginal or Caesarean birth, **the birth of a healthy or sick baby** (e.g., birth trauma, infection), stillbirth, or the birth of a child with congenital anomaly or birth defects.⁷

For this reason, under the bill, a person could not be subject to civil or criminal liability or penalty if they withheld (omitted) care from either a full-term or premature infant – born alive – who subsequently dies due to lack of care.

Second, the bill has specifically listed “abortion” as a pregnancy outcome, and it is well established that live births can occur following a failed abortion.⁸ Thus, according to this bill, there would be no civil or criminal liability or penalty for a woman (or any person aiding or assisting her) who “self-performs” an abortion (through the use of abortion pills), and then withholds care from an infant born alive after a failed abortion.

For example, just a few days ago, a recent report from the U.K. detailed how a baby died four days after being born alive following a botched medical abortion. According to the report, the baby’s mother took mifepristone because she had “decided to legally abort the pregnancy on health grounds believing that she was 12 weeks [pregnant], when in fact she was more than twice that [30 weeks pregnant].”⁹ After the baby’s death, an investigation revealed that “pre-natal scans were either not carried out or were done erroneously.” While the baby in this story did receive medical

⁵NIDCR Pregnancy Outcome Form, NAT’L INSTITUTES OF HEALTH, <https://www.nidcr.nih.gov/sites/default/files/2018-04/pregnancy-outcome-form.pdf?msclkid=812bbf7bbe8411ecaf30e1fe1970132f>.

⁶*Id.*

⁷*Id.*

⁸Matthew Clark, *362 Infants Born Alive as Result of Botched Abortions Died in Last Decade*, ACLJ.ORG (May 13, 2013), <https://aclj.org/planned-parenthood/362-infants-born-alive-result-botched-abortions-died-decade?msclkid=c5742317be8911ec8281078523c0c36e>.

⁹Matt Powell, *Baby Died After 30-Week Pregnant Mother Took an Abortion Pill Thinking She was Just 12 Weeks Gone, Inquest Hears*, Daily Mail (Apr. 12, 2022 8:22 AM), <https://www.dailymail.co.uk/news/article-10711221/Baby-died-doctors-gave-30-week-pregnant-mother-abortion-pill-thinking-12-weeks.html>.

attention after his birth, bills like AB 2223 would ensure that medical attention for babies born alive in these kinds of cases is not required.

As you may be aware, abortion supporters are actively trying to reduce restrictions on and expand access to the exact medical abortion pills used by the woman in that story. Currently, medication abortions account for more than half of all abortions in the United States.¹⁰ And nearly 20% of the medication abortions occurring in the United States are taking place in California.¹¹ Reduced restrictions on medication abortion pills allow women to access these pills without in-person physician visits or ultrasounds to verify the actual pregnancy stage and ensure that the woman is not experiencing an ectopic pregnancy.

The story above perfectly illustrates what happens when abortion restrictions are removed – putting women and preborn (viable) babies at risk. It is also a perfect example of the situation contemplated by Virginia’s former Governor Northam when he spoke about keeping babies “comfortable” while there was a “discussion” as to what to do with the baby born alive after a failed abortion.¹² Bills like this are not a coincidence, as it is obvious to both pro-life and pro-abortion advocates that there will likely be an increase in these kinds of failed-abortion births as access to unregulated or medically unsupervised medication abortion increases.

Further, under the express language of the bill where the “pregnancy outcome” is due to an intended and attempted (but failed) “abortion,” the “person shall not be subject to . . . criminal liability or penalty . . . based on their actions.” On its face, it would appear that this language could allow that individual to kill the child as was initially intended, circumventing liability under current California law that would prevent such infanticide. While that may not seem plausible at first blush, it is well known in legal circles that ill-worded laws often lead to unintended consequences at the hands of creative defense attorneys.

Thirdly, the amended bill does not limit immunization from civil and criminal liability only to live births, “miscarriage, stillbirth, or abortion.” The bill added a category: “perinatal death.”

Because the bill – as originally written – could be interpreted (as was confirmed by the committee’s legal analysis)¹³ to protect both the woman and *any person* assisting the woman from civil and criminal liability related to the death of an infant in the perinatal period for “any

¹⁰Rachel K. Jones, et. al, *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INSTITUTE (Feb. 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>.

¹¹Carole Novielli, *Study: California Commits 20% of Nation's Total Chemical Abortions*, LIVE ACTION (Jan. 25, 2022, 8:37 AM), <https://www.liveaction.org/news/study-california-commits-20-nations-chemical-abortions/>

¹²Matthew Clark, *VA Governor Northam Advocating Infanticide Tracks with Intent Behind the Barbaric Bill He Was Promoting*, ACLJ.ORG (Feb. 1, 2019), <https://aclj.org/pro-life/va-governor-northam-advocating-infanticide-tracks-with-the-intent-behind-the-barbaric-bill-he-was-promoting>.

¹³*Id.*

reason,” the author of the bill added “due to a pregnancy- related cause” following the term “perinatal death.” Now, the bill reads:

a person shall not be subject to civil or criminal liability or penalty . . . based on their actions or omissions with respect to their . . . actual, potential, or alleged pregnancy outcome . . . or perinatal death *due to a pregnancy-related cause*.

While the analysis of the bill stated that this phrase was intended to clarify “that ‘perinatal death’ is intended to be the consequence of a *pregnancy complication*,” the bill itself does not use the term “pregnancy complication,” which is in itself a term of art. “Pregnancy complication” is a common medical term which encompasses both the health of the mother and the baby and includes situations such as stillbirth, gestational diabetes, and preterm delivery/birth.¹⁴

If that were in fact the intent, the legislature could have chosen to use that term; however, that is not the term used. The amendment to the bill instead uses the phrase “due to a pregnancy-related cause.” And the bill does not define “pregnancy-related cause,” which is a much more ambiguous term. Since the author of the bill felt it unnecessary to define “pregnancy-related cause,” the first thing that we did in analyzing this part of the amendment is define the term.

In general, “pregnancy-related cause,” is a term of art that is quite broadly interpreted. In fact, **homicide of “pregnant and recently pregnant women”** is listed as a leading “pregnancy-related cause” of death under federal law.¹⁵

Most (if not all) statutes use “pregnancy-related cause” in reference solely to the mother’s life/health. This is true under California law where “pregnancy-related death” is defined as “the death of a person while pregnant or within 365 days of the end of pregnancy, irrespective of the duration or site of the pregnancy, from *any cause* related to, or aggravated by, the pregnancy or its management, but not from accidental or incidental causes.” Cal. Health & Safety Code § 123630.2 (Deering, Lexis Advance through Chapter 14 of the 2022 Regular Session). Similarly, the CDC defines a “pregnancy-related death” as “the death of a woman **during pregnancy or within one year of the end of pregnancy** from a pregnancy complication, a chain of events initiated by pregnancy, or the aggravation of an unrelated condition by the physiologic effects of pregnancy.”¹⁶

¹⁴*Pregnancy Complications*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html?msclkid=6ad79cd6be8b11ec8f7fdd10239ecf9d> (last visited Apr. 27, 2022).

¹⁵See, e.g., 42 U.S.C. § 280g-4 note (findings under 119 Stat. 3024, Sec. 501(6) “Pregnant and recently pregnant women are more likely to be victims of homicide than to die of any other pregnancy-related cause.”), available at <https://www.govinfo.gov/content/pkg/STATUTE-119/pdf/STATUTE-119-Pg2960.pdf#page=65>. See also, Alia Shoaib, *Homicide is the Leading Cause of Death for Pregnant Women in the United States, a New Study Found*, Insider (Dec. 19, 2021, 7:16 AM), <https://www.insider.com/pregnant-women-in-the-us-homicide-leading-cause-of-death-report-says-2021-12>.

¹⁶*Preventing Pregnancy-Related Deaths*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternal-mortality/preventing-pregnancy-related->

(Note: pregnancy-related death *includes* but is not *limited* to a pregnancy complication. In other words, again, the term used is legally broader than the claimed intent.) Other pregnancy-related causes of death include: heart disease and stroke, infections, and severe bleeding.¹⁷

Nowhere in our research were we able to find the term “pregnancy-related cause” used in relation to newborn or infant deaths or health conditions. It does not occur in California Code in relation to infants, and thus its application in AB 2223 is novel.

c. “*Unintended Consequences*”

In conducting a legal analysis regarding legislative interpretation, because this medical term of art has not been applied to the deaths of perinatal infants previously under California law, it is likely that a court would look to the most analogous use of this term in the law. If that term were applied to infants during the perinatal period in the same way it is applied to women in the year following the end of the pregnancy, it very well may still have “unintended consequences.”

First, a maternal death due to a “pregnancy-related cause” encompasses up to a year post-birth. While the bill uses the term “perinatal,” this term has also been applied in instances that cover over a year post-birth.¹⁸ As is noted in an article published in the National Library of Medicine: “The perinatal period, broadly defined, encompasses the time frame from one year before to 18 to 24 months after the birth of the child.”¹⁹ Thus, the addition of a term that is generally used to encompass up to a year post-birth is concerning, as it could broaden, not lessen, the period in which investigations into the “perinatal deaths” of infants are restricted.

Second, the term “pregnancy-related cause” as applied to pregnant and recently pregnant women includes **certain homicides** as “pregnancy-related” causes of death under federal law, as noted above.²⁰ By applying this same term now to perinatal infants, the bill may still shield certain homicidal deaths of infants from civil or criminal liability or penalties.

In other words, referring to “perinatal death due to a pregnancy-related cause” does not in any way prevent this provision from authorizing certain types of infanticide, if they can be defined in some way as “pregnancy-related.” For example, it could be applied where the person kills an

deaths.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Freproductivehealth%2Fmaternalinfanthealth%2Fpregnancy-relatedmortality.htm (last visited Apr. 27, 2022).

¹⁷Press Release: Pregnancy-Related Deaths Happen Before, During and Up to a Year After Delivery, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/media/releases/2019/p0507-pregnancy-related-deaths.html> (last visited Apr. 27, 2022).

¹⁸See e.g., Helfer, R E. “The perinatal period, a window of opportunity for enhancing parent-infant communication: an approach to prevention.” *Child Abuse & Neglect* vol. 11,4 (1987) 565-79, *available at* <https://pubmed.ncbi.nlm.nih.gov/3322517/>.

¹⁹*Id.*

²⁰42 U.S.C. § 280g-4 note (findings under 119 Stat. 3024, Sec. 501(6)).

infant because they did not want the baby or to have been pregnant, similar to where a homicide against a woman who is pregnant is a “pregnancy-related cause” of death where the person committing the act is doing so because the woman is or was pregnant. Further, if an individual commits infanticide due to postpartum depression, that would almost certainly be a “perinatal death due to a pregnancy-related cause.” Clearly, postpartum depression and any “actions or omissions” attributable to it are “pregnancy-related.”

However, what is most obvious and concerning is that the legislature is attempting to shield women and those who assist and aid them in “self-performed” abortions from having to provide medical attention – or any attention – to babies born alive after botched abortions.

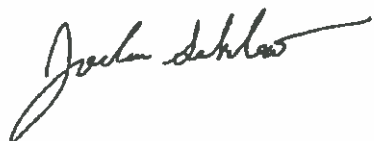
In sum, although California Assembly Bill 2223 has been amended, the bill is still problematic.

CONCLUSION

For the reasons stated above, we oppose AB 2223 and respectfully request that you do everything in your power to ensure that this bill does not advance from your Committee.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE



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