



April 1, 2022

The Honorable Jared Polis
Governor of Colorado
State Capitol Building
200 E. Colfax Ave., Rm. 136
Denver, CO 80203

Dear Governor Polis:

We are writing to oppose Colorado House Bill 22-1279, which was introduced during the 2022 legislative session, and has now reached your desk. The American Center for Law and Justice ("ACLJ") addresses this bill on behalf of itself and over 405,000 of its members, including nearly 9,400 Colorado 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 (including Maryland) 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. Summum*, 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 March 3, 2022, House Bill 22-1279 – entitled the Reproductive Health Equity Act – sponsored primarily by Representative Meg Froelich, Representative Daneya Esgar, and Senator Julie Gonzales, was introduced in the House and was then passed to the Senate. It did not receive amendments in either chamber before being sent to your desk. The ACLJ and its members oppose this pro-abortion bill for the reasons stated in the following legal analysis. We respectfully request that you veto House Bill 22-1279, and reject the unnecessary and radical threat it poses to both existing and future laws that value both life and conscience.

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

Legal Analysis of H.B. 22-1279

I. Background

Abortion advocates have a long history of using euphemisms in an attempt to disguise the horrific nature of the act that they support and promote – namely, the killing of innocent, preborn, human beings. Since the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113, 154 (1973), in which the Court purported to find a constitutional “right” to abortion under the scope of “privacy,” words such as “privacy,” “freedom,” and “equity,” when combined with “reproductive” have become synonymous with “abortion.”

House Bill 22-1279 is yet another in a long line of bills to use these sorts of euphemistic terms, namely, “reproductive health equity,” in an attempt to disguise the fact that it would strip an entire classification of human beings—preborn babies—of all dignity and human rights. If signed into law, House Bill 22-1279 would serve to eliminate all restrictions on abortion within the state and preempt all public entities from infringing, *in any way*, on this “fundamental right.” The bill purports to modernize Colorado law by “affirm[ing] the fundamental right of individual Coloradans to make their own reproductive health-care decisions.” Sections (1)(g) & (2). In reality, the bill establishes the ability of any woman within Colorado to have unlimited access to abortion, including abortions of full-term babies for any reason, such as discriminatory reasons based on sex, race, the potential presence of a disability, etc.²

Moreover, House Bill 22-1279 is wholly unnecessary, as abortion has not only been legal in Colorado since 1967,³ but largely unrestricted.⁴ In fact, the only “restriction” on abortion in Colorado is a parental notification requirement.⁵

II. The Foundational Documents of Our Country Clearly State a Right to Life.

Since the founding of the United States, Americans have valued and protected innocent human life. Although the U.S. Constitution is silent on abortion, both the Constitution and the Declaration of Independence recognize the right to life. The question that House Bill 22-1279 proposes to answer definitively for *all* Coloradans is “when does the right to life begin?” Or, more to the point, “when does innocent life not deserve to be protected?”

Although this question has been debated since the highly contested opinion in *Roe v. Wade* was issued, even Justice Blackmun (*Roe*’s author) himself conceded that *Roe* would fail if it was

² Julie Asher, *Despite Opposition, Colorado Senate Committee Ok's 'Radical' Abortion Bill*, CATH. SENTINEL (Mar. 20, 2022, 8:12 AM), <https://catholicsentinel.org/Content/News/Nation-and-World/Article/Despite-opposition-Colorado-Senate-committee-OKs-radical-abortion-bill/2/34/45363>.

³ Andrea Dukakis, *50 Years Ago, Colorado Passed Nation's First State Law Liberalizing Abortion*, COLO. PUB. RADIO (Apr. 28, 2017), <https://www.cpr.org/show-segment/50-years-ago-colorado-passed-nations-first-state-law-liberalizing-abortion/>.

⁴ Rae Ellen Bichell, *Colorado Braces to Become Refuge for Abortion Access if 'Roe' is Weakened*, NPR (Mar. 29, 2022), <https://www.npr.org/sections/health-shots/2022/03/29/1089280422/colorado-abortion-access>.

⁵ *State Facts About Abortion: Colorado*, GUTTMACHER, <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-colorado?msckid=63c35d89b05011ec8a2b8aca67d05a8b> (last visited Mar. 30, 2022).

ever established that a preborn baby has the right to life.⁶ Justice Blackmun went on to state, as a matter of fact, that the right to life would absolutely trump the judicially fabricated right to abortion created in the majority opinion. Thus, the author of one of the most controversial Supreme Court decisions to date set the path to invalidate that same decision. Although the opinion claimed that there is no historical argument to support a preborn baby's right to life, this conclusion is completely erroneous.

As Supreme Court Justice Thomas noted in a recent concurring opinion, "The Constitution itself is silent on abortion."⁷ It is, however, clear on the right to life, stating: "nor shall any person . . . be deprived of life. . . ."⁸ And we are all familiar with the language in the Declaration of Independence that says: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."⁹ Contrary to the view of those who support the killing of preborn children, we are endowed with unalienable rights upon *creation*, not upon *birth*. Furthermore, the Declaration states that governments were specifically created to secure those unalienable rights, of which life is of utmost importance. Therefore, the government of Colorado has not only the authorization to secure the right to life from creation, *but the duty to do so*. House Bill 22-1279 directly violates that duty by specifically stating that preborn human beings do not have human rights.

Consider that modern scientific developments confirm beyond debate that the life of a human being, as a biological organism, begins at the moment of fertilization. We have all seen the ultrasound photos of babies before birth. We have also seen many instances of babies surviving at earlier and earlier stages of gestation when born prematurely. Given the overwhelming evidence that humans before birth are just as much members of the human species as you and I, we face a question. Do we want to say that there are human beings who have no rights at all, not even the most basic right to life? History has shown us time and again that great evil abounds whenever one class of human beings are declared to be sub-human and not worthy of dignity and legal protections. Colorado should not go down this same path.

III. The Full Scope and Repercussions of House Bill 22-1279 Could Severely Impact the Rights and Freedoms of Colorado Citizens.

Roe, a sweeping decision that many Coloradans and other Americans have outright rejected over the past several decades, is largely responsible for creating the pro-life movement. Like *Roe*, House Bill 22-1279, drafted in response to the possibility that *Roe* will soon be overturned, has also been strongly opposed by those who value innocent human life. It passed the House only after almost an entire day of legislative debate – reportedly the longest such session in Colorado history,¹⁰ and it passed the Senate 20-15.

⁶ *Roe v. Wade*, 410 U.S. 113 at 157 (1973).

⁷ *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. ___, 20 (2019).

⁸ U.S. CONST. amend. V.

⁹ THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

¹⁰ Meghan Lopez, *Colorado House Advances Abortion Access Bill After Record-Breaking Legislative Debate*, DENVER CHANNEL (Mar. 11, 2022, 6:48 PM), <https://www.thedenverchannel.com/news/local-news/colorado-lawmakers-brace-for-a-long-night-of-debate-over-abortion-access-bill>; Anna Maria Basquez, *Reproductive Health Equity Act Heads to Governor's Desk After Passing Senate, Longest House Filibuster in Colorado History*, CBS Local

Moreover, a safety clause included at the end of the bill “declares that this act is necessary for the immediate preservation of the public peace, health, or safety,” Sec. 3; this intentionally tramples on the right and ability of Coloradans to oppose and reject this bill by “refer[ing] all or a portion of an act to the ballot for voter approval.”¹¹ This clause was undoubtedly included in an effort to prevent justified and foreseeable opposition to this bill. As has been stated, abortion “rights” are under no threat of changing, even from the pending decision in *Dobbs*. Therefore, there is no real emergency that exists to validate the use of the safety clause in House Bill 22-1279.

Coloradans should be allowed to oppose this bill, as language within it is broad and its provisions are sweeping. House Bill 22-1279 provides that everything within it “applies to all state and local laws, ordinances, policies, procedures, regulatory guidelines and rules, practices, executive orders, and governmental actions and their implementation, whether statutory or otherwise.” 25-6-405(1). If this bill becomes law, it is difficult to imagine how there would be any limitations on abortion whatsoever in Colorado, including commonsense restrictions such as parental notification requirements.

House Bill 22-1279 defines the “[f]undamental reproductive health-care rights” of Coloradans. 25-6-403. The first of these “fundamental rights” is that of an individual “to make decisions about the individual’s reproductive health care, including the fundamental right to use or refuse contraception.” 25-6-403(1). The second such right is that of a pregnant “individual” to “continue a pregnancy and give birth or to have an abortion and to make decisions about *how* to exercise that right.” 25-6-403(2). The third provision concerning “fundamental rights” is that preborn children have none: “A fertilized egg, embryo, or fetus *does not have independent or derivative rights*” under Colorado law. 25-6-403(3) (emphasis added). As has been noted, however, by Colorado’s judicial branch:

Fundamental rights are those implicit in the concept of ordered liberty such that “neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 117 S. Ct. 2302 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937)). They are rights deeply rooted in this nation’s history and tradition *Chavez v. Martinez*, 538 U.S. 760, 775, 123 S. Ct. 1994, 2005, 155 L. Ed. 2d 984 (2003); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S. Ct. 1278, 1296-97, 36 L. Ed. 2d 16 (1973).¹²

Abortion – and unlimited access to abortion – cannot and should not have a place among rights that are “implicit in the concept of ordered liberty.” Neither would liberty and justice be extinguished if this “right” was sacrificed. In fact, it is the lives of an entire class of human beings that are being sacrificed and extinguished, without justice, for the convenience of other human beings. Moreover, one would be hard-pressed to show how the unlimited “right” to an abortion is

(Mar. 24, 2022, 4:43 PM), <https://denver.cbslocal.com/2022/03/24/reproductive-health-equity-act-abortion-state-capitol/>.

¹¹ Memorandum, Office of Legislative Legal Services, Safety Clauses & Act-Subject-to-Petition Clauses, p. 1, available at <http://leg.colorado.gov/sites/default/files/safety-clauses-and-effective-date-clauses.pdf>.

¹² *Thorpe v. State*, 107 P.3d 1064, 1071 (Colo. App. 2004).

“deeply rooted in this nation’s history and tradition.” It is the opposite that is true, as our nation has always valued life. Yet, this bill *elevates* abortion above other fundamental rights. It does so by attempting to circumvent any standard of review.

The Supreme Court of Colorado assesses the ability to exercise “fundamental” rights using a strict scrutiny standard.¹³ “Where a fundamental right is affected, the state has the burden of establishing that the act is necessarily related to a compelling governmental interest.”¹⁴ Yet this Act goes further with its declaration of virtually unlimited abortion as a fundamental right. It circumvents even the lowest standard of scrutiny, stating that public entities shall not “*deny, restrict, interfere with, or discriminate against* an individual’s fundamental right to use or refuse contraception or to continue a pregnancy and give birth or to have an abortion in the regulations or provisions of benefits, facilities, services, or information.” 25-6-404(a) (emphasis added). Furthermore: “nothing in this part 4 may be construed to authorize a public entity to *burden* an individual’s fundamental rights relating to reproductive health care.” 25-6-405(2) (emphasis added). Unlike fundamental rights (*e.g.*, First Amendment rights) that are guaranteed by the United States Constitution, this “right” would supersede every state policy, no matter how compelling the state’s interest is. Even freedom of speech is subject to time, place, and manner restrictions, and can be restricted when a compelling government interest is implicated, but unfettered access to abortion in Colorado would become a super-“fundamental right.”

Beyond attempting to provide a new (that is, no) standard of review for any current or future abortion regulations, this bill declares that, at any point before birth, a child has no rights—“independent or derivative,”¹⁵ and that the state may not interfere with ending the life of such children. The bill would also enshrine into a law a “right” to exercise the most invidious forms of discrimination: unborn children may be freely and openly targeted for killing solely because of their sex, race, or disability.¹⁶

Of further serious concern, this bill demands that public entities shall not “[d]eny, restrict, interfere with, or discriminate against an individual’s fundamental right to use or refuse contraception or to continue a pregnancy and give birth or to have an abortion in the regulation or provision of benefits, facilities, services, or information.” 25-6-404(a). This purposefully broad language is especially concerning with regard to healthcare providers and workers who are religiously or morally opposed to abortion and who serve in public hospitals. Unlike abortion, the freedom of conscience is among the most fundamental of unalienable rights, and should not be discarded in favor of an abortion-on-demand regime.

¹³ *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 786 (Colo. 1985) (talking about the federal fundamental right to freedom of speech).

¹⁴ *Id.*; *Robertson v. City & Cty. of Denver*, 874 P.2d 325, 340-41 (Colo. 1994) (Vollack, J., concurring) (“The United States Supreme Court has found only a limited group of fundamental rights and has been reluctant to expand the list of fundamental constitutional rights. . . . Where a fundamental right is not involved, a legislative enactment is tested under the rational basis test which requires the government to show that the ordinance is rationally related to a legitimate state interest.”).

¹⁵ 25-6-403(3).

¹⁶ Public entities also may not “[d]eprive, through prosecution, punishment, or other means, an individual of the individual’s right to act or refrain from acting during the individual’s own pregnancy based on the potential, actual, or perceived impact on the pregnancy, the pregnancy’s outcomes, or on the pregnant individual’s health.” 25-6-404(b).

Again, this bill is not necessary to protect abortion “rights” in Colorado. The issue presented in the *Dobbs* case – which has been cited as the foundational reason for House Bill 22-1279 – is solely whether abortion is protected under the Federal Constitution. No possible result in that case would invalidate existing state laws that protect the practice of abortion. Therefore, there is no reason for House Bill 22-1279. It is on the wrong side of history, and out of touch with what the majority of Americans desire, as discussed below.

IV. Abortion is Highly Controversial, and a Majority of Americans Do Not Support Deregulation of Abortion.

Abortion is an issue that has torn apart our country for 49 years. Reliance Colorado’s history of “support”¹⁷ for abortion is misguided. As Americans, we have always valued the right to life, and we should continue to do so. House Bill 22-1279, if enacted, would categorically frustrate the ability of everyday Coloradans who want to exercise their social, moral, or religious objections to abortion and live their lives without fear that they will be forced to support or engage in an act that they find fundamentally repugnant and in opposition to their core values.

Gallup Polling has found that at least 70% of Americans are opposed to abortion being legal in every circumstance;¹⁸ 65% of Americans oppose all abortion in the second trimester; and 81% oppose abortion in the third trimester.¹⁹ Over one third of Coloradans, in particular, believe abortion should be illegal in most or all instances.²⁰ House Bill 22-1279 jeopardizes the ability of Coloradans to exercise their fundamental right of religious freedom, and forces those taxpayers who object to funding abortion – an act that they find socially, morally, or religiously repugnant – to subsidize the killing of innocent human beings. While House Bill 22-1279 has been promoted as necessary to advance the rights and benefits of marginalized people, it does so at the ultimate cost of the most marginalized human population of all: innocent preborn human beings.

¹⁷ Section 1(e) https://leg.colorado.gov/sites/default/files/documents/2022A/bills/2022a_1279_enr.pdf.

¹⁸ Lydia Saad, *Where Do Americans Stand on Abortion?*, GALLUP, <https://news.gallup.com/poll/321143/americans-stand-abortion.aspx> (last visited Mar. 31, 2022) (emphasis added).

¹⁹ *Id.*

²⁰ *Views About Abortion by State (2014)*, PEW RESEARCH CENTER, <https://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/state/>.

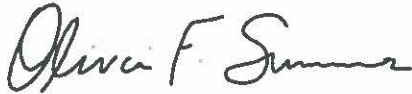
CONCLUSION

For the reasons stated above, we oppose House Bill 22-1279 and respectfully request your veto of this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Jordan Sekulow". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Jordan Sekulow
Executive Director

A handwritten signature in black ink, appearing to read "Olivia F. Summers". The signature is cursive, with the first name "Olivia" being more prominent and the last name "Summers" following in a similar style.

Olivia F. Summers
Associate Counsel for Public Policy