ACLJ
AMERICAN CENTER
for LAW & JUSTICE

August 15, 2022

Senator Scott Wilk
Republican Minority Leader
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RE: ASSEMBLY BILL NO. 2223

Dear Senator Wilk:

In May 2022, the American Center for Law and Justice ("ACLJ") wrote a letter to the California Assembly Committee on Appropriations in order to provide legal analysis opposing Assembly Bill ("AB") 2223. It has come to our attention that since that time AB 2223 passed a full Assembly floor vote and was ordered to the Senate. It has also come to our attention that AB 2223 was heard by the Senate Committee on Judiciary on June 14, 2022, and then sent to the Committee on Health. During its progress through the Assembly, the Bill received multiple amendments, but none of these amendments have alleviated the concerns of the ACLJ that it endangers the lives of newborn infants by rejecting and undermining current California law. We therefore respectfully request that you oppose this bill and vote against it in your committee. The ACLJ opposes the passage of AB 2223 on behalf of itself and over 527,000 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 arguments, 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.

[1] *Stop Barbaric New Abortion Laws*, ACLJ.ORG, https://aclj.org/pro-life/stop-barbaric-new-abortion-laws (last visited August 12, 2022).

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.).

Assembly Member Wicks introduced AB 2223 on February 15, 2022. It was amended and referred to the Health and Judiciary Committees on March 17, 2022. The Judiciary Committee also 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 the Committee on Appropriations. The Committee on Appropriations passed the Bill on May 19, 2022, when AB 2223 was read for a second time in the Assembly and modified again before being read a third time and then ordered to the Senate after passing a full Assembly floor vote. The Senate read AB 2223 for the first time on May 27, 2022, and referred the Bill to the Judiciary, Health, and Public Safety Committees on June 08, 2022. The action was rescinded on June 09, 2022, and referred to the Committee on Public Safety, which passed the Bill and re-referred the Bill to the Committee of Health on June 15, 2022. It was amended by Wicks, passed, and read a second time by the Committee on Health on June 20, 2022. Then the Bill was passed and re-referred to the Committee of Appropriations on June 30, 2022. The Appropriations Committee heard the bill on August 1, 2022, placing it in the suspense file. Finally, the Appropriations Committee voted to pass AB 2223 on August 11, 2022, and it has now been ordered to a third reading.

AB 2223 passed through the Assembly and the Senate only after several (ineffective) amendments were made that did not correct the fundamental problems with the Bill. For that reason, and the reasons outlined below, we respectfully request that you reject it because of the radical threat it poses to children born in California and the way it will undermine existing laws that value and protect life.

Legal Analysis of AB 2223

I. Background

Assembly Member Wicks defended AB 2223 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 nonexistent. Careful legal analysis of AB 2223 reveals that it creates a host of deeply troubling legal issues in its attempt to solve a problem that does not truly exist.

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[2] *AB-2223 Reproductive Health*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2223 (last visited Jun. 10, 2022).

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

> 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 <u>for any reason</u> 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 twenty-eight days after the baby is born (the perinatal period) "for any reason." This abhorrent language has remained unchanged throughout the amendment process. There has been a complete refusal to remove the term "perinatal." It is now abundantly clear that this refusal is intentional and not due to a misunderstanding of the term.

The amendments[4] to the Bill that have thus far been made, discussed in detail below, do nothing to eliminate the concern that this Bill will effectively legalize infanticide in some instances.

II. Legal Issues with AB 2223

The most recent Assembly amendments to AB 2223 (as adopted by the Assembly prior to the Bill being ordered to the Senate) 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 ***causes that occurred in utero***.[5]

Deleting the phrase "due to a pregnancy related cause," and replacing it with "due to causes that occurred in utero," does nothing to keep this Bill from effectively legalizing some instances of infanticide. This is true for three reasons.

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[3] *Id.*

[4] Assembly Member Wicks made several amendments to the Bill. 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 May 24, 2022).

[5] A.B. 2223 Sec. 7. 123467(a).

First, the Bill, as written and amended, still 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.[6] A pregnancy outcome includes full-term birth, premature birth, spontaneous miscarriage, and abortion.[7] 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.[8]

For this reason, under AB 2223, 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. The infant is the "pregnancy outcome," and people would be protected regardless of whether the death of the child was caused by their *actions* or their *omission* with regard to their pregnancy and their care of the infant born alive.

Second, the Bill lists "abortion" as a pregnancy outcome, and it is well established that live births can occur following a failed abortion.[9] 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, 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]."[10] After the baby's death, an investigation revealed that "pre-natal scans were either not carried out or were done erroneously."[11] While the baby in this story did receive medical attention after his birth, bills like AB 2223 would ensure that medical attention for babies born alive in these kinds of cases would not be required, and investigations would be extremely limited.

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

[7]*Id.*

[8]*Id.*

[9]Matthew 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.

[10]Matt 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.

[11] *Id.*

As you may be aware, abortion supporters are actively trying to reduce restrictions on and expand access to the medical abortion pill used by the woman in that story. Currently, medication abortions account for more than half of all abortions in the United States.[12] And nearly twenty percent of medication abortions in the United States occur in California.[13] 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 and women and preborn (viable) babies are placed at risk. It is also an 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.[14] Bills like AB 2223 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.[15] 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, AB 2223 does not limit immunization from civil and criminal liability only to fetal death via "miscarriage, stillbirth, or abortion." The Bill includes another category: "perinatal death."

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[12]Rachel 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.

[13]Carole 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/

[14]Matthew 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.

[15] Cal. Health & Safety Code § 123435

a. "Causes that occurred in utero."

Because the Bill – as originally written – could be interpreted (as was confirmed by the committee's legal analysis)[16] 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 reason," the author of the Bill initially added "due to a pregnancy-related cause" following the term "perinatal death." That language was rightfully objected to after the Committee on Appropriations received our legal analysis opposing AB 2223. As amended, 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, including . . . perinatal death due to ***causes that occurred in utero***.

Assembly analysis of the Bill stated that, the original phrase "due to a pregnancy related cause," was intended to clarify "that 'perinatal death' is intended to be the consequence of a *pregnancy complication*." However, the Bill itself does not use the term "pregnancy complication," which is 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, and is tailored to the actual pregnancy itself.[17] The legislature could have chosen to use that term but did not.

There is no publicly available analysis to indicate why the Assembly Appropriations Committee chose the phrase "causes that occurred in utero" to replace "pregnancy related cause." We, thus, assume that its intent is the same as the intent behind other Assembly Committee amendments. Nonetheless, the Bill yet again fails to define the term being used: "causes that occurred in utero," and the term is indisputably ambiguous. Because the term is ambiguous and imprecise, it does nothing to reduce concerns that the Bill permits infanticide.

While "causes that occurred in utero" may be a frequently used medical term, it is not a regularly used legal expression. In fact, in a search of legal databases, AB 2223 was the law or bill found to utilize this particular phrase. Moreover, a single California case has addressed whether an injury "occurred in utero" and demonstrates the scientific difficulty of attempting such a determination. In *Elaina Valdepena v. Healthcare*,[18] a doctor was unable to determine conclusively

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[16] *Id.*

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

[18] *Elaina Valdepena v. Healthcare*, No. F051567, 2008 Cal. App. Unpub. LEXIS 6443, at *46 (June 20, 2008)

whether a newborn suffered hypoxic brain injury in utero, or after delivery; the doctor

> could not say how much hypoxia [the baby] experienced while in utero. The trial court therefore could not determine whether it was more likely than not that [the baby]'s injury began in utero and therefore could not conclude within a reasonable medical probability that Dr. Bellinghausen's omissions played a substantial factor in [the baby]'s outcome.[19]

Clearly, whether an infant's death is due to causes that "occurred in utero" is not only a difficult thing to determine medically, but it is an imprecise standard, with no legal definition as of yet.[20] As such, the chilling effect that AB 2223 would have on the investigations of infant death during the perinatal period may well jeopardize the safety, well-being, and lives of newborns in California up to 28 days after their birth.

Nowhere in our research were we able to find the term "causes that occurred in utero" used in relation to newborn or infant deaths, though it is very frequently associated with the deaths of babies not yet born (*in utero fetal death*); i.e. stillbirths. It does not occur in the California Code, and thus its use in AB 2223 is entirely novel. Because of the term's imprecision, it opens the door to broad, subjective interpretations and enables parties to claim that an infant's death was "due to" an event that occurred before the baby's birth. The Bill would effectively bar any investigation to confirm the veracity of the claim. In other words, referring to "perinatal death due to causes that occurred in utero" does not in any way prevent this provision from authorizing certain types of infanticide, if they can be defined in some way as due to in utero causes. This language is still far broader than simply covering pregnancy complications.

Notably, the term "causes that occurred in utero" is used in reference to injuries discovered on a newborn. For example, a 2001 news report tells the story of a

> baby [who] was born prematurely in May of 1985 with a shattered joint and an extra layer of skin where she should have had an elbow. . . . Eventually, physicians determined the condition occurred in utero and asked [the mother] if she'd had any accidents during the pregnancy. The mother considered the question carefully – no, none. But there had been kicking and stomping.[21]

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[19] *Id.* at *50.

[20] *See Lopez v. Sony Elecs., Inc.*, 5 Cal. 5th 627, 639, 234 Cal. Rptr. 3d 856, 866, 420 P.3d 767, 775 (2018) (noting the inherent causation problem in examining in utero injuries and the "potential difficulties in identifying such injuries in children or in tracing their source").

[21] Ephrat Livni, *Study Examines Homicide During Pregnancy*, ABC NEWS (Feb. 15, 2001), https://abcnews.go.com/Health/story?id=117621&page=1.

There are countless other examples of babies being born alive with injuries that occurred in utero, who live with appropriate medical care. Many of the examples of injuries occurring to preborn children in the womb are related to domestic abuse.

However, what is most obvious and concerning is that the legislature is attempting to shield women, and those who aid or assist them in "self-performed" abortions, from having to provide medical attention – or any attention – to babies born alive after botched abortions. California law provides, "[t]he rights to medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant of similar medical status prematurely born spontaneously."[22] This law would, sub silento, overrule those protections, and would create a sub-class of newborn human beings by taking away their right to not only medical care, but to life.

Newborn children are persons under the law, entitled to the same equal protection as any other person. Moreover, under California law a "child conceived, but not yet born, is deemed an existing person, so far as necessary for the child's interests in the event of the child's subsequent birth." Cal. Civ. Code § 43.1. Newborn children possess a right to equal protection under the Constitution. *C.M. v. M.C.*, 7 Cal. App. 5th 1188, 1210, 213 Cal. Rptr. 3d 351, 368 (2017). Newborn children are certainly persons for purposes of California law. *See* Cal. Welf. & Inst. Code § 300; *In re Z.M.P.*, No. D041410, 2003 WL 21694634, at *1 (Cal. Ct. App. July 22, 2003) (removing a two-month-old child from parental custody). California law consistently defines child as "a person under the age of 18 years." *See, e.g.*, Cal. Penal Code § 277(a). Newborn infants, including infants who are "72 hours old or younger," are still considered children. Cal. Health & Safety Code § 1255.7(a)(2). And "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." Cal. Const. Art. I § 7. Newborn children merit just as rigorous legal protection as any other person.

In sum, although AB 2223 has been amended, the Bill is still problematic. It changes California law in a way that radically undermines protection for newborns. Unless the word "perinatal" is completely omitted, this law will allow certain forms of infanticide.

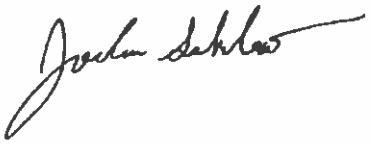
[22] Cal. Health & Safety Code § 123435.

CONCLUSION

For the reasons stated above, we oppose AB 2223 and respectfully request that you also oppose this Bill.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE



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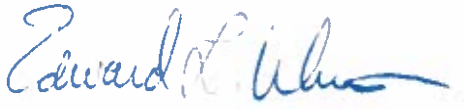

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