

March 22, 2023

SENATE COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS
Legislative Building, Room 4100
401 S. Carson St.
Carson City, NV 89701

Re: Senate Joint Resolution No. 7 – Oppose

Dear Chair and Honorable Members of the Senate Committee on Legislative Operations and Elections,

Please consider this the formal opposition statement to Senate Joint Resolution No. 7 (SJR7), to be heard on March 23, 2023, on behalf of Pacific Justice Institute – Center for Public Policy. We respectfully ask that our concerns be considered and addressed in the forthcoming joint committee meeting and analysis of this joint resolution.

Summary of Arguments in Opposition

SJR7 does not simply maintain the status quo in Nevada. The joint resolution does not simply grant constitutional-level protection to the abortion rights currently codified in state law.¹ Instead, SJR7 may grant a constitutional carte blanche for any abortionist to operate unchecked² and unlicensed.³ SJR7 includes an unprecedented proposal to grant a constitutional guarantee of immunity by deferring to any abortionist’s subjective discretion⁴ and devices.⁵ In so doing, SJR7 strips away current medical protections for the health and safety of mothers, choosing to protect abortionists at the expense of women.⁶

¹ NRS § 442.250.

² *See, e.g.*, SJR7 §§ 25(3)-(5). For example: “The State shall not penalize, prosecute or otherwise take adverse action against a provider of health care, who is licensed by the State, while acting within the applicable scope of practice and standard of care for performing an abortion upon an individual who has granted informed consent to the abortion” *Id.*, at §25(4).

³ The joint resolution shields the malpractice, negligence and/or unlicensed medical operation of any individual so long as that individual claims to have acted with consent and in the name of reproductive freedom: “The State shall not penalize, prosecute or otherwise take adverse action against any individual for aiding or assisting another individual in exercising the right of the individual to reproductive freedom with the voluntary consent of the individual.” *Id.*, at §25(5).

⁴ *See, e.g.*, SJR7 §25(6)(b). The joint resolution limits the state’s ability to regulate abortion before fetal viability, and the definition of fetal viability is left to the discretion of the individual abortionist: “Fetal viability” means the point in a pregnancy when, in the professional judgment of an attending provider of health care and based on the particular facts of the case, there is a significant likelihood of the sustained survival of the fetus outside the uterus without the application of extraordinary medical measures.” *Id.*, at §25(2), (6)(b).

⁵ SJR7 §25(2): “...in no circumstance may the State prohibit an abortion that, in the professional judgment of an attending provider of health care, is medically indicated to protect the life or physical or mental health of the pregnant individual.”

⁶ *Supra*, note 2.

The first and preeminent right among the inalienable rights set forth in Article 1, Section 1 of the Nevada Constitution is “enjoying and defending life,”⁷ and no person shall be deprived of life without due process of law.⁸ Attempting to elevate abortion—and with it any and all manner of “reproductive freedom”⁹—to the same status as defending and not being deprived of life is self-contradictory and must fail. As science continues to advance and reveal the wonders of life in the womb, history will not look kindly on lawmakers who promote the wholesale, profit-driven destruction of the innocent while casting aside necessary medical protections for women.

Background

Nevada voters guaranteed the right to elective abortion up to 24 weeks¹⁰ through a ballot referendum submitted and approved in the 1990 general election;¹¹ voters also guaranteed the right to an abortion after 24 weeks if necessary to preserve the life or health of a pregnant woman.¹² This statute is not subject to legislative amendment or repeal,¹³ and it cannot be amended or repealed without again going before the voters of Nevada. Indeed, for over thirty years this statute has not been altered. The U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health*,¹⁴ as we have already seen, did not change Nevada’s law protecting abortion access and medical care for women under NRS section 442.250. Nonetheless, abortion proponents in Nevada have seized upon *Dobbs* as a moment to promote abortion even if its expansion sacrifices basic health and safety protections for women and children.

With respect to the text of the proposed constitutional amendment, according to the Legislative Counsel’s Digest, “Article 1 of the Nevada Constitution sets forth certain inalienable rights of an individual. (Nev. Const. Art. 1) This joint resolution proposes to amend the Nevada Constitution by adding a new section to Article 1 which:

- (1) guarantees each individual in this State a fundamental right to reproductive freedom;
- (2) authorizes the State to regulate abortion care after fetal viability with certain exceptions; and
- (3) prevents the State from penalizing, prosecuting or taking any other adverse action against an individual for exercising the right to reproductive freedom or for aiding or assisting another individual in exercising his or her right to reproductive freedom.”

Legal Analysis

SJR7 is of no practical benefit to women seeking abortion in Nevada, but it does have the latent potential to be interpreted and applied in ways that could threaten the fundamental safety of women and children, legalize abortion up to the moment of birth and violate the rights of conscience held by medical professionals and others unwilling to participate in abortion.

⁷ Nev. Const. art. 1, §1.

⁸ Nev. Const. art. 1, §8, cl. 2.

⁹ SJR7 §25(1).

¹⁰ NRS § 442.250(b).

¹¹ Nevada Question 7, the Abortion Legal to 24 Weeks Statute Referendum, approved Nov. 6, 1990, and thus affirming NRS § 442.250.

¹² NRS § 442.250(c).

¹³ NRS § 442.250.

¹⁴ *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. ____ (2022).

This joint resolution seeks to exploit emotional responses to the *Dobbs*' decision.¹⁵ Yet despite those who seek to “sound the alarm,”¹⁶ *Dobbs* produced no change in Nevada’s state law or in Nevadans day-to-day life. Unlike *Dobbs*, however, SJR7 could overturn over thirty-years’ of state precedent. The following is but a starting list of the problems presented by SJR7:

1. An abortionist may perform an abortion up to the moment of birth.

SJR7 defers entirely to the sole discretion of any individual abortionist or any other so-called “provider of health care”¹⁷ to decide whether an abortion is warranted to protect an individual. This unrestricted discretion can authorize abortion up to the moment of birth. There is no fixed limit on this subjective discretion, and SJR7 may bar prohibit any oversight that infringes upon an “individual’s autonomous decision-making.”¹⁸

2. The newly fashioned “fundamental right” to “reproductive freedom” is literally “without limit.”

According to SJR7: “Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including without limitation prenatal care, childbirth... vasectomy, tubal litigation, abortion...and infertility care.”¹⁹ Reproductive freedom, but SJR7’s own terms, becomes an *unlimited* constitutional right that encompasses not just abortion but *all* matters relating to pregnancy and fertility. Such a capacious and ambiguous definition opens the door to a “fundamental right” for children to access puberty blockers or obtain surgical intervention without parental notice, let alone consent. Also baffling if not outright bizarre, SJR7 announces a fundamental right to a vasectomy and places it on equal constitutional footing as the right to childbirth.

3. Any “attending provider of health care” has virtually unfettered medical discretion and legal immunity, yet there is no definition or limit as to who qualifies as an attending provider of health care.

The amendment does not provide any clear guidelines as to who qualifies as an “attending provider of health care.”²⁰ Despite this, SJR7 cloaks these unnamed individuals with unchecked discretion to subjectively judge “fetal viability.”²¹ These same unnamed individuals are given a constitutional carte blanche to subjectively determine whether an abortion after “fetal viability” is “medically indicated.” Without objective standards or

¹⁵ See, e.g., U.S. Senator Catherine Cortez Masto’s publication on her own website, crying out to “sound the alarm” before the release of the decision in *Dobbs*’ and its challenge to *Roe v. Wade*, 410 U.S. 113 (1973). Even still, Cortez Masto did not claim that Nevada is a state in which women depended on *Roe* to guarantee access to abortion. See, “Cortez Masto Speaks on the Senate Floor About *Dobbs v. Jackson Women’s Health Organization*,” available at, <https://www.cortezmasto.senate.gov/news/videos/watch/cortez-masto-speaks-on-the-senate-floor-about-dobbs-v-jackson-womens-health-organization> (posted Dec. 1, 2021), accessed Mar. 22, 2023.

¹⁶ *Id.*

¹⁷ SJR7 §25(2).

¹⁸ *Id.*, at §25(6)(b), (c).

¹⁹ SJR7 §25(1).

²⁰ *Id.*, at §25(2), (4), (6)(b).

²¹ *Id.*, at §25(6)(b).

external review, abortion would be authorized up to the moment of birth, with abortionists able to claim legal immunity for such procedures.

4. **Any individual who assists another in an abortion is granted absolute immunity.**

SJR7 demands that the “[s]tate shall not penalize, prosecute or otherwise take adverse action against any individual for aiding or assisting” in any abortion or any other exercise of so-called reproductive freedom if “voluntary consent” is obtained. This blanket immunity may shield unethical actors, including licensed and unlicensed practitioners alike, from malpractice, negligence or other appropriate legal actions brought on behalf of the state of Nevada. Women certainly do not benefit from shielding such unsafe or unethical abortionists or other assistants, whether or not they are acting as medical practitioners.²²

5. **A child’s newfound “fundamental right” may constitutionally supersede parental rights.**

SJR7 conspicuously bestows “any individual” with an unlimited and “fundamental right” to “reproductive freedom.”²³ There is no suggestion that this right would not equally apply to children of any age. There is no indication that parental rights would be protected in a meaningful way. SJR7 may allow the protection of another compelling state interest—such as parental rights—only to “the slightest degree possible” if a parental right “restricts or infringes upon autonomous decision-making.”²⁴

What does this constitutional amendment hope to achieve? SJR7 constitutionally enshrines a virtually unlimited abortion regime, while simultaneously stripping away the minimal medical protections that currently stand to protect the health and safety of women and children.

Our most fundamental and sacred liberties lie beyond the power of a majority to take away. This has been deemed axiomatic for the better part of a century: “One’s right to life, liberty and property, to free speech, a free press, to freedom of worship and assembly, and other fundamental rights may not be submitted to vote.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). As noted above in the summary, defending life is the foremost inalienable right declared by the Nevada Constitution. The right to life is necessarily a prerequisite for enjoyment of all other rights. And as Justice Kennedy further explained in *Gonzales v. Carhart*, 550 U.S. 124 (2007), a central premise of the Court’s abortion jurisprudence has long been that “the government has a legitimate and substantial interest in preserving and promoting fetal life.”²⁵

Conclusion

SJR7 does not simply maintain the status quo in Nevada. This joint resolution does not recast a statutory right to abortion as a constitutional right to the same. Instead, SJR7 starts a constitutional

²² In 2021, Senator Cortez Masto declared the following in response to *Dobbs*: “Three out of every four of us agree—including the vast majority of Nevadans—agree that the people who should be making decisions about pregnancies are women and their doctors.” *Supra*, note 15. Nowhere in SJR7 is there a single reference to either “women” or “their doctors.”

²³ *Id.*, at §25(1).

²⁴ *Id.*, at §25(6)(c).

²⁵ *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007)

amendment process that may fundamentally upend our state constitution, as well as current -abortion rights and health protections for women and children due to its overbroad and ambiguous language.

We urge you to amend SJR7 or to reject it outright. Do not disrupt the current safeguards that protect women and children and risk displacing pre-existing fundamental freedoms, such as defending life, free speech, and free exercise of religion.

Respectfully submitted,

Emily C. Mimnaugh
Nevada Resident and Attorney

PACIFIC JUSTICE INSTITUTE – CENTER FOR PUBLIC POLICY