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LEGAL ANALYSIS OF NEVADA SENATE JOINT RESOLUTION 7 (2023)  
PRESENTED TO THE SENATE COMMITTEE ON LEGISLATIVE OPERATIONS  
AND ELECTIONS  
MARCH 23, 2023**

Chairman Ohrenschall and Members of the Committee, I am Denise Burke, Senior Counsel with Alliance Defending Freedom. I am submitting legal analysis on Senate Joint Resolution (SJR) 7 proposing an amendment to establish a “fundamental right to reproductive freedom” in the Nevada Constitution.

The proposed amendment language is dangerously vague and endangers minors and parental rights. It also threatens the freedom of conscience of Nevada’s healthcare professionals and precludes the enactment and enforcement of commonsense, protective laws such as parental involvement for minors’ abortions and informed consent. It will force Nevada taxpayers to pay for abortions, as well as contraception, sterilizations, infertility treatment, and even the surgical removal of healthy reproductive organs. Taxpayers will be forced to fund these services for non-residents, including having sex-traffickers bring their victims to Nevada to procure free abortions all while avoiding criminal liability for their actions.

*Proposed “Reproductive Freedom” Amendment is Dangerously Vague*

Nevada voters deserve to know exactly what they are voting on—especially when asked to amend their foundational document: the state’s constitution. The proposed amendment language fails to accurately inform Nevadans of the meaning of “reproductive freedom” and the full implications of a vote in favor of the proposed amendment.

The proposed amendment language centers on the term “reproductive freedom” which is inadequately defined. SJR 7 misleadingly provides that “reproductive freedom ... entails the right to make and effectuate decisions about all matters relating to pregnancy, including, without limitation, prenatal care, childbirth,

postpartum care, birth control, vasectomy, tubal ligation, abortion, abortion care, management of a miscarriage and infertility care.” This is not a full and fair definition. The terms used to describe “reproductive freedom” are not defined, and voters will be left to guess what they mean.

The language is vague and will likely be interpreted by Nevada courts to encompass other medical procedures such as the removal of healthy reproductive organs and the provision of cross-sex hormones and other harmful chemicals that alter the normal functioning of the male or female body.

The proposed language also purports to declare “reproductive freedom” as a “fundamental right.” The language of this amendment does not inform voters of the meaning and import of “fundamental rights” which have traditionally included rights reflected in the U.S. Constitution and the Nevada Declaration of Rights, such as the “liberty of speech and the press,” “liberty of conscience,” and the right trial by jury.

Fundamental rights are rights that have been recognized as requiring a high degree of protection from government encroachment. Government infringement on or regulation of these rights is subject to the highest degree of judicial scrutiny. This level of scrutiny is commonly called “strict scrutiny” and requires that state officials, when proposing a regulation or restriction on that right, must demonstrate a “compelling state interest.” Further, the regulation or restriction must be narrowly tailored to effectuate that compelling interest.

Notably, even under the now overruled decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, abortion was not considered a “fundamental right” under the U.S. Constitution as abortion regulations and restrictions were not judged under the strict scrutiny standard, but under the lesser “undue burden” standard. It is not, therefore, accurate to claim that the proposed amendment language simply resurrects and codifies *Roe v. Wade*. It goes dangerously beyond *Roe*.

#### *Proposed Amendment Potentially “Opens the Door” to Infanticide*

SJR 7 provides that the “State shall not penalize, prosecute or otherwise take adverse action against an individual based on the actual, potential, perceived or alleged **outcome of the pregnancy** of the individual, including, without limitation, a miscarriage, stillbirth or abortion” (emphasis added). This provision is dangerously broad and ill-defined.

There is no guidance as to what is meant by “outcome of pregnancy.” Does it include “having to care for a newborn baby”? Does it include the “right” neglect or abandon the newborn? We don’t know. This intentional failure to properly define the breadth and scope of the provision “opens the door” to infanticide: the killing of a born, living baby.

*Language Purporting to Allow Regulations on Post-Viability Abortions is Illusory*

Section 2 of SJR 7 purports to provide that “the State may regulate the provision of abortion care after fetal viability, provided that 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” woman.” The broad exceptions for “physical or mental health” renders this purported protection illusory. This unlimited “health” exception will be used to “rubber-stamp” unnecessary, dangerous, and inhumane late-term abortions.

SJR 7 further defines “fetal viability” as “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**” (emphasis added). This definition is medically incorrect and will callously endanger many pre-term infants who would otherwise survive after birth.

The vast majority of abortion-related state laws use a medically appropriate definition of “viability” such as: “that stage of fetal development when, in the judgment of the physician based on the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a **reasonable likelihood of sustained survival** of the unborn child outside the body of his or her mother, **with or without artificial support**” (emphasis added).

It is important to note the important (highlighted) differences between SJR 7’s definition of “viability” and the medically correct definition. First, SJR 7 requires a “significant” likelihood of sustained survival, while the correct definition requires “a reasonable likelihood” of sustained survival. How will a “significant likelihood of sustained survival” be quantified? How many babies will be denied a chance at life under this provision? We don’t know, and neither will Nevada’s voters who will be asked to approve this medically inappropriate standard.

Second, SJR 7's definition of "viability" precludes the application of "extraordinary measures," while the medically correct definition includes the application of "artificial support." Again, what "extraordinary measures" are contemplated by the language? How many babies who would otherwise have a good chance at survival will instead die because of the denial of care?

These concerns further support the conclusion that SJR 7 "opens the door" to infanticide.

*Proposed "Reproductive Freedom" Amendment Endangers Minors and Parental Rights*

In addition to not knowing what is meant by a "fundamental right" to "reproductive freedom," voters will also be unwittingly compromising parental rights if the proposed constitutional amendment is approved.

The proposed amendment language guarantees a "fundamental right" to "reproductive freedom" to "every individual." This means that anyone, including a minor (male or female), has a "right" to abortion, contraception, sterilization, infertility treatment, and other procedures, including the removal of healthy reproductive organs. These and other complex and dangerous procedures will occur without the knowledge or consent of parents.

Nevada does not currently have an enforceable parental involvement law for abortion. This dangerous omission, coupled with SJR 7, will ensure that minors—including those being sex-trafficked—can be brought into Nevada to receive "no-questions-asked" abortions. This will only further embolden traffickers to continue to wreck the lives of innocent young women in Nevada and beyond. Notably, this result is further guaranteed by Planned Parenthood's announced plans to build a "flagship" abortion center near the Reno airport<sup>1</sup> and to open an abortion facility in the small town of West Wendover on the border with Utah.<sup>2</sup>

Parents are best equipped to protect and care for their children's health and well-being. They have both the right and responsibility to do so. The proposed amendment language would eviscerate that fundamental right.

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<sup>1</sup> See Planned Parenthood CEO: "Nevada is a Safe Haven For Abortion," available at <https://thenevadaglobe.com/articles/planned-parenthood-ceo-nevada-is-a-safe-haven-for-abortion/>.

<sup>2</sup> See Nevada city angry as Planned Parenthood seeks to open under guise of 'primary' and 'prenatal' care, available at <https://www.liveaction.org/news/planned-parenthood-nevada-prenatal-care/>.

*Proposed “Reproductive Freedom” Amendment Threatens the Freedom of Conscience of Medical Providers*

The proposed constitutional amendment provides that the individual’s “right to reproductive freedom” shall not be “denied, burdened, or infringed” by the state officials. Laws protecting the freedom of conscience of healthcare professionals and permitting them to opt out of performing or participating in these procedures could be seen as a “denial”—or at least a “burden”—on an individual’s “right to reproductive freedom.” In this “battle of rights,” the historically fundamental freedom of conscience (explicitly recognized by both the U.S. and Nevada constitutions) may be deemed subservient to the newly created “right” to abortion. This threat to freedom of conscience is untenable.

The paramount importance of freedom of conscience has been repeatedly affirmed. Our Nation’s history, tradition, and jurisprudence confirm that Americans—including healthcare professionals—cannot be forced to commit an act that is against their moral, religious, or conscientious beliefs.

America’s Founders were united in a desire to protect freedom of conscience. For example, Thomas Jefferson made clear that no provision in the Constitution “ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority.”<sup>3</sup> Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience of all Americans be protected. He described conscience as “the most sacred of all property.”<sup>4</sup>

The Supreme Court has consistently ruled in favor of protecting the freedom of conscience of every American. It has explicitly stated that “[f]reedom of conscience... cannot be restricted by law.”<sup>5</sup> But SJR 7 undermines these sacred freedoms and will lead to more nurses, doctors, and other medical professionals leaving the field altogether rather than having their consciences violated.

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<sup>3</sup> Jefferson, Letter to New London Methodists (1809).

<sup>4</sup> Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

<sup>5</sup> *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (emphasis added).

*Proposed “Reproductive Freedom” Amendment Precludes the Enactment and Enforcement of Commonsense Protective Laws*

Current Nevada law contains a few protective abortion-related laws including a limit on abortions after 24 weeks gestation (essentially, a post-viability limitation), a physician-only requirement, an informed consent requirement, and reporting requirements. Each of these commonsense requirements is jeopardized by the proposed amendment.

The proposed amendment provides that the State may not deny, burden, or infringe upon the “fundamental right” to abortion. Application of this provision means that existing protective laws will likely be seen as “burdening” the newly created constitutional “right” to abortion and will be invalidated by Nevada courts. The Legislature will be further prohibited from responding to the growing medical evidence of abortion’s harms to women and from evidence of abortion provider’s often substandard facilities and practices with commonsense legislation. Nevadans—and the citizens of other states—will be left completely unprotected.

*Proposed Amendment Ignores Legitimate State Interests*

The U.S. Supreme Court has recognized that states have multiple interests supporting abortion regulations. These “legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.”<sup>6</sup>

SJR 7 ignores these legitimate state interests, providing that the only “compelling interest” that can inform abortion regulations is “protecting the health of an individual who is seeking reproductive health care that is consistent with accepted clinical standards of practice.” This excessively narrow definition improperly “handcuffs” legislators in their efforts to protect and serve all Nevadans, including the unborn. It also ensures that the only standards of care that will be consulted are those promulgated by self-interested and financially interested abortion providers and advocacy groups. This wrongly ignores the growing evidence of abortion’s harms to women.

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<sup>6</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (internal citations omitted).

*Proposed Amendment Will Force Nevada Taxpayers to Fund More Abortions, Contraception, Sterilizations, Fertility Treatments, Cross-Sex Hormones, and Puberty Blockers*

The U.S. Supreme Court and federal law prohibited taxpayer dollars from funding abortions. Strong majorities of taxpayers agree that tax dollars should not be used to support abortion. Yet under the proposed amendment, Nevada taxpayer dollars could be required to fund abortions, birth control, fertility treatments, cross-sex hormones, and even puberty blockers. They would be forced to fund these procedures and products for residents and non-residents, minors and adults, males and females. Nevada will join California, New York, and Minnesota as a dangerous, unregulated, and unrestricted “Wild West” for abortions to the detriment of women, infants, crime victims, and Nevada taxpayers.

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SJR 7 goes far beyond codifying the now-defunct decision in *Roe v. Wade*. The language is dangerously vague and will compromise parental rights and endanger minors and crime victims. It also threatens the freedom of conscience of Nevada’s healthcare professionals and precludes the enactment and enforcement of commonsense, protective laws such as parental involvement for minors’ abortions.

It would also force Nevada taxpayers to pay for abortions, contraception, sterilizations, fertility treatments, and even the surgical removal of healthy reproductive organs. Taxpayers will be forced to fund these services even for non-residents and for crime victims when the crimes are not reported to law enforcement or appropriately addressed. SJR 7 victimizes rather than protects and empowers women and girls.