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VIA US POST and VIA EMAIL

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**OPEN LETTER TO CALIFORNIA STATE LEGISLATORS IN OPPOSITION TO AB 2223 AS IT IS POORLY DRAFTED AND COULD DE-REGULATE THE ENTIRE ABORTION INDUSTRY AS WRITTEN**

In its attempt to protect women from prosecution for abortion, AB 2223's overbroad language creates a host of unforeseen legal ramifications. The bill potentially de-regulates abortion and overrides existing medical protections for women by creating a class of cooperating individuals unaccountable to state licensing agencies or regulations.

AB 2223 goes much further than simply shielding pregnant people from prosecution; it provides total civil and criminal immunity for the actions (whether legal or illegal) of anyone who aids and assists the pregnant person from civil and criminal liability - so long as the pregnant person consents.

AB 2223 will chill proper investigations of **abortion cooperators** (not just the pregnant person) by granting penalties, including attorney's fees against anyone who even threatens an investigation including law enforcement, medical professionals and mandated reporters.

AB 2223 should be rejected as incompatible with existing laws protecting women's health.

Sincerely,

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### **A. THE BILL’S “NOTWITHSTANDING ANY OTHER LAW” LANGUAGE POTENTIALLY OVERRIDES EXISTING HEALTH PROTECTIONS AND OTHER STATE REGULATIONS**

On its face, AB 2223 eliminates existing women’s reproductive health laws. It grants sweeping protections, not only to the pregnant person, but also to anyone assisting her in achieving her chosen **pregnancy outcome**.

As currently drafted, AB 2223 adds the following statutory language:

#### **California Health and Safety Code 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~~. *causes that occurred in utero.*

(b) A person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their



rights, based solely on their **actions to aid or assist a pregnant person** in exercising their rights under this article with the pregnant person’s voluntary consent.<sup>1</sup> (emphasis added).

AB 2223 uses the phrase “notwithstanding any other law,” a legal term of art. The California Court of Appeals explained in *Klajic v. Castaic Lake Water Agency*:

“Notwithstanding” means “without prevention or obstruction from or by” or “*in spite of*” or “despite”.<sup>2</sup> The statutory phrase “notwithstanding any other law” has been called a “‘term of art’” that **declares the legislative intent to override all contrary law**. By use of this term, the Legislature expresses **its intent “to have the specific statute control despite the existence of other law which might otherwise govern.”**<sup>3</sup>

The phrase expresses the will of the people’s representatives to override other laws, especially existing laws that conflict with the new law. Our state supreme court explains:

“ ‘If conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones.’ But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence.”<sup>4</sup>

Although the author’s stated purpose is to shield mothers from prosecutions for “pregnancy loss,” the bill’s overbroad language far exceeds that stated purpose. AB 2223’s “notwithstanding” language means that the civil and criminal immunity granted to a pregnant person, and granted to their cooperators, supersedes all other laws in effect. This bill operates to grant full civil and criminal immunity for both the pregnant person, and for the **actions of all those who assist the pregnant person**, barring the state from any interference in an individual’s pregnant outcome.

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<sup>1</sup> Text of AB 2223 Reproductive Health (As Amended) . Retrieved June 7, 2022, from [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=202120220AB2223&showamends=false](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2223&showamends=false) (highlights to text added, strikeouts in original).

<sup>2</sup> *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13, (citing Webster’s 3d New Internat. Dict. (unabridged Dict. 1993) p. 1545, italics added; and Webster’s 10th New Collegiate Dict. (1995) p. 795).

<sup>3</sup> *Id.* italics added (citing *People v. Franklin* (1997) 57 Cal.App.4th 68, 73-74); *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785, and cases cited therein; *Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1050-1051, fn. 4; *In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 475, [“notwithstanding any other provision of law” “signals a broad application overriding all other code sections”].) *People v. Fuentes*, G048719 (Cal. Ct. App. Oct. 8, 2014)(emphasis added).

<sup>4</sup> *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961 (citations omitted).



## B. AB 2223 OVERRIDES EXISTING MEDICAL REGULATIONS

Currently, California laws regulates when<sup>5</sup> and who may legally perform an abortion. AB 2223 will provide civil and criminal immunity for all **actions** taken to aid or assist the mother with her chosen pregnancy outcome, irrespective of training or license, effectively eliminating all existing medical regulations around abortion.

The bill's "notwithstanding" language, as well as its sweeping grant of immunity for pregnant persons and their cooperators, will not only override Health and Safety Code Section 123468<sup>6</sup>, it will also corrupt the definition of murder codified in Penal Code section 187(a).<sup>7</sup> Currently, section 187(a) provides immunity against murder charges, but only for anyone who performs an abortion in compliance with existing California regulations. This safeguards women's health while protectings abortionists from murder charges.

AB 2223's sweeping language also likely overrides Penal Code sections 187(b) and 187(c), expanding protection from prosecution. Cooperators need not hold a physician's license or operate in accordance with the state's pre-existing abortion laws; they merely need the consent of the pregnant person. This undermines state medical regulations for medical professionals.

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<sup>5</sup> California Health and Safety Code Section 123466 states: "The state shall not deny or interfere with a pregnant person's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the pregnant person." What is "viable?" People v. Turner (2020) 10 Cal.5th 786, 823, defines "viable" as 22 weeks and 500 grams, as of 1989 (?). Cf. People v. Davis (1994) 7 Cal.4th 797, 810, which defines "viable" as "seven or eight weeks after fertilization."

<sup>6</sup> Existing California law, an abortion is unauthorized either 1) when performed by someone (other than the mother) who is not a licensed health care provider or 2) when a licensed health care professional aborts a viable fetus where the pregnancy did not pose a risk to the pregnant person's health. See Health and Safety Code Section 123468.

<sup>7</sup> California Penal Code Section 187 defines murder. It currently states:

- (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.
- (b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:
  - (1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code .
  - (2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
  - (3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.
- (c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.



### **C. PROVIDES SWEEPING PROTECTIONS FOR THE ACTIONS, WHETHER LEGAL OR ILLEGAL, OF ANY COOPERATOR WHO AIDS OR ASSISTS IN THE PREGNANCY OUTCOME**

AB 2223, in creating California Health and Safety Code Section 123467(b), shields all those persons who cooperate to aid or assist the pregnant person's chosen pregnancy outcome. The specific language states:

(b) A person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be deprived of their rights, based solely on their **actions to aid or assist a pregnant person** in exercising their rights under this article with the pregnant person's voluntary consent.<sup>8</sup>

AB 2223's language not only exempts these Cooperators from existing licensing and training requirements, it also shields them from investigation for their actions.

AB 2223 will add Section 123469 to the Health and Safety Code<sup>9</sup>:

**123469. (a) A party aggrieved by conduct or regulation in violation of this article may bring a civil action against an offending state actor in a state superior court.**

(b) Whoever denies a right protected by this article, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, all of the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) **A civil penalty of twenty-five thousand dollars (\$25,000)**, to be awarded to the person denied the right protected by this article.

(3) Preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this article.

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<sup>8</sup> Text of AB 2223 Reproductive health (As Amended) at Section 7. Retrieved June 7, 2022, from [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=202120220AB2223&showamends=false](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2223&showamends=false) (emphasis added).

<sup>9</sup> *Id.* at Section 9.



(4) Upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to this section. In awarding reasonable attorney's fees, the court shall consider the degree to which the relief obtained relates to the relief sought.

(c) An action under subdivision (b) shall be commenced within three years of the alleged practice violation of this article.

(d) (1) A party aggrieved by conduct or regulation in violation of this article may also bring a civil action pursuant to Section 52.1 of the Civil Code. Notwithstanding Section 821.6 of the Government Code, a civil action pursuant to Section 52.1 of the Civil Code may be based upon instituting or prosecuting any judicial or administrative proceeding in violation of this article.

(2) For purpose of establishing liability pursuant to this subdivision, the **criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, constitutes "threat, intimidation, or coercion" pursuant to Section 52.1 of the Civil Code.**

(e) Sections 825, 825.2, 825.4, and 825.6 of the Government Code, providing for indemnification of an employee or former employee of a public entity, apply to any cause of action brought under this section against an employee or former employee of a public entity.

Thus, AB 2223 creates a class of unaccountable, unregulated unlicensed Cooperators immune from legal scrutiny.

It is possible that the author's intention was to shield cooperators from liability for the specific cause of action known as "aiding and abetting," which can give rise to both civil and criminal liability. However, the language in the bill does not say that.

The actual language of the bill goes much farther, granting Cooperators full civil and criminal immunity for "**their actions to aid or assist a pregnant person.**" So, *whatever* actions the cooperator took (legal or illegal) to aid or assist the pregnant person cannot form the basis of any type of civil or criminal liability. The legal ramifications of such a broad grant of immunity give one pause.

This broad grant of immunity could thwart enforcement of numerous state regulations, such as distributing medications or practicing medicine without a state license, or operating an unlicensed



backyard medical facility. Cooperators “actions” can violate any law with civil and criminal impunity so long as they have the pregnant person’s consent.

Likewise, if a Cooperator performs an abortion on a mother, or alternatively, delivers her child, but is not licensed by the state medical board to do so, what is his status under the law? AB 2223 operates to shield him from state prosecution for aborting the child because he was assisting the mother in obtaining her chosen pregnancy outcome; however, can the state pursue him separately for practicing medicine without a license?

Yet, if Cooperators may be prosecuted after an abortion or a delivery for practicing medicine without a license, AB 2223’s grant of immunity is then perversely limited to a case by case basis and wholly inconsistent with the bill’s stated purpose to shield mothers and all those who assist them in exercising their fundamental right to their chosen pregnancy outcome.

If the mother undergoes either an abortion or delivery of her child, having given consent to the Cooperators’ actions, but dies as a result of those **actions** to aid or assist her, what consequences, if any, does the Cooperator face? Can an investigation into the consequences of the pregnancy outcome even be mounted given AB 2223’s grant of full immunity? If so, under what theories of law can Cooperators be investigated for accomplishing the mother’s goal with her consent?

#### **D. AB 2223 WILL NULLIFY EXISTING INFANT BORN ALIVE PROTECTIONS**

AB 2223 conflicts with California’s 1995 Born Alive Protection law, Health and Safety Code Section 123435. That 1995 law requires that a child born alive in the course of an abortion must receive the same care offered a child delivered in the course of a live birth.<sup>10</sup> As a legal matter, AB 2223’s sweeping language nullifies statutory Born Alive protections.

As currently amended, AB 2223 provides civil and criminal protections to pregnant people and their cooperators for “miscarriage, stillbirth, or abortion, or perinatal death due to ~~a pregnancy-related cause~~ *causes that occurred in utero.*”<sup>11</sup>

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<sup>10</sup> California Health and Safety Code Section 123435. Retrieved June 7, 2022, from [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=HSC&sectionNum=123435](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=HSC&sectionNum=123435)

<sup>11</sup> Text of AB 2223 Reproductive health (As Amended) . Retrieved June 7, 2022, from [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=202120220AB2223&showamends=false](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2223&showamends=false) (italics, highlights and strikeouts in original).



This “perinatal death due to causes that occurred in utero” language means that an infant born alive due to a botched abortion can be left to die so long as the abortionist determines that the cause of death occurred in utero.<sup>12</sup>

Although the Infant Born Alive Protection remains on the books but is totally nullified by both the “notwithstanding” language, as well as the language permitting civil and criminal immunity for the perinatal death of a child - a child born alive but left to die.

As a practical matter, AB 2223 permits infanticide following a botched abortion in direct contradiction to existing California law.

### **E. AB 2223 CREATES A CAUSE OF ACTION, WITH ATTORNEY’S FEES, FOR THE MERE THREAT OF PROPER INVESTIGATION OF PREGNANT PERSONS AND THEIR COOPERATORS BY LAW ENFORCEMENT, MEDICAL PROFESSIONALS OR MANDATED REPORTERS (AND ALL OTHERS)**

AB 2223 negatively impacts law enforcement investigative duties. AB 2223 creates a brand new **private cause of action**, including an attorneys’ fees provisions, for violation of any part of this bill, including the prohibition against performing a proper investigation. Even the threat of opening an investigation is enough to trigger a civil cause of action for damages.

In an interview, the Riverside County Sheriff Chad Bianco, explained the impact AB 2223 will have on his investigative abilities: “if this bill passes, it is preventing us from doing that investigation, from doing that research into why that baby died.’ Law enforcement is going to lose the ability to do its job.... ‘[Law enforcement] can’t even look into it, or we subject ourselves to criminal or civil penalties,’ Bianco said. “This bill either has to be severely amended, or gutted, or voted down.”<sup>13</sup>

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<sup>12</sup> AB 2223 strips the coroner’s duty to investigate the cause, allowing him or her to defer to the “physician of record”.

The operative language of the bill appears as follows:

**SEC. 2.** Section 27491 of the Government Code is amended to read ...

(b) The coroner shall have discretion to determine the extent of inquiry to be made into any death occurring under natural circumstances and falling within the provisions of this section, and if inquiry determines that the physician of record has sufficient knowledge to reasonably state the cause of a death occurring under natural circumstances, the coroner may authorize that physician to sign the certificate of death.

Text of AB 2223 Reproductive Health (As Amended), Section 2. Retrieved June 7, 2022, from [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=202120220AB2223&showamends=false](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220AB2223&showamends=false)

<sup>13</sup> Lorey, S. (2022, May 16). *Riverside sheriff condemns infanticide bill in interview with Pastor Jack Hibbs - California Family Council*. California Family Council - Advancing God's Design for Life, Family, and Liberty through California's Church, Capitol, and Culture. Retrieved June 7, 2022, from <https://www.californiafamily.org/2022/05/pastor-jack-hibbs-interviews-riverside-county-sheriff-chad-bianco/>



The mere **threat of investigation** triggers a cause of action against doctors, nurses or hospital staff, family or other private citizens who may wish to report child abuse or death in the weeks following birth. This will likely chill reports of such abuse for fear of legal reprisal. This aspect of AB 2223 may conflict with state mandated reporter laws, and federal laws inasmuch as it may violate health care providers' right to provide medical advice protected under the First Amendment.

## F. CONCLUSION

AB 2223's overbroad and overreaching language creates a staggering number of legal and practical problems far beyond its goal of protecting women from rogue prosecutions. The bill's extensive and fatal flaws cannot be addressed with wordsmithing.

Women deserve health protections. Creating a law granting sweeping immunity for all Cooperators' actions, whether legal or illegal, such as that contemplated by AB 2223, jeopardizes health protections for all women irrespective of their chosen pregnancy outcome.

For these reasons, AB 2223 should be rejected as incompatible with existing laws protecting women's health.

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