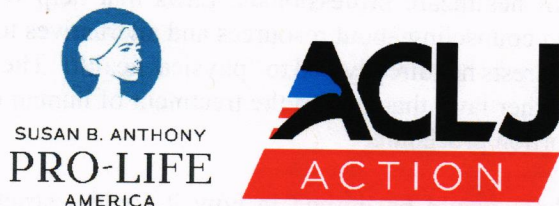


From: Katie Glenn <Kglenn@sbapro-life.org>
Sent: Monday, August 15, 2022 1:20 PM
To: ATG Ballot Comments
Cc: Adam Schwend
Subject: [EXT] SBA ACLJ Action Ballot Initiative Comment



Comment on Proposed Ballot Initiative “A Constitutional Amendment Concerning the Regulation of Abortion”

Date: 15 August 2022 [Submitted Via Email]

To: The Honorable Mark A. Vargo
Attorney General
State of South Dakota

Dear Attorney General Vargo:

This comment is submitted in response to the South Dakota Secretary of State’s receipt of a proposed ballot amendment ([‘the Amendment’](#)) which would significantly alter the way abortion is regulated in South Dakota, permitting more abortions with less oversight than at any point in recent memory.

The Draft Attorney General’s Statement filed on August 4, 2022, undersells the extent to which the Amendment, if adopted, would fundamentally change abortion in South Dakota and fails to address the liability to which the state would be exposed. The Attorney General’s final “Explanation” statement will be the official statement of the government of South Dakota and must accurately explain to voters the stakes of enacting the Amendment, not just to mothers and their children but to the state as a whole.

The Amendment would permit abortion for virtually any reason, even later in pregnancy when the unborn child can feel excruciating pain.

Currently, abortion is [illegal](#) in South Dakota unless it is necessary to save the life of the mother. South Dakota voters have consistently elected pro-life lawmakers who passed the “trigger law,” which took effect on June 24, 2022, when the Supreme Court of the United States [returned](#) “the authority to prohibit abortion at all stages of pregnancy” to Congress and the states.

The Amendment would set South Dakota back decades, returning the state to a regime where abortion doctors are unaccountable for harm they cause to mothers and unborn children are unprotected.

The federal Centers for Disease Control and Prevention (CDC) [reported](#) that in 2019, 92.7% of reported abortions nationally occurred before 13 weeks’ gestation; South Dakota mirrors that trend, [reporting](#) 89% of abortions prior to 13 weeks’ gestation in 2020. As currently written, the Amendment would forbid the state from regulating an “abortion decision and its effectuation” in any way “before the end of the first trimester,” which ends in the [thirteenth week of pregnancy](#). The vast majority of abortions in South Dakota would be totally unregulated, and prosecutors would be unable to act if a woman or girl within their jurisdiction was harmed during an abortion. If notorious Philadelphia abortionist [Kermit Gosnell](#), currently serving a life sentence, set up shop in South Dakota, there is nothing the state could do about it as long as he stayed within that first 12 weeks’ gestation.

During the second trimester, the State may only “regulate the pregnant woman’s abortion decision *and its effectuation* . . . in ways that are *reasonably related to the physical health* of the pregnant woman.” Because the second trimester extends well past the timeframe when children reach viability, which is now closer to [22 weeks’ gestation](#), the Amendment would allow for the killing of unborn children who could survive outside the womb.

Use of the term “effectuate” is concerning because it prevents the state from restricting the method of abortion until the 28th week of pregnancy and could be used to allow the killing (through direct or indirect action) of a child born alive after a botched abortion.

Furthermore, it would prevent the state from asserting any interests on behalf the child and would likely be used to challenge laws protecting the conscience rights of healthcare professionals. Laws that help women make their decision such as informed consent, reflection periods, and counseling about resources and alternatives to abortion would all be struck down as serving otherwise legitimate state’s interests not directly tied to “physical health.” The Amendment could have unforeseen consequences on child-welfare laws or other laws that govern the treatment of human remains, reporting deaths of human beings, or other laws adjacent to the abortion procedure.

Even in the third trimester, South Dakota would be limited in how it could restrict late-term abortions. The “health” exception is left undefined, leaving it to the courts to determine how broadly it might be interpreted. A court might look to existing [South Dakota law](#) and narrowly define it as “a serious risk of substantial and irreversible impairment of a major bodily function.” Or it could rely on [Doe v. Bolton](#), finding that “medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health.” If health could mean anything and everything, there would be virtually no restriction on abortions throughout pregnancy in South Dakota. Ironically, the Amendment would prevent commonsense laws that require healthcare professionals to provide women with information about the well-documented negative effects abortion has on a woman’s physical, mental, and emotional health.

The Amendment does not recognize South Dakota’s interest in the unborn child. His or her health, wellbeing, or chance at life is never considered anywhere in the Amendment as currently written. If added to the South Dakota Constitution, the Amendment would assert that South Dakota has *no* interest in the child and could be used as a tool of future courts to invalidate any protections that remained.

The Amendment would repeal most South Dakota abortion laws, including those protecting children from discriminatory abortions on the basis of their sex or a fetal diagnosis, and prevent South Dakota from protecting women and girls from dangerous, substandard medical treatment.

These laws would be invalidated or significantly limited in scope by the Amendment:

Recognition of the Dignity of Unborn Children:

- [34-23A-1.3](#) (legislative findings recognizing a relationship between mother and child)
- [34-23A-2](#) (“trigger law” protecting the unborn child from conception)
- [34-23A-27](#) (partial-birth abortion ban)
- [34-23A-64](#) (preventing sex-selective abortions)
- [34-23A-67](#) (legislative findings about fetal pain)
- [34-23A-69](#); [34-23A-70](#) (prohibition on abortions after the child can feel pain)
- [34-23A-72](#) (late-term abortions done for a “medical emergency” must use the method likeliest to result in the child’s survival)
- [34-23A-90](#) (preventing abortions on the basis of a Down syndrome diagnosis)

Baseline Health and Safety Standards:

- [34-23A-1.4](#) (legislative findings recognizing the inherent risks to the pregnant woman)
- [34-23A-4](#) (abortions between 12-22 weeks’ gestation must be performed in a hospital or licensed physician’s medical clinic)
- [34-23A-5](#) (abortions after 22 weeks’ gestation may only be performed in the case of a medical emergency and must be in a hospital)

- 34-23A-6 (later-term abortions must be performed in a facility with a supply of blood available and that is able to provide Rho-gam for women with an Rh-negative factor)
- 34-23A-46; 34-23A-48 (licensing of abortion facilities)
- 34-23A-49 (inspection of abortion facilities)
- 34-23A-56 (in-person counseling and screening prior to procedure)
- 34-23A-71 (limiting “medical emergency” exceptions physical health, not self-harm)
- 36-4-8; 36-9A-17.2 (limiting abortion to licensed physicians)
- 36-4-47 (establishing FDA’s best practices for dispensing abortion-inducing drugs)

Ensuring a Woman Makes an Informed Decision:

- 34-23A-1.5 (legislative findings that the state owes a special protection to pregnant women)
- 34-23A-1.6 (legislative findings outlining the standard of care for informed consent)
- 34-23A-7 (written notice to parent or guardian before performing an abortion on a minor)
- 34-23A-7.1 (judicial bypass for minors seeking abortion ensuring that at minimum she speaks to a judge and has access to a guardian ad litem)
- 34-23A-10.1 (voluntary and informed consent after a reflection period, including information about alternatives to abortion and abortion pill reversal)
- 34-23A-52 (opportunity to see a sonogram and hear the child’s heartbeat)
- 34-23A-54 (legislative findings about coerced abortion)

Justice for Women and Families Harmed by Abortion:

- 34-23A-1.7 (common law cause of action for medical malpractice if the physician fails to provide adequate informed consent prior to an abortion)
- 34-23A-10.2 (misdemeanor penalty for a physician who does not obtain informed consent before performing an abortion)
- 34-23A-29; 34-23A-30 (civil action and damages for death of child in partial-birth abortion)
- 34-23A-55 (physician’s duty to ensure that abortion is informed and not coerced)
- 34-23A-60 (civil action if a physician fails to obtain informed consent)
- 34-23A-61 (civil action for any violation of the abortion code)
- 34-23A-91 (civil action for abortion done on the basis of Down syndrome diagnosis)

Conscience Rights of Healthcare Professionals and the Public:

- 34-23A-11 (conscience rights of counselors or social workers)
- 34-23A-12; 34-23A-13 (conscience rights of physicians, nurses, and other healthcare professionals)
- 34-23A-14 (conscience rights of hospitals that do not offer abortions)
- 58-17-147 (prohibiting coverage of elective abortions in qualified health plans)

South Dakota would rival Colorado and New Mexico in its extremism if this Amendment were to pass. The state would become an abortion destination for the region.

The proposed summary insufficiently explains the stakes of the Amendment, including that it would enshrine a “right to abortion” into the South Dakota Constitution.

The Amendment would create a right to abortion in South Dakota law which has never existed in the state’s history by mimicking the failed framework that the Supreme Court of the United States discarded this past term. As the multitudinous decisions of the Supreme Court demonstrate, *Roe v. Wade*’s creation of a “[constitutional right](#)” to abortion did not resolve the issue. Instead, the Court faced decades of abortion-related litigation over the Court’s invented “right” to abortion and efforts by legislatures to affirm the sanctity of unborn human life, protect women from abusive practices, and address the problem of unsafe abortion practices.

As indicated by the list above, if South Dakota were to pass the Amendment, the South Dakota Supreme Court would have to grapple with a similar parade of questions, to be answered with only the aid of vague state constitutional text. The Amendment would expose the state to vast liability and clog up state courts with decades of litigation and showdowns between the three branches of government.

Susan B. Anthony Pro-Life America and ACLJ Action submit an alternative summary which better reflects the impact the Amendment would have on South Dakota's laws and its citizens.

Proposed Summary:

The amendment establishes a constitutional right to abortion in South Dakota and imposes limits on the ability of the legislative and executive branches to regulate abortion.

The amendment establishes that during the first trimester of pregnancy (0-12 weeks'), the state may not regulate or restrict the carrying out of an abortion in any way.

In the second trimester (13-28 weeks'), the amendment does not allow the state to regulate or restrict abortion unless the regulation directly affects the "physical health of the pregnant woman."

In the third trimester (29-40 weeks'), when abortion is determined to be necessary to preserve the life or health of the woman, which may include emotional, financial, or familial health, then the state may not regulate or prohibit the abortion.

The amendment would supersede existing laws related to abortion, including who can perform them and where they are performed, as well as fetal pain, parental consent, alternatives to abortion, and conscience rights of healthcare professionals. The legislature or the courts will need to interpret or clarify terms. The Amendment may conflict with other state civil and criminal laws, which could require litigation to resolve.

We oppose the proposed ballot amendment and encourage the Attorney General to publish a final summary that better reflects the magnitude of this initiative's change to South Dakota law.

Submitted on behalf of Susan B. Anthony Pro-Life America and ACLJ Action.

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Susan B. Anthony Pro-Life America is a network of more than one million pro-life Americans nationwide, dedicated to ending abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

ACLJ Action, Inc. is an organization dedicated to the defense of constitutional values, liberty, and religious freedom in the U.S. and abroad.