TESTIMONY OF MICHAEL J. NORTON
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Regarding House Bill 14-1324, Unlawful Termination of Pregnancy

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My name is Michael J. Norton. I am an attorney and senior counsel with Alliance Defending Freedom, an alliance-building, non-profit legal organization. I have also had the privilege of serving as the United States Attorney for the District of Colorado.

Most of my work with Alliance Defending Freedom is in civil litigation, including advocating for the right of people to freely live out their faith in the area of religious liberties and conscience rights. In that arena, I have litigated conscience issues concerning state and federal law. I am currently involved in multiple lawsuits in federal and state courts concerning the conscience rights of private business owners not to be required by either the federal government or state governments to violate their consciences in connection with the so-call U.S. Department of Health and Human Services abortion pill mandate.

On December 11, 1992, David Martin and his wife pulled over on the side of the road in Sabine County, Texas to assist a motorist. Suddenly, a drunk driver traveling at a high rate of speed struck their vehicle. The force of the collision caused extensive injuries to Mrs. Martin that resulted in the death of her unborn daughter, Edie Elizabeth. The drunk driver was never held legally or financially responsible for Edie's death because – at that time – Texas law did not permit a

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wrongful death cause of action in the death of an unborn child. Texas has since changed its law.[1]

A few years ago in Colorado, Shantel Gonzalez was a passenger in an automobile when her car was struck by another driver. At the time, Shantel was twenty-two weeks pregnant. She was taken to the hospital where she remained for two days. One day following her discharge, she suffered massive vaginal bleeding, returned to the hospital, and not long thereafter gave birth to a male child who lived for a short time. The Colorado Court of Appeals held that a wrongful death action could be maintained for the death of a nonviable fetus born alive and held the negligent driver accountable. *Gonzalez v. Mascarenas,* 190 P.3d 826 (Colo. App. 2008).

Several years before the Gonzalez case, a car driven by Luis Espadero was struck by a car driven by a drunk driver. Mr. Espadero's wife, a passenger in his van, was killed in the collision. At the time of her death, she was nine months pregnant and her full-term unborn male son also was killed in the crash. Following the law of Alabama, Judge Jim R. Carrigan said: "[T]o allow recovery where the fetus is stillborn is essential to the effectuation of legislative intent. . . . The paramount purpose of our wrongful death statute . . . is the preservation of human life. . . . To deny recovery would sanction the tortfeasor's wrongful act and would clearly negate the primary objective of the statute." *Espadero v. Feld*, 649 F.Supp. 1480, 1481, 1493-84 (D.Colo. 1986).

This is the law in Colorado today. HB 14-1324 represents a step backward in our law. Colorado should follow Texas and its change in the law relating to the wrongful death of an unborn child, not retreat from it.

Quite honestly, HB 14-1324 appears to have been drafted by Colorado's abortion lobby and might better be called "Colorado's Kermit Gosnell Protection Act of 2014."

Certainly, there are some worthy goals expressed in the Bill Summary. However, we are concerned that HB 14-1324 does not recognize the right to life, in any circumstance, of an unborn child. In fact, HB 14-1324 appears to go out of its way to assure that any statute or court case that might have previously been interpreted as recognizing that an unborn child has such a right to life would be overruled or superseded by this bill if it is enacted.

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[1] Americans United for Life, Model Legislation & Policy Guide for 2012. "Unborn Wrongful Death Act.

As a starting point, we believe, as do many Coloradans, that life begins at conception; that an unborn child is a "human person;" and that the life of that human person may not be unjustifiably taken. Whether one reaches this position by virtue of reason or by virtue of one's faith, science increasingly demonstrates that the beginning of human life is at the moment of conception or fertilization.

For example, medical advances in recent decades have provided a greater understanding of the development of unborn children and their capacity to feel pain at various stages of growth. Indeed, a substantial and growing body of medical evidence indicates that unborn children respond to touch by eight weeks after fertilization and respond to painful stimuli by no later than 20 weeks after fertilization. Moreover, surgeons routinely administer anesthesia to unborn children before performing surgery. In addition, limitations on later term abortions protect women's health because later-term abortions can be hazardous to women's health.

This bill is wrong for Colorado and Colorado's women because:

- HB 14-1324 fails to recognize that an unborn child is a separate, unique, and living human being. *See, e.g., Planned Parenthood v. Rounds,* 530 F.3d 724, 735-36 (8th Cir. 2008) ("abortion will terminate the life of a whole, separate, unique, living human being"; "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb").

- HB 14-1324 defines pregnancy as "the presence of an implanted human embryo or fetus within the uterus of a woman" and not a unique, living human being at the moment of conception or fertilization.

- HB 14-1324 provides that nothing in "this act shall be construed to confer legal personhood, or any rights associated with that status, upon a human being at any time prior to live birth" and that the act would not "confer[] legal personhood upon an embryo or fetus for the purposes of Colorado's wrongful death statute or for any other purpose."

- HB 14-1324 provides that "nothing in this act shall be construed to create a cause of action against a health care provider engaged in providing health care services to a patient."

- HB 14-1324 provides, in the Bill Summary, that it "creates a civil cause of action as the sole civil remedy for a woman who suffers an intentionally, knowingly, or recklessly unlawful termination of her pregnancy."

    - Kermit Gosnell, who operated the Philadelphia "house of horrors," was convicted of murdering three children who had survived a botched abortion. Last year, the General Assembly passed and the Governor signed a bill amending the Colorado Criminal Code to assure that there would be no such similar criminal prosecutions against abortionists in the State of Colorado. *See* C.R.S. 18-3.5-101(6) (2013). This year, this bill would, if enacted, finish the job that abortionists have set out to achieve as it would shield abortionists from all civil liability as well.

    - Under current Colorado law, both a father and a mother, among others, have a cause of action for the wrongful death of an unborn child who survives a negligent injury to the mother and then dies. This bill would deprive both the father and the mother of that right to recover for the death of their child.

    - Under current Colorado law, abortionists and others who cause the death of an unborn child who survives and then dies are liable for their negligence. This bill not only protects abortionists and others from liability for such simple negligence, it shields them from liability for "reckless[] unlawful termination of . . . [a] pregnancy.

Specifically, and in regard to these concerns, HB 14-1324 would: (a) provide that the term "person" as used in the Colorado Wrongful Death Act, C.R.S. § 13-21-202, does not include an unborn human being; (b) would supersede the Colorado Court of Appeals decision in *Gonzalez v. Mascarenas,* 190 P.3d 826 (Colo. App. 2008); and (c) would define "person" as "a human being who had been born and was alive at the time of the wrongful act, neglect, or default."

As the Colorado Wrongful Death Act, in accord with the *Gonzalez* decision, is currently applied, a wrongful death action may be maintained on behalf of a child who was unborn at the time of the injury but is born alive after the injury and subsequently dies. Moreover, a wrongful death action may also presently be

maintained in Colorado for the death of a viable fetus, particularly a full-term fetus. *Espadero v. Feld,* 649 F. Supp. 1480 (D. Colo. 1986).

Although it is less clear that HB 14-1324 would modify other Colorado laws, currently, Colorado law defines "child abuse or neglect" to include instances where an infant tests positive at birth for a controlled substance. Colorado also funds substance abuse treatment for pregnant women and prohibits the use of drug tests performed as a part of prenatal care in criminal prosecutions.

These causes of action and common sense provisions now in Colorado's law would very likely be repealed by this bill.

We are also concerned that medical malpractice actions by women for botched abortions may be affected if this bill were enacted since the bill purports to be the "sole" civil remedy for unlawful termination of a pregnancy. For example, in Colorado Springs, Ayanna Byer has filed a medical malpractice action against Planned Parenthood of the Rocky Mountains for just such a botched abortion when the Planned Parenthood doctor left tissue in Ms. Byer's uterus and a severe infection ensued. Her medical malpractice negligence case is pending now in El Paso County District Court. This and other similar negligence claims may well be barred by enactment of this bill.

Limiting liability of medical professionals who intentionally, knowingly, or recklessly cause the termination of a pregnancy, as this bill would do, does not help Colorado women or Colorado children. Indeed, this bill hurts women and children, as well as men.

Even *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] do not require the enactment of such an extreme measure.

In *Roe v. Wade*, the Supreme Court recognized two state interests: the "important interest" in protecting a pregnant woman's health and "still another important and legitimate interest in protecting the potentiality of human life." "This is so," the Court explained, "because the [viable] fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological

[2] 410 U.S. 113 (1973).
[3] 505 U.S. 833 (1992).

justifications." Thus, "if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

It is certainly appropriate for the mother of an unborn child to have a cause of action for injuries to her. It is likewise appropriate for an unborn child and her father to also have a right to a cause of action for injuries to her.

Passage of this bill would make Colorado an outlier in the protection of both the mother and the unborn child. Colorado would be the only state in the country that does not, at least, permit a wrongful death action to be brought on behalf of a child who is injured in the womb, is born, and then dies. Rather than providing more protection and remedies for pregnant women and their children, this bill actually provides *less* protection and protects wrongdoing by abortionists and medical professionals.

We urge the defeat of HB 14-1324. It may sound good at first blush, but it is a bad idea – it is bad for Colorado women and children.