

October 13, 1995

Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Entitled "Definition of Life"

Dear Mr. Cenarrusa:

An initiative petition entitled "Definition of Life" was filed with your office on September 18, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare a short and long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioners would like to propose language with these standards in mind, we would recommend that they do so. Their proposed language will be considered, but our office is responsible for preparing the title.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative would amend title 18, chapter 6 of the criminal code, the "Abortion and Contraceptives" chapter, and prohibit the taking of any life. "Life" is defined in section 18-616 of the proposed initiative as consisting of "either brain stem activity, or [a] heart beat in a human being." Thus, the effect of this proposed initiative is to criminalize abortion where there is either brain stem activity or a detectable heartbeat in the fetus. Not only would such an abortion be criminalized by this proposed initiative, the mandatory punishment for such an abortion would be the death penalty. In this regard, section 18-619 of the proposed initiative provides for a penalty of capital punishment. It further states that a violation of the proposed initiative's terms can only be prosecuted by a court as "premeditated murder" and may not be "plea bargained to any other charge." Finally, the proposed initiative provides, in section 18-616, that its definition of life is "for the purpose of protection by the State of Idaho under the Constitution of the United States, and the Constitution of the State of Idaho."

The proposed initiative violates the United States Constitution. The United States

Supreme Court held in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 143 (1973), that a woman has a fundamental right to terminate a pregnancy. The Court established what has been characterized as a “trimester approach” to govern the regulation of abortion. Almost no governmental regulation impeding a woman’s access to an abortion was permitted during the first trimester of a pregnancy. Governmental regulation designed to protect the woman’s health, but not to further the state’s interest in potential life, was permitted during the second trimester. Finally, during the third trimester, when the fetus was viable, certain abortion prohibitions were permitted so long as they did not jeopardize the life or health of the woman. Roe, 410 U.S. at 163-66.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the United States Supreme Court reaffirmed the essential holding of Roe. There were some modifications to the Roe decision. The Court rejected Roe’s trimester construct, reasoning that its “rigid prohibition on all previability regulation aimed at the protection of fetal life . . . undervalue[d] the State’s interest in potential life” Casey, 112 S. Ct. at 2818. The Court instead adopted a new “undue burden” test. Under this test, a state may regulate abortion to further its interest in potential life or to foster the health of the mother so long as the “purpose or effect” of the regulation is not to place “a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* (Citation omitted.) Once the fetus is viable, the state may proscribe abortion “except where it is necessary, in appropriate medical judgment, for the preservation of the life or the health of the mother.” *Id.* at 2821.

The proposed initiative prohibits an abortion if brain stem activity or a heartbeat is detectable in the fetus. This restriction clearly prohibits some previability abortions. Viability is the point at which “there is a realistic possibility of maintaining and nourishing a life outside the womb” Casey, 112 S. Ct. at 2817. Survival as early as 21 weeks gestational age is possible. However, viability does not reach back to when brain stem activity or a heartbeat is initially detectable. For example, a heartbeat can occur as early as the 32nd day of fetal development. This proposed initiative, by bringing within its ban previability abortions, violates Casey’s mandate that the state not place a “substantial obstacle” in the path of a woman seeking an abortion before the fetus attains viability.

The proposed initiative defines life “for the purpose of protection by the State of Idaho under the Constitution of the United States, and the Constitution of the State of Idaho” If it is the intent of the proponents of this proposed initiative to either amend or modify the federal or state constitutions, this goal cannot be accomplished through Idaho’s initiative process. The federal Constitution can only be amended at a national level. *See* U.S. Const. art. V. It cannot be amended or modified by the people of Idaho acting alone. Likewise, the state constitution cannot be amended through the initiative

process. Initiated legislation is on equal footing with legislation enacted by the state, and it does not carry the legal weight of a constitutional provision. Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). The procedure for amending the state constitution is set forth in article 20, section 1 of the Idaho Constitution, which does not include the option of amending by initiative. Consequently, to the extent that this proposed initiative purports to impact either the federal or state constitutions, such language has no legal effect. Any law passed by the initiative process is still subject to constitutional review, and there is no reason to suspect that the legal test set forth in Casey will be modified.

If you have any further questions, please do not hesitate to contact me.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner, Liberty of Conscience, by deposit in the U.S. Mail and by telefax of a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE
ATTORNEY GENERAL

Analysis by:

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