



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

September 22, 2016

The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Repealing Title 18, Chapters 5 and 6, and Section 18-4016, Idaho Code; Amending Title 18, Chapter 40, Idaho Code, to Prohibit Performance of Abortions as Murder

Dear Secretary of State Denney:

An initiative petition was filed with your office on September 12, 2016. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTER OF FORM

The proposed initiative is in proper legislative format for showing repealed and new statutory provisions. Its numbering of subsections in the new statutory provision, however, requires attention.

As explained below, the proposed Idaho Code § 18-6018 includes three definitions and two substantive provisions making abortions unlawful as murder. The definitions are designated as subsections (1) through (3), and the substantive provisions are designated as paragraphs (a) and (b) of subsection (3). The office recommends that, for purposes of clarity and compliance with ordinary statutory drafting conventions, consideration be given to including, in alphabetical order, the three definitions in subsection (1) as paragraphs (a) through (c) following the introductory phrase, "For purposes of this chapter:". It further recommends that the two substantive provisions be included as subsections (2) and (3).

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of Proposed Initiative

The proposed initiative repeals existing Idaho Code provisions in title 18, chapters 5 and 6, Idaho Code, that impose criminal and/or civil liability and professional licensure sanctions on the performance of some, but not all, abortions. It also repeals Idaho Code § 18-4016 that, in relevant part, precludes under three circumstances prosecution for murder for the killing of an embryo or fetus. It adds a new section, Idaho Code § 18-6018, that makes it "unlawful for any person to perform, procure, or attempt to perform an abortion" and deems any person guilty of murder "who performs or procures an abortion." *Id.* § 18-6018(3)(a) and (b).

Proposed § 18-6018(1) to (3) also defines several terms: "unborn human being," "conception," and "abortion." Abortion means "the use or prescription of any instrument, medicine, drug, or any other substance or device to intentionally kill an unborn human being." Unborn human being is defined in part to mean "the offspring of human beings from the moment of conception," with conception defined as "the fertilization of the ovum of a female individual by the sperm of a male individual." These definitions, with the substantive prohibitions in § 18-6018(3)(a) and (b), would prohibit all elective abortions, including termination of ectopic pregnancies.

Two issues warrant noting for clarification purposes. *First*, the proposed initiative is silent as to, and therefore does not affect, Idaho Code § 18-907(3) and (4). Those subsections contain an exception similarly worded to Idaho Code § 18-4016 for aggravated battery prosecutions when the battery is committed "[u]pon the person of a pregnant female, causes great bodily harm, permanent disability or permanent disfigurement to an embryo or fetus." However, prosecutions for attempted murder would be possible in some instances even if an aggravated assault prosecution would

be foreclosed under § 18-907(3) and (4). See, e.g., State v. Buckley, 131 Idaho 164, 953 P.2d 604 (1998) (identifying level of intent required to prove attempted murder in the second degree). The proposed initiative's proponents may wish to consider addressing this arguable inconsistency. *Second*, the proposed § 18-4018 does not specify the degree of murder that accompanies performing an abortion. Idaho Code §18-4003 provides that "[a]ny murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age" constitutes murder in the first degree. Assuming that these circumstances otherwise exist, it is unclear whether the term "child" would be construed to include an embryo or fetus. The proposed initiative's proponents may wish to consider specifying the murder degree attendant to performing an abortion.

B. Substantive Analysis

No dispute exists that the proposed initiative is unconstitutional under current United States Supreme Court precedent and has been so since issuance of the decision in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973). The Supreme Court invalidated there a Texas statute that made "it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'" *Id.* at 117-18. As the Court then added, a majority of other States, including Idaho, had statutes with a like prohibition. *Id.* at 118, n.2 (citing Idaho Code § 18-601 (1948)). The Idaho Legislature responded less than two months after Roe by replacing the abortion prohibition with a law aimed at complying with the decision. 1973 Idaho Sess. Laws 442 (S.B. No. 1184, as amended). In so doing, the Legislature recognized that, absent the new statutory regime, "there is an immediate danger of widespread and undesirable abortion practices within the state . . ." *Id.* at Section 1.

The Supreme Court announced a more nuanced abortion-regulation standard, commonly referred to as the undue burden test, in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992). Nevertheless, it reaffirmed the fundamental proposition first announced in Roe that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 846.

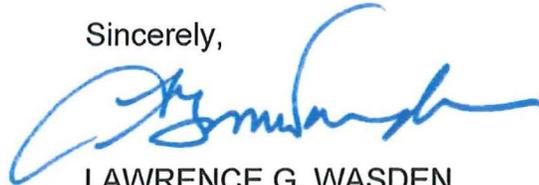
No more direct burden exists on access to abortion than its outright prohibition. Indeed, the proposed initiative would preclude abortion even when medically necessary to save a woman's life or to avoid significant, permanent harm to her. The Ninth Circuit Court of Appeals thus invalidated Idaho Code § 18-505, the enforcement provision in the Pain-Capable Unborn Child Protection Act, because the statute embodied "a categorical ban on *all* abortions between twenty weeks gestational age and viability." McCormack v. Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015). Consequently, if the

proposed initiative were approved by Idaho voters, it would be unenforceable and indefensible.¹

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Scott Herndon, 246 Otts Road, Sagle, Idaho 83860.

Sincerely,



LAWRENCE G. WUSDEN
Attorney General

Analysis by:

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¹Invalidation of proposed initiative, after voter approval, would likely restore the repealed title 18, chapters 5 and 6, and section 18-6016, Idaho Code. See Am. Indep. Party in Idaho, Inc. v. Cenarrusa, 92 Idaho 356, 359, 442 P.2d 766, 769 (1968) ("When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid."). Nevertheless, the proposed initiative's proponent should recognize that, absent restoration of the repealed statutes, the legislative concern expressed at the time of the 1973 amendments to title 18, chapter 6, in the wake of Roe would become relevant.