

MEMORANDUM

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To: Mr. Mark Meuser

Date: June 29, 2007

Re: Colorado Amendment to Define “personhood”—Response to Questions

Introduction

The people of Colorado are seeking to amend their Constitution to include the following:

As used in Article 2, Sections 3, 6, and 25 of the Colorado Constitution, the words “person” and “persons” shall include any human being from the moment of fertilization.

Pursuant to Sections 1-40-105, 1 of the Colorado Revised Statutes, the Colorado Legislative Council and the Office of Legislative Legal Services have provided comments and questions to you regarding the proposed amendment. According to their memorandum dated June 29, 2007, these questions and comments are designed to help them better understand the intent and objective of the proposal and “to aid proponents in determining the language of [the] proposal and to avail the public of knowledge of the contents of the proposal.”

The June 29, 2007 memorandum sets forth both technical and substantive questions. The purpose of this memorandum is to address the substantive matters.

Background

Prior to addressing the specific questions, it is important to provide some background for the proposal. Fundamentally, this proposal establishes and affirms, without question, that Colorado is a state that protects all human life from the moment of fertilization as a matter of

constitutional law. It is important to bear in mind that the proposal establishes a constitutional principle; it does not enact criminal or civil legislation.

Roe v. Wade

When the Supreme Court decided *Roe v. Wade* in 1973, striking down the Texas criminal abortion laws, the Court effectively rendered all state laws banning abortion unenforceable, including the laws of Colorado. *See Roe v. Wade*, 410 U.S. 113 (1973). It did so by essentially declaring that the unborn is not a “person” for purposes of the fundamental rights and protections afforded by the United States Constitution—similar to how the Supreme Court defined a slave as not a “person” for purposes of the law in the infamous *Dred Scott* decision, which was ultimately reversed by the adoption of the Thirteenth and Fourteenth Amendments. It is also similar, in some respect, to how the law defines a corporation as a “person.”

Thus, to define a human life as a “person” for purposes of the law is a legal question that is the prerogative of the lawmakers, or in this case, the prerogative of the people of Colorado exercising their fundamental right to amend their Constitution.

Challenge to *Roe v. Wade*

Roe v. Wade is the primary obstacle standing in the way of any meaningful protection of human life. To remove this obstacle, a case must be presented to the Supreme Court that challenges the central premise of *Roe*—that the unborn is not a person within the meaning of the law. In *Roe*, the Court conceded that if the “personhood” of the fetus “is established, [the case for abortion], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” *Roe*, 410 U.S. at 156-57. The Court reviewed the language of the United States Constitution and concluded that the word “person” did not have

any prenatal application.¹ Nonetheless, the Court concluded, “We need not resolve the difficult question of when life begins. When those trained in . . . medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” *Id.* at 159.

The proposed constitutional amendment would provide the opportunity for the case to be made that human life begins at fertilization. In fact, detailed and compelling evidence exists which places beyond any doubt the conclusion that life begins at this early state of human development.² The proposed amendment would bring the law into conformity with medical science that was either ignored or not available to the Supreme Court in 1973.

Additionally, the proposed constitutional amendment explicitly affirms, as a matter of state law, that “personhood” attaches at the moment of fertilization. It is a well-established principle of law that States possess the right to adopt their own constitutions with rights more expansive than those conferred by the federal constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (affirming “the authority of the State to exercise its police power [and] its sovereign right to adopt in its own Constitution individual liberties more expansive than

¹ *See, e.g., Roe*, 410 U.S. at 156-57 (noting that “Section 1 of the Fourteenth Amendment contains three references to ‘person.’ The first, in defining ‘citizens,’ speaks of ‘persons born or naturalized in the United States.’”).

² After eight days of hearing consisting of 57 witnesses, including world-renowned geneticists, biologists, and practicing physicians, the Senate Subcommittee on Separation of Powers concluded in a report published in 1981 the following: “The testimony of these witnesses and the voluminous submissions received by the Subcommittee points to a clear conclusion: the life of a human being begins at conception.” U.S. Senate Subcommittee on Separation of Powers, Report on The Human Life Bill—S.158 (Dec. 1981). In the present case, the proponents of the amendment chose the term “fertilization,” which is consistent with these findings. In fact, the term “conception” has changed over time; therefore, “fertilization” is the more precise and preferable term.

those conferred by the Federal Constitution”). And the right to life is the most basic and fundamental right, since death forecloses “the right to have rights.” *See Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

In comparison with the right to life, a close reading of the Supreme Court’s abortion jurisprudence supports the argument that the abortion right, while significant, is still something less than a fundamental right—and it is certainly not an absolute right. *See Gonzales v. Carhart*, 127 S.Ct. 1610 (2007) (upholding the federal partial-birth-abortion ban); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) (abandoning the trimester framework of *Roe* and creating an “undue burden” test, which is arguably something less than the “compelling interest” test that is typically applied in cases involving fundamental rights).

In the final analysis, the people of Colorado have a right to determine that the unborn are “persons” within the meaning of the law. This is particularly the case since the U.S. Supreme Court has plainly declared that the United States Constitution does not speak to this issue. Therefore, short of a federal constitutional amendment, this issue is properly the prerogative of the States.

Questions Related to the Proposed Amendment and Responses

Ten multi-part “substantive” questions have been presented regarding the proposed constitutional amendment. In my view, it is not possible to answer fully many of the detailed questions because, as noted previously, the proposed amendment establishes a constitutional principle; it does not enact legislation. For example, how would such detailed questions be answered with regard to the constitutional sections addressing “Inalienable rights,” “Equality of

justice,” or “Due process of law”? Despite this inherent difficulty, the following responses to these questions are offered:

1. (a) What is the intent of defining the terms “person” and “persons” for sections 3, 6, and 25 of article II of the state constitution?

The intent is to afford the protections of these sections to all human persons, including the unborn. No “person” is to be excluded. The proposed amendment seeks inclusion for all human beings.

(b) Do the proponents intend that the definition of “person” and “persons” in the measure apply to other sections of the state constitution or to the Colorado Revised Statutes?

The proposed amendment intends that the definition of “person” and “persons” apply to those enumerated sections in the state constitution as expressed in the amendment. It is a constitutional provision and not a statutory definition. However, from a practical perspective, the Colorado Revised Statutes must comply with the state constitution. That is a well-understood principle of law. This proposed amendment and its implications are no different.

(c) How does the definition of “person” or “persons” in the measure work with other definitions of “person” or “persons” that currently exist in Colorado statute?

Like most constitutional amendments, this proposed amendment establishes a constitutional principle that is applicable to all laws. The question posed does not provide any specific examples. However, suffice to say that if a statutory definition of “person” or the use of the word “person” in any statute results in the deprivation of rights for any “person” defined by the constitutional provision, then, arguably, that statute is unconstitutional.

2. How does the new definition for “person” or “persons” apply to section 3 of article II of the state constitution and how do you anticipate it will be implemented?

Section 3 of article II would apply to all persons, including the unborn, so I would anticipate the courts and legislature to implement this section with that consideration.

3. How does the new definition for “person” or “persons” apply to section 6 of article II of the state constitution and how do you anticipate it will be implemented?

Section 6 of article II would apply to all persons, including the unborn, so I would anticipate the courts and legislature to implement this section with that consideration.

4. How does the new definition for “person” or “persons” apply to section 25 of article II of the state constitution and how do you anticipate it will be implemented?

Section 25 of article II would apply to all persons, including the unborn, so I would anticipate the courts and legislature to implement this section with that consideration.

Note: This proposed amendment establishes a constitutional principle; it does not enact specific legislation. The single principle it establishes is simple: it ensures that all human beings are recognized as “persons” under the law. There are no exceptions.

5. Does the measure provide a legal status to a fetus that is separate from that of the mother. If so, what is the effect of this provision?

The proposed amendment provides that the unborn will be recognized under the law as all other human beings are so recognized. *Cf. Pizza Hut of America, Inc. v. Keefe*, 900 P.2d 97, 101 n.3 (Colo. 1995) (“The facts of this case do not require us, however, to answer today the difficult question of whether a fetus is a separate and distinct person from the mother.”). Recognizing the “personhood” of the unborn, however, does not mean that the law now neglects

the “personhood” of the mother. One would expect that any legislation that followed the proposed amendment would take into account the fact that a pregnancy involves two persons. A few examples illustrate the point.

Consider, as a first example, the unintended consequence of the removal of a pregnant woman’s cancerous uterus to save her life. Such a procedure would likely cause the death of her fetus.³ This, however, should not trigger any criminal homicide laws because the principle of the “double effect” would apply. *See, e.g., Quill v. Vacco*, 521 U.S. 793, 801-02, 807-08, n.11 (1997) (recognizing the principle of “double effect” in a case upholding New York’s prohibition on assisting suicide). The use of “deadly force” and the right of “self-defense” would be inapplicable in this context because there is no aggressor. If, however, action is taken with the criminal intent to kill the unborn person, then criminal homicide laws could apply. *See, e.g., id.*

As another example, consider a situation where a gynecologist is delivering a child and is confronted with a circumstance in which the mother’s life may now be in jeopardy as a result of the delivery. The gynecologist is required to take steps that comply with the applicable standard of care to save the mother from the life-threatening condition and to do what is medically reasonable to save the child that is in the birth process. There is nothing extraordinary about this. Outside of the abortion context, even today the child is a separate and distinct human life that is worthy of a reasonable measure of care. *See, e.g., Espadero v. Feld*, 649 F. Supp. 1480, 1484 (D.Colo. 1986) (holding that a wrongful death action could be brought under Colorado law for the death of a viable fetus and observing, “There is no rational justification for applying to a baby’s death immediately before birth a rule different from that which applies if the death occurs

³ It should be noted that the law does not treat this as an abortion in the first instance.

immediately after birth”); *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. Ct. App. 1955) (holding that a suit may be maintained by a mother for the loss of a child that was “quick” in her womb at the time of the homicide); *Martin v. St. John Hosp. & Med. Ctr. Corp.*, 517 N.W.2d 787 (Mich. Ct. App. 1994) (holding that a wrongful death action for injury to a fetus could be brought for performance of an allegedly negligent cesarean section during prior pregnancy); *see also Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971) (holding that a common-law negligence action could be brought on behalf of a child injured during the fourth month of pregnancy). Plainly, the legislative intent behind these statutes is “to preserve and protect human life.” *Espadero*, 649 F. Supp. at 1483. The proposed amendment would ensure that this principle is consistently applied to all human life, including the unborn.

Indeed, the amendment would remedy the present inconsistencies in the law. Consider the example of a pregnant woman who is crossing the street and is intentionally run down by a reckless driver. In some states, the law could punish the perpetrator for a double homicide—acknowledging the lives of both the mother and the unborn child. At a minimum, a wrongful death action could be brought against the driver. However, if the mother were to make it safely across the street to an abortion facility, the physician performing the abortion could intentionally kill the unborn child with no consequences. The proposed amendment would remedy this inconsistency by ensuring that the law acknowledges the life of the unborn child in all situations.

6. Will a human being at the moment of fertilization have the same rights as any other human being; as a minor; as an adult?

What are the “rights” of “any other human being” at the instant the human is born? It would appear that those basic, fundamental constitutional rights, at a minimum, are enumerated

in sections 3, 6, and 25 of article II of the Colorado Constitution. Pursuant to the proposed amendment, those rights that a newborn presently possesses at the moment of birth would now vest once a human life is formed at the moment of fertilization.

7. It appears that the proposed language could affect a woman’s constitutional right to have an abortion. The following questions are based on the assumption that a court would interpret the language in that manner.

(a) Do you expect that the proposed language would create an “undue burden” or a “substantial obstacle” to a woman’s right to an abortion?

The “right to an abortion” is premised on the faulty assumption that an unborn child is not a person and therefore not entitled to any protections under the law. Prior to 1973, that was not the case. As the U.S. Supreme Court noted, once the “personhood” of the fetus is established, the case for abortion collapses. Thus, if there is no “right” to intentionally kill an innocent person, then there is no “undue burden” or “substantial obstacle” to that “right.” Upon adoption of this amendment, the unborn child would be a person as a matter of state law.

(b) Since section 25 of article II of the state constitution deals with due process of law, do you anticipate due process procedures being applied prior to an abortion, and, if so, what form would the due process take?

Both civil and criminal law proscribe the intentional killing of an innocent person. Should someone engage in such a criminal or tortious act, I would expect that the perpetrator would have the right to due process—which is generally “notice” and an “opportunity to be heard.” If there is legal justification or mitigation for the action (*e.g.*, self-defense, defense of others, insanity, etc.), the perpetrator will have an opportunity to raise the issue at that time.

Also, as outlined previously, the principle of the double effect is always applicable. The proposed amendment does not change that.

Moreover, the proposed amendment does not criminalize any behavior. If the legislature wanted to immunize a woman from criminal prosecution for participating in an abortion, then that would be the prerogative of the legislature. However, the legislature could not pass laws that were inconsistent with the proposed amendment, such as providing no penalties for intentionally killing innocent human life that is not yet born or seeking to exclude the unborn from the protections of the criminal law. Carving out such exceptions would violate the guarantees of equal protection (for example, the legislature could not exclude African Americans from the protections of the civil and criminal laws without running afoul of the constitution).

8. (a) Would the proponents consider defining “moment of fertilization”?

The proposed amendment uses plain language, as required. Fertilization is a common term. No further definition is required.

(b) Does this term differ from “conception”?

“Conception,” at one time, was commonly understood as “the union of the sperm and the ovum.” Another word for this event is “fertilization.” However, the meaning of “conception” was intentionally changed in recent years to refer not to the fertilization of the ovum by the sperm—the moment when life begins—but instead to the implantation of the blastocyst (the newly developing human at about a week after fertilization) into the wall of the mother’s uterus. Thus, fertilization is the more precise term for when human life truly begins; therefore, it is the preferred term.

9. How will someone know when fertilization has occurred, and how will this affect the implementation of the law?

The same way someone would know if she were pregnant or if a child were “viable” under the laws that exist today (the law currently treats a viable fetus differently from a fetus that is not viable). For example, the law does not permit a non-physician to perform any abortions—how would a prosecutor determine that an abortion were in fact performed on a fetus, viable or otherwise?

10. Section 3 of article II of the state constitution guarantees a person certain rights, some which are specified [note: question implies that it also contains some “unspecified rights”]. Section 6 of the article II of the state constitution guarantees to a person access to the courts. Section 25 of article II of the state constitution guarantees that a person shall not be deprived of life, liberty, or property without due process of law. Section 1 (5.5) of article V of the state constitution prohibits an initiated measure from including more than one subject. What is the single subject of this proposed measure?

The proposed amendment addresses one subject: it establishes the constitutional principle that the fundamental rights of a person under the Colorado Constitution vest at the moment of fertilization. This single subject might have multiple applications—similar to the due process guarantee—but it is still a single subject.

The purpose of the single subject requirement is to avoid the inclusion of incongruous subjects in the same initiative and thereby prevent voter fraud and surprise. *See In re Proposed Initiative 1996-4*, 916 P.2d 528, 531 (Colo. 1996). A proposed initiative violates this constitutional requirement when it relates to more than one subject and possesses two distinct

and separate purposes that are neither dependent upon nor connected to each other. *See In re Proposed Initiative 1996-6*, 917 P.2d 1277, 1279-80 (Colo. 1996). The courts are bound to construe the single subject requirement liberally to preserve and protect the right of initiative and referendum. *See In re Proposed Initiative on Parental Choice in Education*, 917 P.2d 292, 294 (Colo. 1996).

Therefore, construing the proposed amendment liberally, as required, it is evident that the proposal reflects a single, unifying purpose: it establishes, as a matter of constitutional principle, that the fundamental rights of a person under the Colorado Constitution vest at the moment of fertilization.

Sincerely,

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