July 19, 1995

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Entitled "Protection From Late Term Abortion Act"*

Dear Mr. Cenarrusa:

An initiative petition entitled "Protection From Late Term Abortion Act" was filed with your office on June 26, 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

Section 18-616 of the proposed initiative would amend title 18, chapter 6 of the criminal code, the "Abortion and Contraceptives" chapter, and prohibit abortions beyond the "first thirteen weeks of prenatal development," except those necessary "to save the life of the child's mother." The proposed initiative goes on in section 18-617 to detail some of the specific abortion methods prohibited, although this list of proscribed methods does not purport to be exhaustive:

> Section 18-617. PROCEDURES COMMONLY PRACTICED TO CAUSE WILLFUL DEATH PROHIBITED FOR PRENATAL CHILDREN OVER THE AGE OF 13 WEEKS. The people find that procedures used in later term abortions cause suffering and pain in the

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* Following the issuance of this Certificate of Review, the petitioners resubmitted a revised initiative. Pursuant to Idaho Code § 34-1809, the Attorney General issued long and short ballot titles. These ballot titles were challenged and were modified as a result of Buchin v. Lance, No. 22395, 1995 WL 757770 (Idaho Dec. 22, 1995).

> unborn which is inhumane. The prohibition provided by this Chapter shall apply to the following procedures only after 13 weeks of gestation, including but not limited to the following abortion procedures: (a) dismemberment of the prenatal child's body, or (b) chemically burning or poisoning the prenatal child, or (c) the partial delivery of a prenatal child for the purpose of removing, by incision through the skull, followed by suction, the child's brain from his or her skull, otherwise known as brain suction abortion (dilation and extraction).

The initiative further provides that an attending physician must determine whether "the life of a child falls within or beyond his or her first thirteen weeks of prenatal development." Section 18-619 then states that a woman "upon whom any abortion is performed" is not guilty of violating the act and, under section 18-620, she or the "father" may seek "money damages" from the "medical abortion provider." Such damages are "for all injuries, psychological and physical, occasioned by a violation of [the] section" as well as "statutory damages equal to three times the cost of the abortion." Damages are available "even if [a] party consented to the performance of an abortion." In short then, under this proposed initiative, all second and third trimester abortions are legally prohibited unless carrying the unborn child to term would endanger the mother's life, and if a second or third trimester abortion is performed, money damages may be sought from the doctor by the parents of the aborted fetus. This proposed initiative, by legally prohibiting previability abortions that take place beyond the thirteenth week of prenatal development, violates the Federal Constitution as construed by the United States Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Abortion is one of the most divisive issues this country has faced. To those who are "pro-choice," what is at stake is "the right of an individual, married or single to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349 (1972). For those who are "pro-life," the balance is different and the "government intrusion" warranted. For them, legalizing abortion is simply authorizing adults, with the approval of the law, to take the lives of children not yet born and thus incapable of defending themselves.

Layered on top of this conflict is the additional question of which is the proper branch of government to resolve the issue—the judiciary or the legislature. Those in favor of a judicial resolution argue that a "woman's right to reproductive choice" is a "fundamental liberty" that cannot "be left to the whims of an election." Casey, 112 S. Ct. at 2854 (Blackmun, J., concurring). Therefore, it is the responsibility of the courts to protect that right. But, this view is not universally shared, and the judiciary's willingness to enter into the abortion fray has also been criticized as exhalting the role of the judiciary over the democratic process and prolonging the abortion controversy:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.
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> We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

Casey, 112 S. Ct. at 2885 (Scalia, J., dissenting).

The United States Supreme Court first took on the abortion issue in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 143 (1973). In that opinion, the Court held that a woman has a fundamental right to terminate a pregnancy and established what has been characterized as a "trimester approach" to govern the regulation of abortion. Almost no regulation was permitted during the first trimester of pregnancy. Regulation designed to protect the woman's health, but not to further the state's interest in potential life, were 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 mother. Roe, 410 U.S. at 163-66.

Roe was followed by widespread criticism, and by 1990, there was some expectation that it would be overruled. Subsequent Supreme Court opinions seemed to erode Roe's basic holding and, in particular, when the decision in Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), was issued, there no longer appeared to be five justices on the Court who supported the Roe decision. Thus, when the Court granted *certiorari* in Planned Parenthood of Southeastern Pennsylvania v. Casey, Roe's days appeared to be numbered.

Such was not the case. Justices O'Connor and Kennedy changed their positions from Webster, and the Court, in a five-to-four ruling, reaffirmed a woman's constitutional right to have an abortion before the fetus reaches viability. There were, however, 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 health of the mother." *Id.* at 2821. Obviously, there are many

who disagree with the Casey decision. But, unless it is overruled, it remains the law and must be followed.

The proposed initiative prohibits abortions beyond the thirteenth week of prenatal development. In so doing, it is proscribing some previability abortions. Viability constitutes 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, and the Supreme Court has upheld a statute which "create[d] what [was] essentially a presumption of viability at 20 weeks." Webster, 109 S. Ct. at 3055. However, viability does not reach back to the thirteenth week of pregnancy, and this proposed initiative, by prohibiting abortions beyond the thirteenth week of prenatal development, brings within its ban some previability abortions. An outright ban on previability abortions clearly 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. *See* Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992) (Louisiana statute prohibiting previability abortions is unconstitutional under Casey); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992) (Utah statute, insofar as it banned previability abortions before 21 weeks gestational age, held unconstitutional under Casey). Consequently, the proposed initiative, as applied to previability abortions, appears unconstitutional.[1]

The next question is whether the proposed initiative's prohibition could apply to abortions performed when the fetus is viable. As noted, under Casey, a state may proscribe abortion once the unborn child is viable "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Casey, 112 S. Ct. at 2821. The proposed initiative provides an exception to its prohibition to "save the life of the child's mother." It does not provide any exception where the mother's health is endangered. Because the mother's health is not taken into account, the proposed initiative may also be too restrictive even as to abortions performed on a viable fetus.

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 petitioners John and Teri Slack by deposit in the U.S. Mail of a copy of this certificate of review.

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[1] The Ohio House and Senate recently approved a bill prohibiting one abortion procedure—the dilation and extraction procedure. The proposed initiative, here, appears to ban all abortion procedures after the thirteenth week of prenatal development. Since this office is not now reviewing an initiative prohibiting only one particular abortion procedure, this office offers no opinion as to the constitutionality of such a prohibition. However, the proponents of this proposed initiative may want to be aware that there is case law, issued prior to Casey, indicating that particular abortion procedures cannot be prohibited if the risk to the woman's health is thereby increased. *See, e.g.*, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

Yours very truly,

ALAN G. LANCE
Attorney General

Analysis by:
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