

November 20, 2015

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed constitutional initiative (A.G. File No. 15-0072) that would define the term “person” for purposes of Article I, Section 7 of the State Constitution.

Background

State Laws Regarding the Rights of a Person. Under the California Constitution, persons have many fundamental rights and protections. For example, Section 7 of Article I of the Constitution states that a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. The California Constitution does not define who is considered to be a person for these purposes, including unborn children.

State and Federal Court Decisions. Current federal and state case law generally do not extend the above rights of due process and equal protection to unborn children. Court rulings on abortion often discuss the legal status of unborn children because these cases require the courts to consider what, if any, legal protections are provided to zygotes, embryos, and fetuses. (In this context, the term zygote refers to a fertilized human egg, while the terms embryo and fetus refer to later stages of prenatal human development.)

In 1969, the California Supreme Court stated (in *People v. Belous*) that “there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child.” The court found that under both the California and United States Constitutions, women have a fundamental right to choose whether to bear children, and only a compelling state interest, such as protecting women’s lives, could subject that right to regulation. In 1973, the United States Supreme Court (in *Roe v. Wade*) found that the word person, as used in the U.S. Constitution for the purposes of due process and equal protection, did not include the unborn. The court found that women generally have a right under the U.S. Constitution to terminate a pregnancy by abortion prior to the point of fetal viability.

Federal and state courts have continued to uphold these rulings. In 1992, the U.S. Supreme Court upheld the central tenet of its *Roe* decision (in *Planned Parenthood v. Casey*). Decisions by the California Supreme Court (for example, *Committee to Defend Reproductive Rights v. Myers* in 1981) have recognized a right to abortion under the California Constitution's right of privacy guaranteed by Section 1 of Article I.

State and Local Health, Social, and Education Programs. The state and local governments administer several health and social services programs that provide benefits mainly to low-income persons. The services these programs provide include: (1) reproductive health services such as prenatal care, birth control, delivery, and abortion; (2) general health care services to children and families and the aged and disabled; and (3) child welfare services to protect children from abuse and neglect. The state also funds education for children regardless of income.

Medical Research. Proposition 71, enacted by California voters in 2004, made conducting stem cell research a state constitutional right. Stem cell research sometimes involves fertilized human eggs. Public and private funds currently support this research.

Proposal

This measure amends Section 7 of Article I of the State Constitution to define the term person for purposes of that section. This measure states that “the term ‘PERSON,’ as it is applied to all living human beings, applies to all living human beings from the beginning of their biological development as human beings (i.e., human organism), regardless of the means by which he or she was procreated, method of reproduction, age, race, sex, gender, physical well-being, function, size, level of development, environment, and/or degree of physical or mental dependency and/or disability.” Thus, this measure would confer due process and equal protection rights upon human zygotes, embryos, and fetuses.

Fiscal Effects

The fiscal impact of the measure is difficult to determine, as it would depend on subsequent interpretation by the courts. This is because the measure may conflict, in certain circumstances, with federal court rulings. For example, abortion would still be legal under federal law as established by the U.S. Supreme Court. When a conflict arises between federal and state laws, the U.S. Constitution mandates that the federal law takes precedence. Therefore, it is likely that this measure would not change any federal laws, in particular federal law establishing a right to an abortion.

This measure, however, could require the state to balance the rights of the mother against the newly established due process and equal protection rights for the zygote, embryo, or fetus. These rights could, for example, obligate the state to provide legal counsel to represent the rights of a zygote, embryo, or fetus, and require state and local governments to protect zygotes, embryos, and fetuses from child abuse and neglect. Moreover, the establishment of fetal due process and equal protection rights could shift eligibility for certain health and social services to an earlier pre-birth point in development. Finally, to the extent new fetal rights discouraged abortion, there would be net public costs associated with the additional children born as a result of this amendment, accounting for unknown state savings from fewer abortions being performed under

the Medi-Cal program and other state health programs. These net costs are difficult to estimate, but could be significant.

In addition to the impacts discussed above, this measure could restrict stem cell research and alter medical practices in both the public and private sector. The economic and fiscal impacts of these changes are unknown.

Summary of Fiscal Effects. Assuming current federal case law, this measure would have the following fiscal effect on state and local governments:

- Potentially significant net costs to state and local governments from the establishment of due process and equal protection rights for zygotes, embryos, and fetuses.

Sincerely,

Mac Taylor
Legislative Analyst

Michael Cohen
Director of Finance