

March 12, 2008

Hon. Edmund G. Brown Jr.
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Krystal Paris
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative regarding abortions of viable fetuses (A.G. File No. 08-0002, Amdt. #1-S). This measure would amend the State Constitution and state law to prohibit abortions on fetuses beyond 24 weeks of pregnancy, with certain exceptions.

Background

State Laws Regarding Individual Rights. Under California law, persons have many fundamental rights and protections. For example, under Section 43 of the California Civil Code, besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and for injury to his personal relations. Currently, a fetus is deemed to be a person under Civil Code Section 43.1 as necessary to protect the child's interests in the event of the child's subsequent birth.

Abortion Permissible Under State Law. Current California law permits qualified medical personnel to perform abortions on fetuses that are not yet viable. State law defines viability as the point in a pregnancy when the physician determines "there is a reasonable likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures." State law also defines murder as the "unlawful killing of a human being, or a fetus, with malice aforethought" but provides an exemption for abortions that are sought by the mother and performed by qualified medical personnel.

State and Federal Court Decisions. In 1969, the California Supreme Court found (in *People v. Belous*) 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 women generally have a right under the United States Constitution to terminate a pregnancy by abortion prior to the point of fetal viability. In 1992, the Supreme Court upheld the central tenet of its *Roe* decision (in *Planned Parenthood v. Casey*). Subsequent decisions by the California Supreme Court (for example, *Committee to Defend Reproductive Rights v. Myers* in 1981) specifically established a right to abortion under the California Constitution's right of privacy guaranteed by Section 1 of Article I and under other state constitutional provisions. Consequently, women currently may obtain abortions, and physicians may perform them, essentially on an elective basis.

Medi-Cal Funding of Abortions. Under existing state law, benefits provided to qualifying persons under the Medi-Cal Program include abortions based on the rationale that the state cannot elect to fund only one legally permissible choice a woman has during pregnancy, that is, to carry to term or terminate prior to birth. The state and the federal governments (through the national Medicaid Program) typically share the cost of Medi-Cal benefits on a roughly equal basis. However, federal law generally prohibits Medicaid funding of abortions, so that the cost of Medi-Cal abortions is paid entirely by the state.

Most Abortions Occur Prior to 24 Weeks. While data on abortions in California is limited, national abortion data suggest that most abortions are performed before 24 weeks of pregnancy. Data reported by the federal Center for Disease Control indicate that 1.4 percent of abortions are performed after 21 weeks of pregnancy. These data suggest that perhaps up to a few thousand such abortions may be performed in California each year. An unknown portion of these may occur after 24 weeks of pregnancy.

Proposal

Constitutional Ban on Aborting Viable Fetuses. This measure would amend the State Constitution to:

- Define a viable fetus as one who "has attained sufficient development of organs as to be capable of living outside the uterus of the mother, with or without life support," and state that a fetus would be presumed viable at 24 weeks.
- Prohibit abortions on viable fetuses unless the mother's life was endangered by certain physical conditions.

- Provide that “the rights to life and medical care of a viable fetus shall be the same as the rights of an infant of similar medical status in the uterus of the mother or born alive prematurely.”

Revised State Abortion Law. This measure would also revise the definition of murder in state law to provide that abortions performed beyond 24 weeks of pregnancy would be considered murder unless the mother’s life was “endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”

Fiscal Effects

We estimate that after a few years, the measure could result in costs to state and local governments not likely to exceed \$20 million annually for public benefit programs, legal proceedings, and incarceration.

Fiscal Effects Would Depend Mainly on Behavior. The fiscal effects of this measure would depend mainly on how it would change the behavior of women who might have sought an abortion after 24 weeks of pregnancy in the absence of a prohibition on such abortions. (Some of these women may qualify for exemptions that this measure would establish.) These women may choose to seek abortions earlier in pregnancy in order to comply with this measure, or to travel out of state to obtain abortions. To the extent that women choose these alternatives, no additional state or local costs would result from this measure.

Some State Benefit Costs Possible. If this measure results in an increase in the number of women delivering babies instead of obtaining abortions, some state costs could result to the extent that those children or mothers qualify for state health and social services programs. We estimate that such costs would be as much as several million dollars annually after a few years.

Some Criminal Justice Costs Possible. Abortions occurring after 24 weeks of pregnancy that do not meet this measure’s exemption requirements would be considered criminal acts. If such abortions did occur and were prosecuted, some new costs related to court proceedings and incarceration could result for the state and local governments. We estimate that such costs could total up to roughly \$10 million annually after a few years.

Summary

Potential costs to state and local governments not likely to exceed \$20 million annually after a few years for public benefit programs, legal proceedings, and incarceration.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Michael C. Genest
Director of Finance