

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

August 10, 2005

**TO:** Michael Lawrence and Timothy Dore

**FROM:** Legislative Council Staff and the Office of Legislative Legal Services

**RE:** Proposed initiated measure 2005-2006 #48, concerning late-term abortion-limiting initiative

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution, including suggested editorial changes to promote the use of plain language in such proposals. Pursuant to that provision, we are submitting our comments to you regarding the appended proposed initiative.

It is our understanding that the purpose of our comments is to help proponents arrive at language that will accomplish their intent in proposing changes to the constitution or laws of the state and to avail the public of knowledge about the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

## Purposes

The major purposes of the proposal appear to be:

1. To make it a class 6 felony to knowingly perform an abortion of a viable fetus or perform an abortion of a viable fetus with reckless disregard for whether the fetus is viable or not, except when it is necessary to prevent either the death of the pregnant woman or the serious risk of substantial and irreversible impairment of a major bodily function of the woman.
2. To specify that, if a person performs an abortion on a "viable fetus" based on a "medical emergency", the physician must document the "medical emergency".
3. To specify that a physician licensed to practice medicine who is to perform the abortion shall use his or her good-faith clinical judgment to determine before the abortion whether the fetus is a "viable fetus".
4. To define "abortion" as the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.
5. To define "viable fetus" as a fetus that has attained that stage of fetal development when its life may be continued indefinitely outside the womb by natural or artificial life-supportive systems.
6. To define "medical emergency" as that condition which, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate a medical procedure to prevent the woman's death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function.
7. To specify that a "viable fetus" may be an actual life.
8. To state that a "viable fetus" is close enough to being an actual human life that the people of the state of Colorado choose to vest a "viable fetus" with all of the rights and protections granted to persons under Colorado law.
9. To specify that the criminal penalty for any person violating this proposal is a class 6 felony, punishable by a fine not to exceed ten thousand dollars, but not less than one thousand dollars, or a prison sentence for a presumptive term of one year to eighteen months or both.
10. To establish that a physician must document the basis for his or her good-faith clinical judgment that the particular fetus is viable.
11. To establish a requirement that a report be made of each abortion performed in the state to the department of public health on forms prescribed by it. To require the reports to include the following information:

- a. Identification of the physician who performed the abortion, and the facility where the abortion was performed and of the referring physician, agency or service, if any.
  - b. The county and state in which the woman resides.
  - c. The woman's age.
  - d. The number of prior pregnancies and prior abortions of the woman.
  - e. The gestational age of the unborn child at the time of the abortion.
  - f. The type of procedure performed or prescribed and the date of the abortion.
  - g. Preexisting medical conditions of the woman which would complicate the pregnancy, if any, and if known, any medical complication which resulted from the abortion itself.
  - h. The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed by a physician who determined a "medical emergency" existed.
  - i. The weight of the aborted fetus.
  - j. The basis for any medical judgment that a "medical emergency" existed, if the physician who performed the abortion determined that a 'medical emergency' had existed.
  - k. The basis by which the physician performing the abortion determined the gestational age of the fetus.
12. To require every facility in the state of Colorado where an abortion is performed to file a report showing the total number of abortions performed within the hospital or other facility during that quarter year, and the total abortions performed at each trimester of pregnancy.
  13. To require the report described in number 12 to be filed on a form prescribed by the department of public health that allows the facility to indicate whether or not it is receiving state-appropriated funds.
  14. To require the report described in number 12 to be available for public inspection and copying only if the facility receives state-appropriated funds within the 12 calendar-month period immediately preceding the filing of the report.

15. To require the department of public health to keep the report described in number 12 confidential if the facility indicates it is not receiving state-appropriated funds, unless it receives other evidence which causes it to conclude the facility receives state-appropriated funds.
16. To establish, that if any provisions of the initiative are held to be invalid, the invalidity of such provisions will not affect the validity of the remaining provisions.

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### **Comments and Questions**

The form and substance of the proposed amendment raise the following comments and questions:

Technical questions:

1. Article V, section 1 (8), of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by initiative:

"Be it Enacted by the People of the State of Colorado:"

Would the proponents consider adding an enacting clause at the beginning of the proposed measure?

2. In Colorado, when a proposed measure adds new language to or repeals existing language of the Colorado Revised Statutes, the proposed measure uses an amending clause indicating the specific section of the law where new language will be added or existing language will be deleted. [The following is an example of an amending clause to add a new article to title 12, in the Colorado Revised Statutes: "SECTION 1. Title 12 is amended BY THE ADDITION OF A NEW ARTICLE to read:"]. The amending clause would be placed following the enacting clause referred to in question one of this memorandum. The new language itself generally is shown in small capital letters [THIS IS AN EXAMPLE OF LANGUAGE IN SMALL CAPITAL LETTERS]. If language from the statutes is to be repealed, the convention is to show the language to be repealed with dashes through it, or strike-type, to indicate it is repealed or to state in the amending clause that the entire provision or provisions are repealed [~~this is an example of strike-type~~].

a) Would the proponents consider adding an appropriate amending clause to the proposed measure to indicate that the measure will add a new article to the state statutes?

b) Would the proponents consider showing the language that is to be added to the Colorado state statutes in small capital letters and the language to be stricken from the statutes, if any, in strike-type?

3. Traditionally, language explaining the rationale for a proposed statutory or constitutional amendment is placed in a section called a "legislative declaration." The second and third sentences in the definition of a "viable fetus" appear to be such language. Would the proponents consider organizing and consolidating these portions of the proposal into a "legislative declaration" section, or eliminating these portions altogether?
4. To conform with standard drafting practice, would the proponents consider not capitalizing the words "State", "Class", and "Department of Public Health" as they appear throughout the measure?
5. To conform with standard drafting practice, would the proponents consider not including defined terms in quotation marks outside of the definitions section of the proposal? In the definitions section of the proposal, would the proponents consider including the defined term in double, rather than single, quotes?
6. In subsection 12-37.3-101 (1), the term "human pregnancy" is not preceded by an article. Would the proponents consider including an article before "human pregnancy"?
7. In subsection 12-37.3-102 (2), the subsection includes the penalties for a class 6 felony. Standard drafting practice does not call for including the penalty range in the specific statute. Would the proponents consider making a cross-reference to the penalty provisions in section 18-1.3-401 instead of listing the penalty range?
8. Would the proponents consider changing the "Department of Public Health" to the "department of public health and environment" to accurately reflect the name of the state department?
9. In section 12-37.3-103, would the proponents consider putting the headings "Reports by physicians." and "Report by facility." in bold type?
10. Each of the paragraphs in subsection 12-37.3-103 (1), ends with a period. Standard drafting practice calls for paragraphs (a) through (i) to end in a semi-colon, paragraph (j) to end in "; and", and paragraph (k) to end in a period. Would the proponents consider making the suggested changes to paragraphs (a) through (j)?
11. In paragraph 12-37.3-103 (1) (g), the term "pregnancy" is not preceded by an article. Would the proponents consider including an article before the term "pregnancy"?
12. In paragraph 12-37.3-103 (1) (h), would the proponents consider revising the following language "death of the pregnant woman or *he* substantial" to read as follows "death of the pregnant woman or *the* substantial"?
13. In paragraph 12-37.3-103 (1) (h), the proposal states, "where an abortion has been performed by a physician". The word "where" indicates a place, but as it is used in the initiative it is

describing a condition. Would the proponents consider changing the term “where” to a term that indicates a condition rather than a place?

14. In paragraph 12-37.3-103 (1) (j), the term “Basis” is not preceded by an article. Would the proponents consider adding an article before the term “Basis”?
15. In subsection 12-37.3-103 (1), the term “patient” and “woman” seem to be used interchangeably, would the proponents considering using one term for consistency?
16. In subsection 12-37-103 (2), in order to conform with standard drafting practice, would the proponents consider revising "12 calendar-month period" to "twelve calendar-month period"?
17. The next to last sentence in subsection 12-37-103 (2) ends in a colon. Would the proponents consider changing the colon to a period.
18. Traditionally, text is not numbered within sections unless there are two or more subsections within the section. In section 12-37.3-104, would the proponents consider striking the subsection "(1)" identification at the beginning of the text?
19. In section 12-37.3-104, the proponents refer to "this part". Would the proponents consider substituting "this article" for "this part" in each of the three places the term appears in that section to more accurately reflect the fact that the proposal is referring to an article, not a part, of the Colorado Revised Statutes?

Substantive Questions:

1. At the top of initiative, it states "**LATE-TERM ABORTION LIMITING INITIATIVE**". Do the proponents intend this to be the title of initiative, if so would the proponents consider removing it since the title board will set the title?
2. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of this initiative?
3. When do the proponents intend the measure to become effective? Would the proponents consider including a specified effective date?
4. How do the proponents see this new article working with part 1 of article 6 of title 18, Abortion? Do the proponents see any equal protection problems between the two articles?
5. Describe the rights included in "all the rights and protections granted to persons under Colorado law" that appears in subsection 12-37.3-101 (2)?
6. The definition of abortion used in the initiative is different than another definition of abortion in Colorado statute, see section 12-37.5-103, C.R.S. Do the proponents intend to use a

different definition than current statutes provide?

7. In subsection 12-37.3-102 (3), the provision provides an affirmative defense to performing an abortion on a “viable fetus” if the physician performed the abortion based upon a documented “medical emergency”. By making performing the abortion based upon a documented “medical emergency” an affirmative defense, the initiative places the burden of proving the medical emergency on the physician. Is it the proponents' intent to place burden of proof on the physician?
8. In section 12-37.3-102, the illegal act is described in subsection (1) and the mental state is described in subsection (6). Would the proponents consider putting the illegal act and the mental state into the same subsection?
9. In section 12-37.3-102, the proposal appears to use the term “person” and “physician” interchangeably? Do the proponents intend for only sections (4) and (5) apply to physicians, but sections (1) and (6) apply to persons? Would the proponents considering clarifying to whom the initiative applies?
10. Do the proponents intend that the reports required by section 12-37.3-103 to apply to all abortion performed in the state?
11. In subsection 12-37.3-103 (1), the header states “Reports by physicians.”, but the statutory language does not actually direct the physician to file the required reports. Would the proponents consider clarifying that the physician must file the reports or specifying who is required to file the reports?
12. In paragraph 12-37.3-103 (1) (f), what does "type of procedure prescribed" mean? Do abortions have to be reported if they are only prescribed and not actually performed?
13. Only paragraph 12-37.3-103 (1) (f) refers to "prescribed", should the other paragraphs also include "prescribed"?
14. In paragraph 12-37.3-103 (1) (h), do the proponents intend that all physicians who perform abortions in the case of a medical emergency complete this requirement of the form, or only those physicians who perform abortions on viable fetuses in the case of a medical emergency?
15. Paragraphs 12-37.3-103 (1) (h) and (j), appear to require the same information. Do the proponents intend for different information to be supplied? If so, would the proponents consider clarifying the different information required?
16. Does subsection 12-37.3-103 (2), require that facilities file a report every quarter of the year, or a report listing the abortions performed by quarter? Does it mean any three-month period or specific three-month quarters? Would the proponents consider clarifying this requirement?

17. Does the provision in subsection 12-37.3-103 (2) requesting the total number of abortions for each trimester mean just for that quarter? Would the proponents considering clarifying the intent?
18. With regard to section 12-37.3-103, how will the department of public health and Environment receive evidence that causes it to conclude that the facility receives state-appropriated funds, other than through the self-reporting of the facility? How will the department make a determination on the accuracy of such information, or determine that the information is substantial enough to cause the department to conclude that the facility receives state-appropriated funds? Will the facility have an opportunity to rebut a determination by the department that the facility receives state-appropriated funds?
19. Section 12-37.3-103, uses the term “State-appropriated funds”, what do the proponents consider “State-appropriated funds” to include? From whom may they be received? Would the proponents consider defining the term?
20. What is the intent of section 12-37.3-104? For instance, would the proponents still intend for all of the provisions to be effective except the definition of abortion, if the definition of abortion was found unconstitutional?