
From: Michael Pauley <mpauley@sd catholicconference.org>
Sent: Monday, August 15, 2022 1:55 PM
To: ATG Help
Subject: [EXT] Comment on draft abortion amendment title and explanation

Dear Attorney General Vargo:

On behalf of the South Dakota Catholic Conference, I am submitting the following comments on the draft ballot title and explanation, announced by your office August 5, 2022, concerning an initiated constitutional amendment related to abortion.

1) As stated in SDCL 12-13-25.1, the title prepared by the Attorney General "shall be a concise statement of the subject of the proposed initiated measure or initiated amendment to the Constitution."

The draft title prepared by your office reads:

"A Constitutional Amendment Concerning the Regulation of Abortion."

This title is ambiguous and potentially misleading because it suggests that the purpose of the amendment is to "regulate" abortion. Yet, the proposed amendment would *deregulate* abortion. It would nullify many existing South Dakota statutes and regulations that protect preborn children and their mothers.

The "subject" of the amendment is to legalize abortion for any reason during the first and second trimester of pregnancy, and during the third trimester whenever a physician, at his or her sole discretion, deems it necessary to "preserve the life or health of the pregnant woman."

Current South Dakota law defines abortion as "the intentional termination of the life of a human being in the uterus" (SDCL 34-23A-1). It would promote greater clarity about the subject of the amendment to use this language in the title, e.g., "A Constitutional Amendment to legalize the intentional termination of a human being's life in the uterus by means of abortion."

This suggested language is consistent with titles of similar measures that have appeared before voters in recent years:

2020: Initiated Measure 26

"An initiated measure to legalize marijuana for medical use."

2020: Constitutional Amendment B

"An amendment to the South Dakota Constitution authorizing the Legislature to allow sports wagering in Deadwood."

In both examples above, the title contains precise verbs ("legalize," "allow," "authorizing") and specific nouns ("sports wagering," "marijuana for medical use") that make the subject of the proposal abundantly clear for voters.

By contrast, the vague phrase "concerning the regulation of abortion" does not inform voters about the true subject of the amendment and may cause some voters to believe the amendment is seeking to do the exact opposite of what it would truly implement.

2) In the first line of the explanation, the draft states:

“This constitutional amendment establishes a framework for the regulation of abortion.”

This sentence is misleading, for many of the same reasons discussed above. South Dakota already has a “framework” for regulating abortion that has developed over the course of nearly five decades. The proposed constitutional amendment would overturn most of this framework and, practically speaking, replace it with a regime of unlimited abortion-on-demand. Failing to inform voters of this fact does not do justice to the requirements of SDCL 12-13-25.1, which requires the attorney general to provide an “objective, clear, and simple summary to educate the voters of the **purpose and effect** of the proposed... initiated amendment to the Constitution” (emphasis added).

3) The next five sentences of the draft summary amount to little more than a restatement, rather than an explanation, of the language proposed by the sponsors of the proposed amendment. The attorney general is required by law to include “a description of the legal consequences” of the initiated amendment, but the explanatory language in large part fails to do so.

To cite just one example, the language of the proposed amendment refers to “trimesters” of pregnancy. This paradigm for creating an abortion right was first promulgated by the U.S. Supreme Court in the *Roe v. Wade* decision (1973), but later rejected by the court in *Planned Parenthood v. Casey* (1992). The *Casey* court discarded the trimester framework primarily because improvements in medical technology meant that preborn children were becoming viable—which is to say, capable of surviving outside the womb—at a much earlier period in pregnancy. However, the proposed South Dakota abortion amendment would return to a pre-*Casey* standard, in which it is impossible to restrict any second-trimester abortion for the purpose of protecting the life of the preborn child. Therefore, if the proposed amendment were to be adopted, it would permit late-term abortions, for any reason, of perfectly healthy preborn children who are capable of surviving outside the womb. This is just one of several radical “legal consequences” of the proposed amendment. South Dakota voters deserve to know about these repercussions in the explanatory language that will appear on their ballots.

4) Finally, the explanatory language should accurately describe the class of human beings who are most affected by the terms of the proposed amendment. Existing state law (SDCL 34-23-1.2) states as follows: “The Legislature finds that all abortions, whether surgically or chemically induced, terminate the life of a whole, separate, unique, living human being.” The explanatory language should always make the preborn child the focus when describing the effects of the proposed amendment. For example, “Throughout the first and second trimesters, the amendment allows the life of a preborn child to be terminated by means of an abortion, which may be procured for any reason.”

Thank you for considering these recommended changes to the ballot title and explanatory language.

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