

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
<http://atg.sd.gov>

MARK A. VARGO
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

RECEIVED
AUG 24 2022
S.D. SEC. OF STATE

August 24, 2022

Honorable Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

RE: Attorney General's Statement (An Initiated Amendment Establishing a Right to Abortion in the State Constitution)

Dear Secretary Barnett,

Enclosed is a copy of a proposed initiated amendment, in final form, that the sponsor submitted to this Office. In accordance with state law, I hereby file the enclosed Attorney General's Statement for this initiated measure.

By copy of this letter, I am providing a copy of the Statement to the sponsors.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark A. Vargo", with a long horizontal flourish extending to the right.

Mark A. Vargo
ATTORNEY GENERAL

MAV/dd
Enc.

Filed this 24th day of
August, 2022
Steve Barnett
SECRETARY OF STATE

cc/encl: James D. Leach
Reed Holwegner – Legislative Research Council

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AUG 24 2022

S.D. SEC. OF STATE

CONSTITUTIONAL AMENDMENT

ATTORNEY GENERAL'S STATEMENT

Title: An Initiated Amendment Establishing a Right to Abortion in the State Constitution.

Explanation:

This initiated amendment establishes a constitutional right to an abortion and provides a legal framework for the regulation of abortion. This framework would override existing laws and regulations concerning abortion.

The amendment establishes that during the first trimester a pregnant woman's decision to obtain an abortion may not be regulated nor may regulations be imposed on the carrying out of an abortion.

In the second trimester, the amendment allows the regulation of a pregnant woman's abortion decision, and the regulation of carrying out an abortion. Any regulation of a pregnant woman's abortion decision, or of an abortion, during the second trimester must be reasonably related to the physical health of the pregnant woman.

In the third trimester, the amendment allows the regulation or prohibition of abortion except in those cases where the abortion is necessary to preserve the life or health of the pregnant woman. Whether an abortion is necessary during the third trimester must be determined by the pregnant woman's physician according to the physician's medical judgment.

Judicial clarification of the amendment may be necessary. The Legislature cannot alter the provisions of a constitutional amendment.

Filed this 24th day of
August, 2022
Steve Barnett
SECRETARY OF STATE

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BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article VI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION:

Before the end of the first trimester, the State may not regulate a pregnant woman's abortion decision and its effectuation, which must be left to the judgment of the pregnant woman.

After the end of the first trimester and until the end of the second trimester, the State may regulate the pregnant woman's abortion decision and its effectuation only in ways that are reasonably related to the physical health of the pregnant woman.

After the end of the second trimester, the State may regulate or prohibit abortion, except when abortion is necessary, in the medical judgment of the woman's physician, to preserve the life or health of the pregnant woman.

Filed this 24th day of
August 2022
Steve Barnett
SECRETARY OF STATE

From: Bethany Soye <bethanysoye@gmail.com>
ent: Monday, August 15, 2022 5:00 PM
o: ATG Ballot Comments
Subject: Fwd: [EXT] Comment

Comment from Elected Members of the South Dakota Legislature on Proposed Ballot Initiative “A Constitutional Amendment Concerning the Regulation of Abortion”

Date: 15 August 2022

To: The Honorable Mark A. Vargo
Attorney General
State of South Dakota

In response to: A proposed ballot initiative which would alter or invalidate the majority of South Dakota laws regulating and prohibiting elective abortions

Dear Attorney General Vargo:

We are elected representatives of the citizens of South Dakota, and we request that you update the Draft Attorney General’s Statement before the final filing deadline on August 24, 2022. The proposed ballot amendment (‘the Amendment’) would supersede virtually every law we have enacted, and the Draft Statement as currently written does not reflect this.

Our constituents send us to Pierre to enact policies that reflect their values, and the Amendment would undo decades of work. The Final Statement is the official statement on the Amendment of the State of South Dakota. Voters will read the Statement before making their decision on how to vote on the Amendment, and they deserve accurate information about the extent to which it would make legislating on abortion impossible.

Currently, abortion is illegal in South Dakota after the Supreme Court of the United States returned lawmaking authority to elected officials, including state legislators, on June 24, 2022. Before the *Dobbs v. Jackson Women’s Health Org.* decision was handed down, we had enacted significant protections that our Attorney Generals had defended in court to ensure that South Dakota protected unborn children and their mothers to the greatest extent possible.

We passed laws preventing dehumanizing procedures like partial-birth abortion and mandating that babies born-alive during an abortion receive life-saving care. We ensured that each woman gives genuine informed consent, providing her with information about her child and her own health risks, that she cannot be coerced, and that there are many resources available if she chooses to parent or adopt.

We have recognized South Dakota’s legitimate interests in the life and dignity of the unborn child, the emotional and psychological risks to the mother, and the damage abortion does to the medical profession. We understand that most South Dakotans do not want to participate in or pay for abortions, and we have honored their wishes by enacting robust safeguards for the conscience rights of healthcare professionals and the public. The Amendment would not permit any of these to stand, allowing lawmakers to legislate only those interests tied directly to the mother’s “physical health” until 29 weeks’ gestation, long after the baby can survive outside the womb.

The Amendment would *create* a right to abortion in the South Dakota Constitution, but the Draft Statement does not reflect any of these massive policy shifts.

We the undersigned urge you to issue a Final Statement summarizing the impact the Amendment would have if voted into law in 2024. As our state's top lawyer, it is your duty to explain the text, not simply repeat it.

We oppose the Amendment and hope that the Final Statement more accurately reflects the changes to South Dakota law it would require, including its limitations on our ability to legislate on behalf of our constituents.

Respectfully,

Representatives Aaron Aylward, Drew Dennert, Fred Deutsch, Lana Greenfield, Jon Hansen, John Mills, Rhonda Milstead, Tina Mullaly, Scott Odenbach, Carl Perry, Sue Peterson, Tom Pischke, Tony Randolph, Bethany Soye, and Marli Wiese

Senators Julie Frye-Mueller, Al Novstrup, Maggie Sutton, and Marsha Symens

Dear Attorney General Vargo:

As members of the South Dakota Legislature for many years, and as sponsors and co-sponsors of a significant number of statutes designed to protect the rights of pregnant mothers and their children in utero, we submit these comments to the Attorney General's draft of his explanation of the proposed amendment to the South Dakota State Constitution that would create a right to an abortion. This amendment, if passed, would operate to completely repeal and revoke all of the work we have done on behalf of the people of South Dakota in this area of the law.

It is, therefore, essential that the description of the amendment and its essential nature and import be unambiguous.

In particular (although it is not our only objection), we take exception to the first line of the "Explanation" that states "This constitutional amendment establishes a framework for the regulation of abortion."

This statement is misleading.

This amendment to the state constitution would create a new constitutional right, a right to have an abortion where no such right currently exists either under the state constitution or the U.S. Constitution.

The A.G.'s explanation should clearly state that "this constitutional amendment establishes a new right to have an abortion."

At the current time, the state constitution supports the existing law that forbids performance of all abortions unless one is required to save the life of the mother.

The way the introduction is currently phrased may mislead the reader into believing that the amendment actually extends to the legislature a new power to regulate, a power that it currently has and which the constitutional amendment would revoke.

To that same end the two paragraphs following that introductory sentence does not clearly state that the new right to an abortion would actually operate to prohibit the state from banning any abortions in the first two trimesters and take away the state's ability to protect the lives of the children of the state and to protect the real rights of South Dakota's pregnant mothers.

The amendment would strip the state's current authority to prohibit abortions and any meaningful regulation of abortions in the first two trimesters. The voters are entitled to know what they are asked to approve and that really must be stated in plain language.

Respectfully yours,
Senator Al Novstrup
Representative Fred Deutsch

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 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.

Michael G. Pauley
Executive Director
South Dakota Catholic Conference
PO Box 678
Rapid City, SD 57709
605-389-6565 (mobile)
605-791-7291 (office)

Quaerite Pacem Civitatis

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From: David Prentice <DPrentice@lozierinstitute.org>
nt: Monday, August 15, 2022 10:03 AM
o: ATG Help
Cc: Tara Sander Lee; Ingrid Skop; David Prentice
Subject: [EXT] Comment on South Dakota Attorney General Draft Statement on Constitutional Amendment

August 15, 2022

Office of the Attorney General
Ballot Comment
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501
ATGhelp@state.sd.us

Comment on South Dakota Attorney General Draft Statement on Constitutional Amendment

This comment is filed in response to the release of the draft Attorney General's Statement on "A Constitutional Amendment Concerning the Regulation of Abortion" and to highlight the lack of understanding of the medical and scientific facts embodied in the draft statement and the proposed constitutional amendment. Since one purpose of the Attorney General's statement is to "educate the voters of the purpose and effect of the proposed" measure, we urge the Attorney General to take the following facts to heart and revise the draft statement to reflect the modern scientific facts and implications of the proposed constitutional amendment.

The U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* (597 U.S. ____ (2022); https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf) found no right to abortion within the U.S. Constitution, and returned authority on regulation of abortion to the people and their elected representatives. Among the errors in *Roe v. Wade* and other previous decisions pointed out by the Court were reliance on unscientific and manufactured medical evidence, such as an arbitrary viability line and imposition of a trimester system which has no basis in medical science.

If anything, the proposed state constitutional amendment is an even more egregious departure from factual science and medicine than were *Roe v. Wade* and *Doe v. Bolton* on the national level. It ignores the effects of abortion on the lives of women as well as the status of the unborn child. The proposed state constitutional amendment, and the Attorney General's draft statement, completely ignore both (1) the medical facts regarding risks to the mother's life in regard to abortion, and (2) the existence of another human being whose life is also at stake, the fact that there are two lives impacted in any decision regarding abortion.

MEDICAL RISKS TO WOMEN

The proposed constitutional amendment is outdated and recycles non-scientific discussion from fifty years ago. The trimester system dividing a pregnancy length into three equal parts was invented by the Blackmun Court. It was not an obstetric term. In 1973, viability—the gestational age when a young human being can survive separated from his mother—was thought to be around 26-28 weeks gestation, hence the Court's presumption that the state did not have an interest in protection of that life until the so-called third trimester. With advances in medical technology over the last fifty years, the age of viability has decreased dramatically, with some children surviving birth at less than twenty-two weeks gestation, many with good quality of life (Watkins PL *et al.*, Outcomes at 18-22 months of corrected age for infants born at 22-25 weeks of

gestation in a center practicing active management. *J Pediatr.* 217, 52-58, 2020, DOI: [10.1016/j.jpeds.2019.08.028](https://doi.org/10.1016/j.jpeds.2019.08.028).)

The presumption in the proposed constitutional amendment is that early abortion is so safe that legislation to protect a woman's safety is never necessary until the second trimester. This is factually incorrect, and the presumption puts women's lives and health at risk. Abortion carries significant physical and psychological risks to the pregnant woman (AAPLOG, "Induced abortion and adverse mental health effects," <https://aaplog.org/induced-abortion-and-adverse-mental-health-effects/>), and these physical and psychological risks increase with gestational age (AAPLOG. "Abortion and Mental Health." Practice Bulletin. December 2019, <https://aaplog.org/wp-content/uploads/2019/12/FINAL-Abortion-Mental-Health-PB7.pdf>). While maternal mortality from abortion increases dramatically as pregnancy progresses, there is still significant risk from induced abortion even early in pregnancy, including the risk of sepsis, cervical damage and uterine perforation which can be caused by first trimester dilation and suction procedures. CDC data document a 38% increase in mortality for each week an abortion is performed past eight weeks gestation, resulting in 15-fold increased mortality in the early second trimester, 30-fold increase in the mid-second trimester and 76-fold higher risk of death to a woman when an abortion is performed past viability (Bartlett LA *et al.*, Risk Factors for Legal Induced Abortion Related Mortality in the U.S., *Obstet Gynecol.* 103, 729-737, 2004, DOI: [10.1097/01.AOG.0000116260.81570.60](https://doi.org/10.1097/01.AOG.0000116260.81570.60)). Beyond 13-14 weeks gestation, there is significant risk of uterine perforation, hemorrhage and other catastrophic injuries because later abortions require forcing open the strong muscular cervix and performing multiple blind passes with surgical instruments to dismember and remove a fetus and placental tissue (S Wills and K Altman, Does Banning Abortions After 15 Weeks Make Any Sense? *On Point* 68 Charlotte Lozier Institute. September 2021, <https://lozierinstitute.org/does-banning-abortions-after-15-weeks-make-any-sense/>) (Kerns JL *et al.*, Disseminated Intravascular Coagulation and Hemorrhage After Dilation and Evacuation Abortion for Fetal Death, *Obstet Gynecol.* 134, 708-713, 2019, DOI: [10.1097/AOG.00000000000003460](https://doi.org/10.1097/AOG.00000000000003460)).

Abortion complications and associated deaths are no doubt underreported, due to the lack of mandatory abortion reporting in the U.S. (Studnicki J *et al.*, Improving the Metrics and Data Reporting for Maternal Mortality: A Challenge to Public Health Surveillance and Effective Prevention, *Online Journal of Public Health Informatics* 11(2):e17, DOI: [10.5210/ojphi.v11i2.10012](https://doi.org/10.5210/ojphi.v11i2.10012)), and biased interpretations by researchers affiliated with the abortion industry give the impression of safety. However, high-quality European records with far more complete and accurate reporting on pregnancy outcomes document far higher rates of maternal deaths following abortion compared to childbirth (Gissler M *et al.*, Pregnancy Associated Mortality After Birth, Spontaneous Abortion or Induced Abortion in Finland. 1987-2000, *American Journal Obstetrics and Gynecology*, 190, 422-427, 2004, DOI: [10.1016/j.ajog.2003.08.044](https://doi.org/10.1016/j.ajog.2003.08.044); Karalis E *et al.*, Decreasing mortality during pregnancy and for a year after while mortality after termination of pregnancy remains high: a population based register study of pregnancy associated deaths in Finland 2001-2012, *British Journal Obstet Gynecol.* 124, 1115-1121, 2017, DOI: [10.1111/1471-0528.14484](https://doi.org/10.1111/1471-0528.14484); Reardon DC, Thorp JM, Pregnancy associated death in record linkage studies relative to delivery, termination of pregnancy, and natural losses: A systematic review with a narrative synthesis and meta-analysis. *SAGE Open Medicine* 5, 1-17, 2017, DOI: [10.1177/2050312117740490](https://doi.org/10.1177/2050312117740490)). Abortion is also associated with a significantly increased risk of low birth weight and pre-term birth in subsequent pregnancies (Shah PS *et al.*, Induced termination of pregnancy and low birthweight and preterm birth: a systematic review and meta-analyses, *BJOG* 116, 1425-1442, 2009, DOI: [10.1111/j.1471-0528.2009.02278.x](https://doi.org/10.1111/j.1471-0528.2009.02278.x); and Swingle HM *et al.*, Abortion and the risk of subsequent preterm birth: a systematic review with meta-analyses, *Journal of Reproductive Medicine* 54, 95-108, 2009, <https://pubmed.ncbi.nlm.nih.gov/19301572/>). There are also several well-documented independent studies from 2013-2020 that found a significant increased overall risk of mental health disorders in post-abortive women including an elevated risk of psychiatric disorders, increased risk of suicide, increased risk of depression, anxiety, and stress (Coleman PK, The Turnaway Study: A Case of Self-

Correction in Science Upended by Political Motivation and Unvetted Findings, *Frontiers in Psychology*, 13, 905221, 2022, <https://DOI.org/10.3389/fpsyg.2022.905221>).

Further, most abortions occurring at less than ten weeks gestation are performed with the chemical regimen of mifepristone and misoprostol. Due to poor U.S. abortion data, and the tendency for frightened women to turn to an emergency room rather than return to the abortionist, complications are not readily detected, but international records-linkage studies and meta-analyses demonstrate 3.4-7.9% of women will have failed medical abortions and require surgery. Other physical complications include retained tissue, hemorrhage, infection and ongoing pregnancy (Raymond E *et al.*, First trimester medical abortion with mifepristone 200 mg and misoprostol: a systematic review, *Contraception* 87, 36-37, 2013, DOI: [10.1016/j.contraception.2012.06.011](https://doi.org/10.1016/j.contraception.2012.06.011); Chen M, Creinin M, Mifepristone with buccal misoprostol for medical abortion: A systematic review, *Obstet Gynecol* 126, 12-21, 2015, DOI: [10.1097/AOG.0000000000000897](https://doi.org/10.1097/AOG.0000000000000897); Niinimäki M *et al.*, Immediate complications after medical compared with surgical termination of pregnancy, *Obstet Gynecol* 114, 795-804, 2009, DOI: [10.1097/AOG.0b013e3181b5ccf9](https://doi.org/10.1097/AOG.0b013e3181b5ccf9)). The risks to women of chemical abortion regimens can be seen in the fact that the rate of abortion-related emergency room visits following a chemical abortion increased over 500% from 2002 through 2015. Up to 60% of known chemical abortion complications were miscoded as being due to spontaneous abortion (miscarriage), further demonstrating the inaccuracy of U.S. data. (Studnicki J *et al.*, A Longitudinal Cohort Study of Emergency Room Utilization Following Mifepristone Chemical and Surgical Abortions, 1999–2015, *Health Services Research and Managerial Epidemiology* 8:23333928211053965, 2021, DOI: [10.1177/23333928211053965](https://doi.org/10.1177/23333928211053965)). The FDA's recent removal of mifepristone's Risk Evaluation and Mitigation Strategy (REMS) in-person safety restrictions will only result in chemical abortions becoming even more dangerous, risking women's lives, health and future pregnancies (Skop I, Chemical abortion: Risks posed by changes in supervision, *Journal of American Physicians and Surgeons* 27, 56-61, 2022, <https://www.jpands.org/vol27no2/skop.pdf>).

It has been documented on many occasions that unsupervised abortion providers may provide poor quality care. Dr. Kermit Gosnell, who was convicted of manslaughter and whose abortion clinic was dubbed "The House of Horrors" by the Philadelphia district attorney, did not receive an inspection from the Pennsylvania Department of Health for over seventeen years, allowing him to prey on poor inner city minority women for decades. More recently, a Pensacola abortionist lost his medical license, and his clinic was shuttered after he nearly killed three women in three consecutive months. There is no supervising organization for all abortion providers as there are for every other medical specialty, so the responsibility for ensuring safe quality abortion care for women falls to the state's legislation. Abortion providers currently are less regulated than cosmetologists and barber shops.

Finally, the South Dakota proposition that abortion may still be allowed if necessary for the life and "health" of the mother mirrors the Supreme Court's *Doe v. Bolton* decision, whereby "health" was defined as any factor that contributed to the woman's physical, emotional, psychological, or familial well-being, including her age. Clearly, this "health" exemption can be, and has been, used to permit almost any abortion, up until birth. It is extraordinarily rare, if non-existent, for a dangerous late-term abortion to be indicated to protect a woman's life in the third trimester, as a life-threatening event after fetal viability can be more safely managed by induction or c-section, not intentionally killing the unborn child in abortion (Skop I, Medical Indications for Separating a Mother and Her Unborn Child, May 2022, <https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child/>). There are few places in the world that allow such unfettered abortion, and passage of this constitutional amendment would place South Dakota's abortion law on par with human rights abusers such as North Korea and the People's Republic of China (Baglini Nguyen A, Constitutional Limits on Abortion in the United States Compared to International Norms, *American Report Series* Issue 6, Charlotte Lozier Institute, 2014, <https://lozierinstitute.org/internationalabortionnorms/>).

TWO HUMAN LIVES AT RISK IN ABORTION

The Attorney General's draft statement and the proposed constitutional amendment completely ignore the existence of another human being whose life is also at stake in abortion. The existence of this human life has been accepted among knowledgeable scientists as consensus for decades. For example, the Carnegie stages of human development—which accept fertilization (sperm-egg fusion) as the beginning of human life and organismal development—have been the accepted standard of human embryological development since 1942 and reaffirmed by leading embryologists since that time (O'Rahilly R, Müller F, *Developmental Stages in Human Embryos: Revised and New Measurements, Cells Tissues Organs* 192, 73–84, 2010, DOI: [10.1159/000289817](https://doi.org/10.1159/000289817)). A recent survey found that 96 percent of 5,577 biologists from 1,058 academic institutions affirmed that a human's life begins at fertilization; 85 percent of the 5,577 biologists self-identified as pro-choice (*Brief of Biologists as Amici Curiae in Support of Neither Party*, filed with the U.S. Supreme Court, 2021. https://www.supremecourt.gov/DocketPDF/19/19-1392/185346/20210729162737297_19-1392%20BRIEF%20OF%20BIOLOGISTS%20AS%20AMICI%20CURIAE%20IN%20SUPPORT%20OF%20NEITHER%20PARTY.pdf).

Medical and scientific authorities now know more about human prenatal development than ever before and are saving unborn children like never before.

Human development, a brief timeline

At the moment of conception when the sperm fuses with the egg (about 2 weeks' gestation) there is the creation of a new, totally distinct, unborn child—a human being. A human being has a complete DNA genome genetically distinct and separate from the mother (T. W. Sadler, *Langman's Medical Embryology*, 14th ed., Philadelphia: Wolters Kluwer, 2019).

Between 5- and 6-weeks' gestation, an unborn child's heart begins to beat. The heart is the first organ to form in a developing human being (Tan CMJ and Lewandowski AJ, *The Transitional Heart: From Early Embryonic and Fetal Development to Neonatal Life, Fetal Diagn Ther* 47, 373-386, 2020, DOI: [10.1159/000501906](https://doi.org/10.1159/000501906)).

The heart rate averages 110 beats per minute by the end of the 6th week, increasing to approximately 170 beats per minute by the 10th week. This same heart will beat 54 million times before birth, and over 3.2 billion more times into adulthood, constantly pumping blood through the entire human body for a lifetime (Hornberger LK, Sahn DJ. Rhythm abnormalities of the fetus, *Heart* 93, 1294-300, 2007, DOI: [10.1136/hrt.2005.069369](https://doi.org/10.1136/hrt.2005.069369); The Beat Goes On – Tracking the Total Number of Heart Beats During Pregnancy and Beyond, The Endowment for Human Development, https://www.ehd.org/dev_article_appendix.php).

An unborn child begins to move about in the womb and reacts to touch at approximately 8 weeks gestation (de Vries JI *et al.*, The emergence of fetal behaviour. I. Qualitative aspects. *Early human development*, 7, 301–322, 1982, DOI: [10.1016/0378-3782\(82\)90033-0](https://doi.org/10.1016/0378-3782(82)90033-0))

The eyes begin to form at 5 weeks gestation and finish forming by 10 weeks' gestation; eye movements can be detected by ultrasound at 12 weeks' gestation (Eye Formation: Dive Deeper. Voyage of Life by the Charlotte Lozier Institute. <https://lozierinstitute.org/dive-deeper/eye-formation/>)

By 8 to 9 weeks, the unborn child has detectable brain waves (Borkowski WJ, Bernstine RL, Electroencephalography of the Fetus, *Neurology* 5, 362, 1955, DOI: [10.1212/WNL.5.5.362](https://doi.org/10.1212/WNL.5.5.362)).

As early as 10 weeks' gestation, all of the unborn child's organ rudiments are formed and in place, the unborn child sucks his or her thumb, and it is possible to determine whether he or she is left-handed or right-handed. The digestive system and kidneys start to function at this time, and the unborn child will show a preference for either right handedness or left handedness (Hepper PG, Lateralised Behaviour in First Trimester Human Foetuses, *Neuropsychologia* 36, 531–534, 1998, [10.1016/S0028-3932\(97\)00156-5](https://doi.org/10.1016/S0028-3932(97)00156-5) Right and Left-Handedness: Dive Deeper, The Voyage of Life. Charlotte Lozier Institute. <https://lozierinstitute.org/dive-deeper/right-and-left-handedness/>).

By 11 weeks' gestation, teeth as well as external genitalia begin to form (T. W. Sadler, *Langman's Medical Embryology*, 14th ed., Philadelphia: Wolters Kluwer, 2019; and Teeth: Dive Deeper. Voyage of Life by the Charlotte Lozier Institute. <https://lozierinstitute.org/dive-deeper/teeth/>).

At 12 weeks' gestation, an unborn child can open and close his or her fingers, starts to make sucking motions, and senses stimulation from the world outside the womb. (The Voyage of Life. Charlotte Lozier Institute. <https://lozierinstitute.org/fetal-development/week-9-to-10/>).

Fingerprints start forming at 12 weeks and are fully developed by 19 weeks (Babler WJ, Embryologic development of epidermal ridges and their configurations, *Birth defects original article series*, 27(2), 95–112, 1991; and When and How Fingerprints Form: Dive Deeper, The Voyage of Life. Charlotte Lozier Institute. <https://lozierinstitute.org/dive-deeper/when-and-how-fingerprints-form/>).

By 15 weeks, the unborn child can taste, feel pain, the skeleton has hardened from cartilage into bone, and the heart pumps 26 quarts of blood (15 Facts at 15 Weeks, Charlotte Lozier Institute. <https://lozierinstitute.org/15-facts-at-15-weeks/>)

By 16 weeks, the unborn child can hear and at 24 weeks respond to music, reading, and singing (Graven SN and Browne JV, Auditory Development in the Fetus and Infant. *Newborn and Infant Nursing Reviews* 8, 187-193, 2008, DOI: [10.1053/j.nainr.2008.10.010](https://doi.org/10.1053/j.nainr.2008.10.010); and Hearing in the Womb: Dive Deeper, The Voyage of Life. Charlotte Lozier Institute. <https://lozierinstitute.org/dive-deeper/hearing-in-the-womb/>).

Recent medical and surgical advances have made it possible for unborn children to receive life-saving treatment while still inside the womb, some as early as 15 weeks' gestation As of July 2022, there are over 35 medical centers in the U.S. that perform advanced in-utero fetal therapeutic procedures (Charlotte Lozier Institute. Fact Sheet: The Growth of Maternal-Fetal Medicine and Fetal Care Centers in the United States. July 2022. <https://s27589.pcdn.co/wp-content/uploads/2022/07/Fact-sheet-Maternal-Fetal-Medicine-pdf.pdf>)

Medical technology and active physician care has made it possible to save extremely premature babies and decline the age of viability to as early as 21 weeks (5 months) gestation (Saving Extremely Premature Babies: Dive Deeper, The Voyage of Life. Charlotte Lozier Institute. <https://lozierinstitute.org/dive-deeper/saving-extremely-premature-babies/>; and <https://www.guinnessworldrecords.com/news/2021/11/worlds-most-premature-baby-defies-sub-1-survival-odds-to-break-record-681851>).

There is substantial medical evidence that an unborn child is capable of experiencing pain and consciousness very early in the womb, by at least 12-15 weeks' gestational age.

Pain receptors (nociceptors) begin forming at 7 weeks' gestational age (Myers LB, Bulich LA, Hess, P, Miller, NM. Fetal endoscopic surgery: indications and anaesthetic management. *Best Practice & Research Clinical Anaesthesiology*. 18:2 (2004) 231-258; Anand KJS, Hickey PR. Pain and its effects in the human neonate and fetus. *New England Journal of Medicine*. 317:21 (1987) 1321-1329).

Nerves linking these pain receptors to the brain's thalamus and subcortical plate form between 12 and 20 weeks' gestational age. The thalamus functions in pain perception in fetuses as well as in adults.

(Derbyshire SWG and Bockmann JC, Reconsidering fetal pain, *Journal of Medical Ethics* 46, 3-6, 2020, doi: [10.1136/medethics-2019-105701](https://doi.org/10.1136/medethics-2019-105701); Kostović I, Judaš M, The development of the subplate and thalamocortical connections in the human foetal brain, *Acta Paediatr* 99, 1119–1127, 2010, DOI: [10.1111/j.1651-2227.2010.01811.x](https://doi.org/10.1111/j.1651-2227.2010.01811.x); Van de Velde M, De Buck F, Fetal and Maternal Analgesia/Anesthesia for Fetal Procedures, *Fetal Diagnosis and Therapy* 31, 201, 2012, DOI: [10.1159/000338146](https://doi.org/10.1159/000338146); Ulfig N *et al.*, Transient structures of the human fetal brain: subplate, thalamic reticular complex, ganglionic eminence, *Histol Histopathol* 15, 771–790, 2000, DOI: [10.14670/HH-15.771](https://doi.org/10.14670/HH-15.771)).

The application of painful stimuli to an unborn child is associated with significant increases in stress hormones in the unborn child, known as the stress response (Myers LB *et al.*, Fetal endoscopic surgery: indications and anaesthetic management, *Best Pract Res Clin Anaesthesiol* 18, 231, 2004, DOI: [10.1016/j.bpa.2004.01.001](https://doi.org/10.1016/j.bpa.2004.01.001); Brusseau R and Mizrahi-Arnaud A, Fetal Anesthesia and Pain Management for Intrauterine Therapy, *Clinics in Perinatology* 40, 429, 2013, DOI: [10.1016/j.clp.2013.05.006](https://doi.org/10.1016/j.clp.2013.05.006)). In fact, evidence indicates that subjection to

painful stimuli as a fetus is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life (Fink RJ, *et al.*, Remifentanyl for fetal immobilization and analgesia during the ex utero intrapartum treatment procedure under combined spinal–epidural anaesthesia, *British Journal of Anaesthesia* 106, P851–855, 2011, DOI: <https://doi.org/10.1093/bja/aer097>).

For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia (Fisk NM *et al.*, Effect of direct fetal opioid analgesia on fetal hormonal and hemodynamic stress response to intrauterine needling, *Anesthesiology* 95, 828–835, 2001, DOI: [10.1097/0000542-200110000-00008](https://doi.org/10.1097/0000542-200110000-00008)).

Fetal surgeries are now being performed even into the first half of gestation, and incorporate anesthesia and analgesia in the protocols (Lecointre L *et al.*, Fetoscopic Laser Coagulation for Twin–Twin Transfusion Syndrome before 17 Weeks’ Gestation: Laser Data, Complications and Neonatal Outcome, *Ultrasound in Obstetrics & Gynecology* 44, 299–303, 2014, <https://doi.org/10.1002/uog.13375>; Baud D *et al.*, Fetoscopic Laser Therapy for Twin-Twin Transfusion Syndrome before 17 and after 26 Weeks’ Gestation, *Am J Obstet Gynecol*, 208, 197.e1-7, 2013, DOI: 10.1016/j.ajog.2012.11.027; Ramirez MV, Anesthesia for fetal surgery, *Colombian Journal of Anesthesiology* 40, 268, 2012, <https://doi.org/10.1016/j.rcae.2012.07.006>). As one of the world’s leading fetal surgeons on the development of fetal surgery points out, using spina bifida as an example of good medical practice for *in utero* surgical intervention: “Fetal therapy is the logical culmination of progress in fetal diagnosis. In other words, the fetus is now a patient.” (Adzick NS, Prospects for fetal surgery, *Early Human Development* 89, 881-886, 2013, DOI: [10.1016/j.earlhumdev.2013.09.010](https://doi.org/10.1016/j.earlhumdev.2013.09.010)).

Standard of medical care now calls for direct fetal analgesia and anesthesia during fetal surgery, beginning at least by 15 weeks.

Current medical evidence has concluded that from the 15th week gestational age onward, “the fetus is extremely sensitive to painful stimuli,” making it “necessary to apply adequate analgesia to prevent [fetal] suffering.” (Sekulic S *et al.* Appearance of fetal pain could be associated with maturation of the mesodiencephalic structures. *Journal of Pain Research* 9, 1031-1038, 2016, DOI: [10.2147/JPR.S117959](https://doi.org/10.2147/JPR.S117959); Bellieni CV, Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress, *Pediatric Research* 89, 1612, 2020, DOI: [10.1038/s41390-020-01170-2](https://doi.org/10.1038/s41390-020-01170-2)).

Through technological advancements, the peer-reviewed evidence has only become more compelling as ultrasonographic studies have literally given us a window into the womb for the first time. [A study](#) published earlier this year found that fetuses at approximately 31 weeks’ gestation grimaced with pain when their thighs were injected with anesthetic prior to a painful intrauterine surgery (Bernardes LS *et al.*, Sorting Pain Out of Salience: Assessment of Pain Facial Expressions in the Human Fetus, *Pain Reports* 6(1), e882, 2021, DOI: [10.1097/PR9.0000000000000882](https://doi.org/10.1097/PR9.0000000000000882)). Another 2021 study observed the same result — a pained grimace upon being pricked with a needle with anesthetic — with a 23 weeks’ gestation fetus about to undergo heart surgery in the womb (Bernardes LS *et al.*, Acute Pain Facial Expressions in 23-Week Fetus, *Ultrasound in Obstetrics & Gynecology* 59, 394-395, 2021, DOI: [10.1002/uog.23709](https://doi.org/10.1002/uog.23709)).

Conscious behavior even in early fetal life has also been shown using modern techniques. Ultrasonography on fetal twins reveals that fetuses as young as 14 weeks’ gestation consistently demonstrate differential movements directed at their twin compared to those directed at either themselves or at the uterine wall, showing conscious, intentional behavior (Castiello U *et al.*, Wired to Be Social: The Ontogeny of Human Interaction, *PLoS ONE* 5(10): e13199, <https://doi.org/10.1371/journal.pone.0013199>). As early as 16 weeks’ gestation, fetuses can distinguish between music and mere vibroacoustic noise that stimulates the same auditory pathways (López-Teijón M *et al.*, Fetal Facial Expression in Response to Intravaginal Music Emission, *Ultrasound* 23, 216-223, 2015, DOI: [10.1177/1742271X15609367](https://doi.org/10.1177/1742271X15609367)). Fetuses at 23 weeks of life distinguish nursery rhymes with the syllable “LA” from rhymes with the syllable “LU” (Ferrari GA *et al.*, Ultrasonographic Investigation of Human

Fetus Responses to Maternal Communicative and Non-communicative Stimuli, *Frontiers Psych.* 7, Article 354, 2016, <https://doi.org/10.3389/fpsyg.2016.00354>).

Substantial evidence indicates that a functioning cerebral cortex is not required to experience pain. The thalamus appears to be the functional site for pain.

Children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain (see, e.g., Merker B, Consciousness Without a Cerebral Cortex: A Challenge for Neuroscience and Medicine, *Behav. & Brain Sci.* 30, 63, 2007, DOI: [10.1017/S0140525X07000891](https://doi.org/10.1017/S0140525X07000891)).

In adult humans and in animals, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does (Mazzola L *et al.*, Stimulation of the Human Cortex and the Experience of Pain: Wilder Penfield's Observations Revisited, *Brain* 135, 631, 2012, DOI: [10.1093/brain/awr265](https://doi.org/10.1093/brain/awr265)).

Anesthesia-induced loss of consciousness, and therefore conscious pain perception, is associated with a reduction in the activity of the thalamus, not the cortex (Song X, Yu B, Anesthetic Effects of Propofol in the Healthy Human Brain: Functional Imaging Evidence, *J. Anesthesia* 29, 279, 2015, DOI: [10.1007/s00540-014-1889-4](https://doi.org/10.1007/s00540-014-1889-4); Gili T *et al.*, The Thalamus and Brainstem Act as Key Hubs in Alterations of Human Brain Network Connectivity Induced by Mild Propofol Sedation, *J. Neuroscience* 33, 4024, 2013, DOI: [10.1523/JNEUROSCI.3480-12.2013](https://doi.org/10.1523/JNEUROSCI.3480-12.2013)); additional references cited in: *Dobbs v. Jackson*. Brief of Maureen L. Condic, PhD and the Charlotte Lozier Institute as Amici Curiae supporting petitioners, 2021.

<https://lozierinstitute.org/wp-content/uploads/2021/07/CLI-Dobbs-Amicus-Brief.pdf>).

In summary, the medical and scientific evidence overwhelmingly shows that abortion has significant risks for women, and destroys a young, developing human being. The statement of the Attorney General should educate the public of the full facts, so that citizens can make an informed choice.

Sandra Sander Lee, Ph.D.

Senior Fellow and Director of Life Sciences

Ingrid Skop, M.D., F.A.C.O.G.

Senior Fellow and Director of Medical Affairs

David A. Prentice, Ph.D.

Vice President and Research Director

Charlotte Lozier Institute

202-288-5819

dprentice@lozierinstitute.org

August 11 2022

Attorney General

AUG 15 2022

Lynwood WA 98087

Dear Acting Attorney General Mark Vargo:

I am a resident of South Dakota (since August 1992) but have been working for the Department of Defense (Navy) since 2005 and am now stationed in Everett Washington and work as a Registered Nurse at the Everett Naval Branch Health Clinic until I retire later this year. I understand you are taking public comment on the ballot proposal on abortion drafted by "Dakotans for Health" that would be placed on the 2024 ballot if enough signatures are obtained.

While not perfect it is reasonable and would protect a pregnant woman's right to an abortion in the first trimester while in the second and third trimester, the state could regulate the abortion decision relating to the pregnant woman's health and physician's medical judgement.

I strongly believe in a women's right to bodily autonomy, the right to privacy related to a women's health care decisions without governmental interference and that those decisions should be discussed and made between the woman and her healthcare Provider.

I would make a recommendation of said ballot initiative that it also include provision that a women could have a termination of pregnancy for fetal demise as well as a fetal anomalies (incompatible with life).

There seems to be large amount of religious influence within the Legislature and the Governor regarding this issue. This is evidenced by South Dakotan's voting against an abortion ban by 56% in 2006 and again in 2008 with 55% opposed.

Abortion is a part of "safe" woman's health care and should remain so. I want to see this placed on the ballot in 2024 so South Dakotans can be clear as a State of what they want.

Thank you.

Sincerely,

Mary E. Willock RN

Mary E. Willock R.N.

August 11 2022

4525 164th Street SW Apt DD304

Lynwood WA 98087

Attorney General

AUG 15 2022

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Thank you.

Sincerely,

Mary E. Willock RN

Mary E. Willock R.N.

From: Dale Bartscher <dale.sdrtl@gmail.com>
nt: Monday, August 15, 2022 1:24 PM
o: ATG Ballot Comments
Subject: [EXT] SD Right to Life's Comments on the Constitutional Amendment on Abortion
Attachments: Letter to AG Vargo re pro-abortion ballot measure explanation.pdf; ATT00001.htm

Good Monday Afternoon,

Would you please acknowledge receipt of this document for the AG's consideration? Thank You!

-Dale Bartscher
South Dakota Right to Life
605-390-7319

Attorney General Vargo:

South Dakota Right to Life sends its congratulations on your recent appointment as our great state's newest Attorney General. We pray for the Lord's protection over you and your family and for the wisdom and discernment you and your staff will need in navigating the duties of your office. We are writing today to express our deep concern over the draft title and explanation related to the 2024 initiated constitutional amendment to legalize abortion.

Under SDCL 12-13-25.1, you are tasked with drafting "an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed . . . initiated amendment to the Constitution," along with "a description of the legal consequences of the proposed . . . initiated amendment to the Constitution."

The explanation begins with the leading statement: "this constitutional amendment establishes a framework for the regulation of abortion." This statement is misleading and does not educate the voters as to the actual purpose, effect, and legal consequences of the amendment for two primary reasons:

(1) The constitutional amendment doesn't merely "establish a framework for the regulation of abortion." Instead, it overrides the regulatory framework for abortion that's already in place in our state. Numerous regulations which protect unborn babies and pregnant mothers and that make up our state's existing regulatory framework would face being overridden by the constitutional amendment—like parental notification laws respecting minors, criminal protections against coerced abortions, informed consent provisions which require abortionists to be truthful to mothers about the abortion procedure, conscience protections to protect doctors and nurses from being forced to perform abortions or get sued, and state laws preventing taxpayer funding of abortion would almost certainly be overridden by the constitutional amendment.

(2) Beyond merely "establish[ing] a framework for the regulation of abortion," the constitutional amendment legalizes the termination of human life from conception all the way to birth. This leading statement from the explanation, that "this constitutional amendment establishes a framework for the regulation of abortion" fails to educate the voters as to what the actual purpose and effect of the constitutional amendment is: a radical liberalization of legal abortion in South Dakota.

Similarly, the draft title "A Constitutional Amendment Concerning the Regulation of Abortion" fails to educate voters as to the actual subject matter of the amendment. This amendment is indisputably about legalizing abortion, but the title fails to communicate that to the voters.

Turning to the main body of your explanation, as you are aware, state law requires you to educate the voters in your explanation as to the (1) purpose, (2) effect, and (3) legal consequences of the amendment. The main body of your explanation is essentially a restatement of the amendment, which seemingly would satisfy your duty to explain the "purpose" of the

amendment. However, by failing to educate the voters about the existing regulations and protections which would be overridden by the amendment, as discussed above, we believe the explanation fails to explain the "effect" and "legal consequences" of the amendment.

Finally, the explanation concludes that "judicial or legislative clarification of the amendment may be necessary." We agree that many aspects of the amendment lack necessary clarification, as many important phrases in the amendment, such as "its effectuation" and "reasonably related," are left completely undefined in the amendment. However, we are concerned that the inclusion of the statement that "legislative clarification of the amendment may be necessary," is confusing and misleading to voters because it might lead to the conclusion that this measure can be amended or modified by the legislature, which is not true. The phrase might also lead voters to believe that the confusing phrases contained in the amendment can be clarified or defined by legislative action, which is also not true.

In summary, by characterizing the amendment as merely setting up a regulatory framework for abortion, the title and leading statement in the explanation fail to educate the voters as to what this amendment really does: legalize the termination of human life from conception to birth. The explanation also fails to explain the effect and legal consequence of the amendment: the overriding of existing prohibitions on taxpayer funding of abortions, the overriding of criminal protections against coerced abortions, the overriding of prohibitions on extreme late term abortion, and the overriding of many other existing protections which voters might not realize that they are overriding if they approve this amendment.

Thank you for your attention. We ask that you please revise the draft explanation based upon these comments.

Sincerely,

South Dakota Right to Life

From: Natalie Hejran <Natalie.Hejran@aul.org>
ent: Monday, August 15, 2022 9:36 AM
ro: ATG Ballot Comments
Subject: [EXT] Abortion Ballot Comment

Hi,

My name is Natalie Hejran and I am staff counsel at Americans United for Life. Please find below our comment on the proposed ballot summary.

Americans United for Life is the oldest and most active pro-life national advocacy organization. AUL has dedicated over 50 years to advocating for comprehensive legal protections for human life from conception to natural death. The proposed ballot summary is misleading, since it states only that the resolution would provide a "framework" by which abortion would be regulated, without mentioning that it would vitiate much of South Dakota's abortion legislation.

Today, South Dakota law defends Life and prohibits abortions except when necessary to save the life of the mother. This proposed constitutional amendment would effectively result in the invalidation of all progress the legislature has made over the years to become one of the most pro-Life states in the U.S. It would expand and enshrine abortion as a "right" and prevent future legislators from implementing regulations or limitations on abortion.

The language of the amendment makes this clear. Abortion would go from *prohibited* to *protected*. It explicitly states that in the first trimester, regulation of the "abortion decision and its effectuation" would not be permitted *at all*. This means South Dakota would suddenly allow abortion on demand throughout the first trimester. No restrictions and no protections.

In the second trimester, the only regulations that would be allowed are those that "reasonably relate[] to the physical health of the pregnant woman." This language has the potential to render meaningless existing commonsense safeguards, such as prohibitions on sex-selective abortions and abortions made based on a potential Down syndrome diagnosis. It could also preclude informed consent to ensure that women receive truthful information about abortion procedures and the nature of life in the womb. It could even prevent the enforcement of South Dakota's parental notice law which serves as a protection for minor girls.

Finally, in the third trimester, abortions could be regulated or prohibited except when "necessary . . . to preserve the life or health of the pregnant woman." This exception is not as minimal as it sounds, since "health" has historically been defined broadly by the Supreme Court to include "physical, emotional, psychological, familial, and the woman's age" for the purposes of post-viability abortions. This effectively would allow abortion in almost all cases.

If legalizing abortion wasn't bad enough, this amendment would also prevent the passage of any future protections for both mother and child. This includes protections against physical harm to women through the regulation of abortion providers. By lowering professional accountability, abortion providers in South Dakota will be free to operate without regulation and oversight, to the detriment of women and young girls as they risk facing life-threatening and potentially life-ending complications due to abortion.

What is described as "establish[ing] a framework for the regulation of abortion" is really the expansion of selective abortion in a state where there is a desire to regulate, and even prohibit, it. South Dakotans want to continue their strong efforts in protecting Life. The proposed constitutional amendment does the opposite and must be rejected.

Thank you,



Natalie Hejran, Esq.
Staff Counsel

202-741-4908
1150 Connecticut Ave NW, Ste 500
Washington, DC 20036



From: poppajhb@aol.com
ent: Thursday, August 11, 2022 4:28 PM
io: ATG Ballot Comments
Subject: [EXT] Draft Ballot Explanation Submission

From: John and Mary Baldrige, Pierre, SD 57501

To acting Attorney General Mark Vargo:

Submitted herewith are our comments regarding the Proposed Constitutional Amendment on Abortion.

Mr. Vargo, let us set out here in a very passionate response to the most obvious and very Democratically/Planned Parenthood type of laced language for this Proposed Amendment from your website.

It reflects a very distinct bias to be pro-abortion and does not line up with South Dakota's Trigger Law of 2005 which was activated by the overturning of Roe v. Wade.

In all previous state ballots where we have seen Amendments offered to voters, there was always at the bottom of the balloted Amendments and explanation of what a YES or NO vote would mean. There was no explanation of what either vote would mean to the voter in your present proposed Amendment.

THIS MUST BE CORRECTED WITH EXPLANATIONS ADDED.

For example: We request that you add explanations based on Truth to the Voters of South Dakota such as the following;

A YES vote would reverse the Trigger Law of 2005 and change the current law to allow more abortions in South Dakota, as described above.

A NO vote to this Amendment would reject any changes to the current Trigger Law of 2005 that was activated with the reversal of Roe v. Wade and is currently in place as law. This vote would keep Governor Noem's position in place that South Dakota would be one of the most Abortion Free states in America.

Under God The People Rule...and It is for Righteousness in Government we stand.

John and Mary Baldrige
John and Mary Baldrige

From: Katie Glenn <Kglenn@sbaproplife.org>
nt: Monday, August 15, 2022 1:20 PM
J: ATG Ballot Comments
Cc: Adam Schwend
Subject: [EXT] SBA ACLU Action Ballot Initiative Comment



Comment on Proposed Ballot Initiative “A Constitutional Amendment Concerning the Regulation of Abortion”

Date: 15 August 2022 [Submitted Via Email]

To: The Honorable Mark A. Vargo
Attorney General
State of South Dakota

Dear Attorney General Vargo:

This comment is submitted in response to the South Dakota Secretary of State’s receipt of a proposed ballot amendment (“[the Amendment](#)”) which would significantly alter the way abortion is regulated in South Dakota, permitting more abortions with less oversight than at any point in recent memory.

The Draft Attorney General’s Statement filed on August 4, 2022, undersells the extent to which the Amendment, if adopted, would fundamentally change abortion in South Dakota and fails to address the liability to which the state would be exposed. The Attorney General’s final “Explanation” statement will be the official statement of the government of South Dakota and must accurately explain to voters the stakes of enacting the Amendment, not just to mothers and their children but to the state as a whole.

The Amendment would permit abortion for virtually any reason, even later in pregnancy when the unborn child can feel excruciating pain.

Currently, abortion is [illegal](#) in South Dakota unless it is necessary to save the life of the mother. South Dakota voters have consistently elected pro-life lawmakers who passed the “trigger law,” which took effect on June 24, 2022, when the Supreme Court of the United States [returned](#) “the authority to prohibit abortion at all stages of pregnancy” to Congress and the states.

The Amendment would set South Dakota back decades, returning the state to a regime where abortion doctors are unaccountable for harm they cause to mothers and unborn children are unprotected.

The federal Centers for Disease Control and Prevention (CDC) [reported](#) that in 2019, 92.7% of reported abortions nationally occurred before 13 weeks’ gestation; South Dakota mirrors that trend, [reporting](#) 89% of abortions prior to 13 weeks’ gestation in 2020. As currently written, the Amendment would forbid the state from regulating an “abortion decision and its effectuation” in any way “before the end of the first trimester,” which ends in the [thirteenth week of pregnancy](#). The vast majority of abortions in South Dakota would be totally unregulated, and prosecutors would be unable to act if a woman or girl within their jurisdiction was harmed during an abortion. If notorious Philadelphia abortionist [Kermit Gosnell](#), currently serving a life sentence, set up shop in South Dakota, there is nothing the state could do about it as long as he stayed within that first 12 weeks’ gestation.

During the second trimester, the State may only “regulate the pregnant woman’s abortion decision *and its effectuation* . . . in ways that are *reasonably related to the physical health* of the pregnant woman.” Because the second trimester extends well past the timeframe when children reach viability, which is now closer to [22 weeks’ gestation](#), the Amendment would allow for the killing of unborn children who could survive outside the womb.

Use of the term “effectuate” is concerning because it prevents the state from restricting the method of abortion until the 20th week of pregnancy and could be used to allow the killing (through direct or indirect action) of a child born alive after a botched abortion.

Furthermore, it would prevent the state from asserting any interests on behalf the child and would likely be used to challenge laws protecting the conscience rights of healthcare professionals. Laws that help women make their decision such as informed consent, reflection periods, and counseling about resources and alternatives to abortion would all be struck down as serving otherwise legitimate state’s interests not directly tied to “physical health.” The Amendment could have unforeseen consequences on child-welfare laws or other laws that govern the treatment of human remains, reporting deaths of human beings, or other laws adjacent to the abortion procedure.

Even in the third trimester, South Dakota would be limited in how it could restrict late-term abortions. The “health” exception is left undefined, leaving it to the courts to determine how broadly it might be interpreted. A court might look to existing [South Dakota law](#) and narrowly define it as “a serious risk of substantial and irreversible impairment of a major bodily function.” Or it could rely on [Doe v. Bolton](#), finding that “medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health.” If health could mean anything and everything, there would be virtually no restriction on abortions throughout pregnancy in South Dakota. Ironically, the Amendment would prevent commonsense laws that require healthcare professionals to provide women with information about the well-documented negative effects abortion has on a woman’s physical, mental, and emotional health.

The Amendment does not recognize South Dakota’s interest in the unborn child. His or her health, wellbeing, or chance at life is never considered anywhere in the Amendment as currently written. If added to the South Dakota Constitution, the Amendment would assert that South Dakota has *no* interest in the child and could be used as a tool of future courts to invalidate any protections that remained.

The Amendment would repeal most South Dakota abortion laws, including those protecting children from discriminatory abortions on the basis of their sex or a fetal diagnosis, and prevent South Dakota from protecting women and girls from dangerous, substandard medical treatment.

These laws would be invalidated or significantly limited in scope by the Amendment:

Recognition of the Dignity of Unborn Children:

- [34-23A-1.3](#) (legislative findings recognizing a relationship between mother and child)
- [34-23A-2](#) (“trigger law” protecting the unborn child from conception)
- [34-23A-27](#) (partial-birth abortion ban)
- [34-23A-64](#) (preventing sex-selective abortions)
- [34-23A-67](#) (legislative findings about fetal pain)
- [34-23A-69](#); [34-23A-70](#) (prohibition on abortions after the child can feel pain)
- [34-23A-72](#) (late-term abortions done for a “medical emergency” must use the method likeliest to result in the child’s survival)
- [34-23A-90](#) (preventing abortions on the basis of a Down syndrome diagnosis)

Baseline Health and Safety Standards:

- [34-23A-1.4](#) (legislative findings recognizing the inherent risks to the pregnant woman)
- [34-23A-4](#) (abortions between 12-22 weeks’ gestation must be performed in a hospital or licensed physician’s medical clinic)
- [34-23A-5](#) (abortions after 22 weeks’ gestation may only be performed in the case of a medical emergency and must be in a hospital)

- 34-23A-6 (later-term abortions must be performed in a facility with a supply of blood available and that is able to provide Rho-gam for women with an Rh-negative factor)
- 34-23A-46; 34-23A-48 (licensing of abortion facilities)
- 34-23A-49 (inspection of abortion facilities)
- 34-23A-56 (in-person counseling and screening prior to procedure)
- 34-23A-71 (limiting “medical emergency” exceptions physical health, not self-harm)
- 36-4-8; 36-9A-17.2 (limiting abortion to licensed physicians)
- 36-4-47 (establishing FDA’s best practices for dispensing abortion-inducing drugs)

Ensuring a Woman Makes an Informed Decision:

- 34-23A-1.5 (legislative findings that the state owes a special protection to pregnant women)
- 34-23A-1.6 (legislative findings outlining the standard of care for informed consent)
- 34-23A-7 (written notice to parent or guardian before performing an abortion on a minor)
- 34-23A-7.1 (judicial bypass for minors seeking abortion ensuring that at minimum she speaks to a judge and has access to a guardian ad litem)
- 34-23A-10.1 (voluntary and informed consent after a reflection period, including information about alternatives to abortion and abortion pill reversal)
- 34-23A-52 (opportunity to see a sonogram and hear the child’s heartbeat)
- 34-23A-54 (legislative findings about coerced abortion)

Justice for Women and Families Harmed by Abortion:

- 34-23A-1.7 (common law cause of action for medical malpractice if the physician fails to provide adequate informed consent prior to an abortion)
- 34-23A-10.2 (misdemeanor penalty for a physician who does not obtain informed consent before performing an abortion)
- 34-23A-29; 34-23A-30 (civil action and damages for death of child in partial-birth abortion)
- 34-23A-55 (physician’s duty to ensure that abortion is informed and not coerced)
- 34-23A-60 (civil action if a physician fails to obtain informed consent)
- 34-23A-61 (civil action for any violation of the abortion code)
- 34-23A-91 (civil action for abortion done on the basis of Down syndrome diagnosis)

Conscience Rights of Healthcare Professionals and the Public:

- 34-23A-11 (conscience rights of counselors or social workers)
- 34-23A-12; 34-23A-13 (conscience rights of physicians, nurses, and other healthcare professionals)
- 34-23A-14 (conscience rights of hospitals that do not offer abortions)
- 58-17-147 (prohibiting coverage of elective abortions in qualified health plans)

South Dakota would rival Colorado and New Mexico in its extremism if this Amendment were to pass. The state would become an abortion destination for the region.

The proposed summary insufficiently explains the stakes of the Amendment, including that it would enshrine a “right to abortion” into the South Dakota Constitution.

The Amendment would create a right to abortion in South Dakota law which has never existed in the state’s history by mimicking the failed framework that the Supreme Court of the United States discarded this past term. As the multitudinous decisions of the Supreme Court demonstrate, *Roe v. Wade*’s creation of a “[constitutional right](#)” to abortion did not resolve the issue. Instead, the Court faced decades of abortion-related litigation over the Court’s invented “right” to abortion and efforts by legislatures to affirm the sanctity of unborn human life, protect women from abusive practices, and address the problem of unsafe abortion practices.

As indicated by the list above, if South Dakota were to pass the Amendment, the South Dakota Supreme Court would have to grapple with a similar parade of questions, to be answered with only the aid of vague state constitutional text. The Amendment would expose the state to vast liability and clog up state courts with decades of litigation and showdowns between the three branches of government.

Susan B. Anthony Pro-Life America and ACLJ Action submit an alternative summary which better reflects the impact the Amendment would have on South Dakota's laws and its citizens.

Proposed Summary:

The amendment establishes a constitutional right to abortion in South Dakota and imposes limits on the ability of the legislative and executive branches to regulate abortion.

The amendment establishes that during the first trimester of pregnancy (0-12 weeks'), the state may not regulate or restrict the carrying out of an abortion in any way.

In the second trimester (13-28 weeks'), the amendment does not allow the state to regulate or restrict abortion unless the regulation directly affects the "physical health of the pregnant woman."

In the third trimester (29-40 weeks'), when abortion is determined to be necessary to preserve the life or health of the woman, which may include emotional, financial, or familial health, then the state may not regulate or prohibit the abortion.

The amendment would supersede existing laws related to abortion, including who can perform them and where they are performed, as well as fetal pain, parental consent, alternatives to abortion, and conscience rights of healthcare professionals. The legislature or the courts will need to interpret or clarify terms. The Amendment may conflict with other state civil and criminal laws, which could require litigation to resolve.

We oppose the proposed ballot amendment and encourage the Attorney General to publish a final summary that better reflects the magnitude of this initiative's change to South Dakota law.

Submitted on behalf of Susan B. Anthony Pro-Life America and ACLJ Action.

Stephen Billy, J.D.
VP of State Affairs

James Rockas
Executive Director

Katie Glenn, J.D.
State Policy Director
Susan B. Anthony Pro-Life America
sbapro-life.org
Arlington, VA
202-223-8073

Robert Burkett
Senior Advisor and Chief of Staff
ACLJ Action, Inc.
acljaction.org
Washington, D.C.
833-437-0399

Susan B. Anthony Pro-Life America is a network of more than one million pro-life Americans nationwide, dedicated to ending abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

ACLJ Action, Inc. is an organization dedicated to the defense of constitutional values, liberty, and religious freedom in the U.S. and abroad.

Aug 9, 2022

Attorney General

Relating to the Proposed Constitutional Amendment on Abortion AUG 12 2022

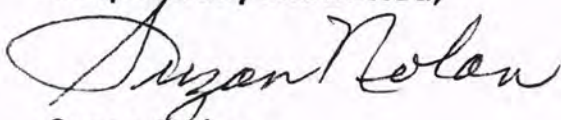
The Draft of this proposal does not go far enough to protect the right of women to have agency over their bodies. No woman should be forced to carry a child. Our laws should reflect trust in women to make their own decisions regarding abortion throughout the duration of the pregnancy.

The State's involvement in a woman's right to bear a child or terminate a pregnancy at any stage is an egregious act of interference and does not honor the separation of church and State. Our state's laws should reflect a respect and a trust that a woman and her doctor know what's best. Our law and the language of the proposed constitutional amendment should reflect this. No woman should be forced to carry a child.

The law has never kept women from aborting unwanted pregnancies. It has created hardship for women who cannot afford private abortions or travel expenses and jeopardizes the health and welfare of women.

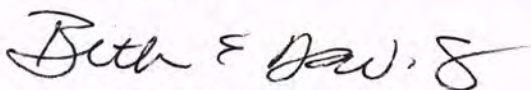
We respectfully request that the language be amended to protect the rights of women to choose an abortion throughout the term of their pregnancies.

Respectfully submitted,



Suzan Nolan –

, Rapid City, SD 57701



Beth Walz Davis –

, Rapid City, SD 57701

Aug 9, 2022

Attorney General

Relating to the Proposed Constitutional Amendment on Abortion AUG 12 2022

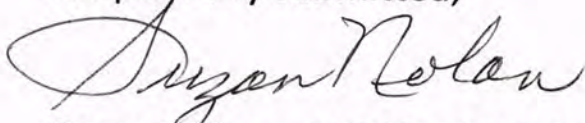
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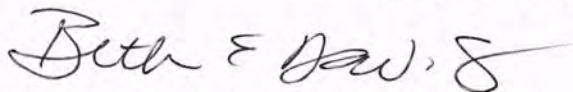
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Respectfully submitted,



Suzan Nolan – 1164 Lookout Lane, Rapid City, SD 57701



Beth Walz Davis – 1164 Lookout Lane, Rapid City, SD 57701

AUG 12 2022

August 10, 2022

Attorney General Vargo,

Thank you for stepping up to fill the role of Attorney General in our great state. I hope things are going well for you in your new position.

I am reaching out regarding the abortion ballot measure explanation that has been released from your office and to see if there's any possibility of amending it, as I believe the current wording will cause confusion among SD voters. My intent is not to be a critic, but to express my concerns in a way that I believe will best serve South Dakotans.

As I read the explanation of the abortion ballot measure, the tone and wording struck me as written by someone who is pro-abortion. I know you are striving for a neutral explanation, but the wording comes across as favorable towards the measure. In addition, the wording has a clear "legalese" tone rather than a layman's explanation of the measure. I believe the latter would better serve South Dakotans as they do their own research and make their own decisions.

Our organization will be working hard to oppose this measure, but my request today isn't that you write the explanation in a way that opposes the measure. I believe the following changes would put the explanation in a more neutral position and clear up the confusion.

Opening Statement Feedback:

This amendment essentially codifies *Roe v. Wade*. Would you consider changing the language to something like **"This amendment would place into our constitution a framework of abortion policies similar to the *Roe v. Wade* decision of 1973. Abortion would always be allowed during the first trimester, usually allowed in the second trimester, and allowed in the third trimester if the mother's health is at risk."** This is a straight-forward statement that doesn't lean either way and explains the measure in layman's terms. Both sides can read the amendment and reasonably conclude that the amendment is equivalent to *Roe v. Wade*.

Second Paragraph Feedback:

The explanation is written accurately, but not in layman's terms. Would you consider changing the language to something like, **"The amendment establishes that during the first trimester, the state cannot place any regulations on the practice of abortion. The decision must be left solely to the judgement of the pregnant woman."**

Third Paragraph Feedback:

This section of the explanation is the cloudiest. I believe the average citizen would read this paragraph and not understand what is being said. Would you consider changing the language to something like, **"In the second trimester abortion would generally be**

AUG 13 2012

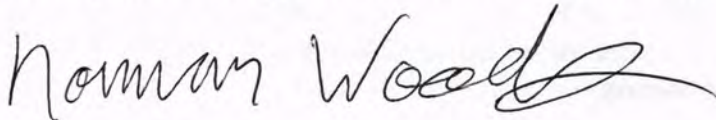
allowed, but the amendment allows for some regulations to be placed on the practice. These regulations are only allowed if they are related to the mother's health."

Fourth Paragraph Feedback:

Would you consider changing this language to something like **"In the third trimester, the amendment allows the state to regulate or prohibit abortion except for cases where the doctor believes the abortion is necessary for the 'life or health' of the mother."**

I believe these changes would better explain what the measure does and would help clarify in voter's minds what they are voting on. I appreciate your consideration.

Thank you for taking the time to read my comments.



Norman Woods

Director

Family Heritage Alliance Action

605-939-8006

Norman@familyheritagealliance.org

PO Box 329
R.C. 57709

From: norman familyheritagealliance.org <norman@familyheritagealliance.org>
Content: Wednesday, August 10, 2022 2:20 PM
From: ATG Help
Subject: [EXT] Ballot Comment

Attorney General Vargo,

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I am reaching out regarding the abortion ballot measure explanation that has been released from your office and to see if there's any possibility of amending it, as I believe the current wording will cause confusion among SD voters. My intent is not to be a critic, but to express my concerns in a way that I believe will best serve South Dakotans.

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Thank you for taking the time to read my comments.

Norman Woods

Director

Family Heritage Alliance Action

605-939-8006

Norman@familyheritagealliance.org

STATE OF SOUTH DAKOTA



RECEIVED

AUG 04 2022

S.D. SEC. OF STATE

OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

Phone (605) 773-3215

Fax (605) 773-4106

<http://atg.sd.gov>

MARK A. VARGO
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

August 4, 2022

Filed this 4th day of
August, 2022

Steve Barnett
SECRETARY OF STATE

Honorable Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

RE: Attorney General's Statement (Initiated Constitutional Amendment:
Concerning Abortion)

Dear Secretary Barnett,

Enclosed is a copy of a proposed constitutional amendment, in final form, that the sponsor submitted to this Office. In accordance with state law, I hereby file the enclosed *draft* Attorney General's Statement for the purposes of receiving public comment on the same.

By copy of this letter, I am providing a copy of the *draft* Statement to the sponsor.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark A. Vargo".

Mark A. Vargo
ATTORNEY GENERAL

MAV/dd
Enc.

Cc/encl: James D. Leach
Reed Holwegner - Legislative Research Council

RECEIVED

AUG 04 2022

S.D. SEC. OF STATE

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article VI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION:

Before the end of the first trimester, the State may not regulate a pregnant woman's abortion decision and its effectuation, which must be left to the judgment of the pregnant woman.

After the end of the first trimester and until the end of the second trimester, the State may regulate the pregnant woman's abortion decision and its effectuation only in ways that are reasonably related to the physical health of the pregnant woman.

After the end of the second trimester, the State may regulate or prohibit abortion, except when abortion is necessary, in the medical judgment of the woman's physician, to preserve the life or health of the pregnant woman.

RECEIVED

AUG 04 2022

S.D. SEC. OF STATE

CONSTITUTIONAL AMENDMENT

DRAFT ATTORNEY GENERAL'S STATEMENT

Title: A Constitutional Amendment Concerning the Regulation of Abortion.

Explanation:

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

The amendment establishes that during the first trimester a pregnant woman's decision to obtain an abortion may not be regulated nor may regulations be imposed on the carrying out of an abortion.

In the second trimester, the amendment allows the regulation of a pregnant woman's abortion decision, and the regulation of carrying out an abortion. Any regulation of a pregnant woman's abortion decision, or of an abortion, during the second trimester must be reasonably related to the physical health of the pregnant woman.

In the third trimester, the amendment allows the regulation or prohibition of abortion except in those cases where the abortion is necessary to preserve the life or health of the pregnant woman. Whether an abortion is necessary during the third trimester must be determined by the pregnant woman's physician according to the physician's medical judgment.

Judicial or legislative clarification of the amendment may be necessary.

Filed this 4th day of
August, 2022
Steve Barnett
SECRETARY OF STATE

Attorney General

JUN 23 2022

JAMES D. LEACH

Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702-3483
Tel: (605) 341-4400
Fax: (605) 341-0716

Legal Assistant
Raquel L. Vokenroth, CLA

Legal Secretary
Verma J. Stehly

jim@southdakotajustice.com

June 20, 2022

By U.S. Mail and email

Jason.Ravnsborg@state.sd.us

Jason R. Ravnsborg
Attorney General
1302 E. Hwy. 14, #1
Pierre, SD 57501

Reed.Holwegner@sdlegislature.gov

Reed Holwegner, Director
Legislative Research Council
500 E. Capitol Ave
Pierre, SD 57501

Steve.Barnett@state.sd.us

Steve Barnett
Secretary of State
Capitol Building
500 East Capitol Avenue Ste 204
Pierre, SD 57501-5070

Gentlemen:

On behalf of the sponsors and in accordance with SDCI 12-13-25.1, I enclose a copy of a proposed initiated amendment to the Constitution in final form. Thank you.

Respectfully submitted,

/s/ James D. Leach

James D. Leach

JL/hs

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article VI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION:

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After the end of the second trimester, the State may regulate or prohibit abortion, except when abortion is necessary, in the medical judgment of the woman's physician, to preserve the life or health of the pregnant woman.

JUN 21 2022

PRESIDENT PRO TEMPORE LEE SCHOENBECK, CHAIR | SPEAKER SPENCER GOSCH, VICE CHAIR
REED HOLWEGNER, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | JOHN McCULLOUGH, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV



June 17, 2022

Mr. James D. Leach
Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702-3483

Dear Mr. Leach:

SDCL 12-13-24 and 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each initiated measure submitted to it by a sponsor, for the purpose of determining whether the measure is "written in a clear and coherent manner in the style and form of other legislation" and for the purpose of ensuring that the "effect of the measure is not misleading or likely to cause confusion among voters." Comments and suggestions in compliance with the cited sections are included below.

LRC encourages you to consider the edits and suggestions to the proposed text. The edits are suggested for sake of clarity and to bring the proposed measure into conformance with the style and form of South Dakota legislation. The latter is based upon the Guide to Legislative Drafting, which may be found as one of the online references via the [website](#) of the South Dakota Legislature.

Measure as Submitted with Suggested Changes and Explanations

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article VI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION ~~to read:~~

It is not necessary to utilize an italicized font.

~~Before the end of the first trimester, the abortion decision and its effectuation must be left to the judgment of the pregnant woman.~~

As proposed, this sentence does not require any action on the part of the state. If the intent is to prohibit action on the part of the state, that prohibition should be clearly articulated. In its current form, the sentence appears to be merely explanatory and is therefore an unnecessary addition to the South Dakota Constitution. It is suggested that either the sentence: (1) be stricken, or (2) rewritten to establish a pregnant woman's right to abortion before the end of the first trimester, if that is the intent of the sentence.

After the end of the first trimester, the State, ~~in promoting its interest in the health of the pregnant woman,~~ may regulate by law the abortion decision and its effectuation only in ways that are reasonably related to ~~her~~ the health of the pregnant woman.

Because the state's interest in the health of the pregnant woman is not specifically articulated, there is no basis upon which to reference a "promotion" of that interest. In the absence of such an articulation, it is suggested that the phrase be stricken.

Authorizing the regulation of the abortion decision and its effectuation on the condition that the manner of regulation be "reasonably related" to the "health" of the pregnant woman raises several questions:

- What constitutes a "reasonable" relationship to the woman's health?
- Is the term "health" to be broadly construed as referencing mental and physical wellbeing?
- Does the reference to a pregnant "woman" preclude the regulation of abortion in the case of a pregnant minor?

This proposed language references the regulation of an abortion "[a]fter the end of the first trimester." In fact, the regulation applies to a time frame that begins at the end of the first trimester and extends only to the end of the second trimester. It would be preferable to articulate that duration or even to use a phrase such as "except as otherwise provided in this section"

After the end of the second trimester, the State, ~~in promoting its interest in the potentiality of human life,~~ may regulate or prohibit abortion, ~~except where~~ when it is necessary, in the medical judgment of the woman's physician, to preserve the life or physical or emotional health of the pregnant woman.

Because the state's interest in promoting the potentiality of human life is not specifically articulated, there is no basis upon which to reference a promotion of that interest. Secondly, because the above sentence deals specifically with the regulation or prohibition of an abortion during the third trimester of a pregnancy, the reference to the state's interest in promoting the potentiality of human life could be interpreted as applying only to that latter period of a pregnancy and not to an earlier stage. The intent of the proposed language is not entirely apparent. In the absence of a clearer articulation, it is suggested that the phrase be stricken.

As noted above, the above sentence also references the phrase "pregnant woman," thereby raising an issue with respect to its application in the case of a pregnant minor.

While the reference to preserving the "life" of the pregnant woman is a reasonably identifiable threshold, preserving the "physical" health of the pregnant woman is more nebulous. Is this intended to mean only great bodily harm or the impairment of major bodily functions, or is it intended to have a broader application? Again, the intent of the language is not readily apparent.

The sentence also contains a reference to "preserving" the emotional health of the pregnant woman. Is this intended to merely maintain her current emotional state? Does it preclude any action or intervention to restore her emotional health? The intent is likewise not clear, and neither is the manner in which a woman's baseline emotional health might be established for purposes of equitably applying this concept.

While the above sentence pertains to the preservation of the pregnant woman's physical and emotional health, it does not appear to provide any flexibility in addressing medical situations involving the life or health of a fetus in the case of a pregnancy involving multiple fetuses.

Lastly, the proposed constitutional amendment language would be added to S.D. Const., Art. VI, which is the state of South Dakota's Bill of Rights. The last two sentence of the proposed language authorizes the state to regulate or prohibit abortions during the second and third trimesters of a woman's pregnancy, meaning the language gives the state the authority to pass laws regulating abortion. The language does not establish the right of an individual in relation to state government, as do other sections in the Bill of Rights article. Perhaps the last two sentences could be moved into their own article or into a different existing article.

Although you are not statutorily required to make changes based upon the suggestions and comments provided above, you are encouraged to be cognizant of the standards established in SDCL 12-13-24 and 12-13-25 and ensure that your language is in conformity.

SDCL 12-13-25 also requires the issuance of a written opinion "as to whether the initiated amendment embraces only one subject under S.D. Const., Art. XXIII, § 1" and whether it is in fact an "amendment under S.D. Const., Art. XXIII, § 1," or a "revision under S.D. Const., Art. XXIII, § 2." The proposed constitutional change appears to embrace only one subject, the availability of an abortion. Given that the subject does not result in a far-reaching, complete, comprehensive, and substantial rewrite of the state constitution, it appears to be an amendment and not a revision of the constitution.

This letter is issued in compliance with statutory requirements placed upon this office. It is neither an endorsement of the measure nor a guarantee of its sufficiency. If you proceed with the measure, please ensure that neither your statements nor any advertising contain any suggestion of endorsement or approval by the Legislative Research Council.

Enclosed with this letter you will find the suggested edits without comments.

Sincerely,



Reed Holwegner
Director

RH/jm/at

Enclosure

CC: The Honorable Steve Barnett, Secretary of State
✓ The Honorable Charles McGuigan, Acting Attorney General

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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