

(Popular Name)
The Right to Life

(Ballot Title)

An Amendment to the Arkansas constitution:

Recognizing each innocent human being, at every stage of development, as a person with the right to life;

Prohibiting abortion;

Allowing life saving medical treatment;

Allowing birth control and in-vitro fertilization that does not cause the death of a person;

Possibly challenging the U. S. Supreme Court ruling of Roe vs Wade;

Recognizing and affirming that protecting the right to life of every innocent person in Arkansas is the right and responsibility of the people of Arkansas.

Be it enacted by the People of the State of Arkansas

The constitution of the State of Arkansas is amended BY THE ADDITION OF A NEW AMENDMENT, Amendment 88, to read:

The Right to Life

Section:

1. Purpose and effect.
2. Repeal of Section 2 of Amendment 68.
3. Provisions self-executing.

1. Purpose and effect.

No innocent person shall be denied the right to life. With respect to the right to life, the word "person" shall apply to all human beings at every stage of their development.

This Amendment shall have no effect on contraceptives or other methods of birth control that do not cause the death of a person. This Amendment shall have no effect on in vitro fertilization or other methods of assisted reproduction that do not cause the death of a person. This Amendment shall have no effect on medical treatment for life threatening physical conditions intended to preserve life.

2. Repeal of conflicting laws.

All sections of this Amendment shall be deemed sovereign to the people of the state of Arkansas in accordance with the 10th Amendment of the United States constitution; therefore, Section 2 of Amendment 68 shall be repealed.

3. Provisions self-executing.

All provisions of this Amendment are self-executing and severable.

Accompanying Brief in Response to Opinion No. 2011-163.

1. Popular Name

The Attorney General alleges that the popular name “The Paramount Right to Life” is misleading and lends a partisan coloring to the amendment (pg 4). We have chosen to remove the word “Paramount” from the popular name as to avoid any inference of unfair coloring. However, the title “The Right to Life” is neither ambiguous to the voters nor unfair in its use.

The AG uses the ruling in Riviere, where the court found that the popular name “Unborn Child Amendment” was insufficient to inform the voters of the effect of the amendment, to strike down our title, “The Paramount Right to Life.”

Whereas the popular name “Unborn Child Amendment” is clearly ambiguous as it could deal with anything related to the unborn child, “The Right to Life”, can only deal with the right to not have one’s life taken, which is exactly the point of our amendment.

Riviere struck the “Unborn Child Amendment” popular title because that popular name lacked the specificity to logically lead to the substance and intent of the amendment. The concern of the court in Riviere, was that a voter who supports abortion might be tricked into supporting the vague “Unborn Child Amendment”. On the other hand, our popular name “The Right to Life” is not only the most concise iteration of the intent of the drafters, which extends beyond mere abortion, to the protection of all innocent life, no matter the manner and the stage at which the life is taken, but it is also firmly established in the law and more importantly in the public’s understanding.

Practically every legislative endeavor, especially those dealing with foundational principles, have numerous effects. Under the AG’s standard of review, the people would not be able to initiate a measure on “Freedom of Speech” because the popular name “Freedom of Speech” would not specifically describe political contributions, obscenity and pornography, artistic expression, the right to protest, etc. The AG’s standard of review should be limited to ensuring that the title and summary give the voter a fair understanding of the issues presented.

2. The term “Innocent”

The AG attempts to make a case that the term “innocent person” is ambiguous and/or misleading (pg6). He suggests an unprecedented reading of the phrase “no innocent person” to mean “that ‘all’ persons are innocent.” The term “innocent” before “person” is an obvious classification of the type of persons that we intend to protect. Categorizing persons suggests that there are persons who do not fall into the category. Clearly, if the amendment intended to protect all persons, it would not reference the category of “innocent.”

The AG’s asks the question as to “which non-‘innocent’ individuals fall within the group that is not constitutionally guaranteed a ‘right to life’” (pg6). The amendment only applies to innocent persons and does not address in any way the right to life of non-innocent persons. The right to life of non-innocent persons is and will continue to be protected by the Due Process clause of Declaration of Rights, Section 8.

The AG casts the amendment as ambiguous because it would protect “persons’ whose ‘innocence’ has not been compromised in some undefined fashion” (pg6). The term “innocent”, both to the lay person and to the legislative expert means only one thing, “not guilty of a crime.” In all of the numerous sections within the Arkansas code that the word innocent appears, nowhere did the drafters see the need to define what the word “innocent” means. It is the very definition of a self explanatory term, used in such contexts as “The General Assembly recognizes that many innocent persons suffer injury, death, property damage, and resultant financial hardship because of crimes committed in this state...” (A.C.A. 16-90-301).

The AG also engages in an analysis of the merits of the proposed Amendment, when he questions how the protection of the right to life, as applied to born innocent persons might relate to existing laws (pp6-7). We regard our amendment as one dealing with foundational rights, such as those included in Arkansas’ bill of rights or Declaration of Rights. The people have the right to amend their Declaration of Rights in the state of Arkansas. Rights such as “Freedom and Independence”, “Equality before the law”, “Liberty of the press and of speech,” etc. are all foundational rights which affect numerous existing laws. Nothing in the constitution or laws of Arkansas prohibits the people from using the initiative process to amend existing foundational amendments or to propose new ones. In other words, the people are not precluded from being able to rule themselves on the foundational issues of our time.

3. The term “including the unborn.”

We have chosen to exclude the words “including the unborn” from our new version, because they were inserted for emphasis and don’t add anything material to the language.

4. The term “every stage of development.”

The AG asserts that the term, “every stage of development” is somehow an ambiguous phrase (pg7), and yet the term is used in dozens of state laws, several federal laws, and in the most commonly used medical and biological system of scientific classification of the human being, the Carnegie Stages of Human Development. For example, the federal Unborn Victims of Violence Act applies to any “member of the species homo sapiens, at any stage of development, who is carried in the womb.”

5. In vitro vs in utero.

The AG questions whether the amendment applies to persons in utero or in vitro (pg9). We feel no further clarification is necessary regarding this question. The amendment states that it “applies to all human beings.” If you’re a human being, the amendment would protect your right to life. Location, in or ex utero, is completely irrelevant in light of the universal term “all.”

6. Specific forms of birth control/in vitro methods.

The AG correctly states that the amendment doesn’t specify exactly what birth control and in vitro methods would be prohibited under the amendment (pg9). The amendment’s purpose is to state a foundational principle. We recognize this as an issue based on the difference between a statute and an amendment dealing with foundational rights. For

example, the right “of acquiring, possessing and protecting property” (Declaration of Rights, Section 2) states a principle but doesn’t lay out any specifics on the implementation of the principle.

7. Exclusions.

The AG is correct regarding “exclusions” (pg10). We have removed the section title and renumbered the sections.

8. The life of the mother.

The AG asserts that the Preserve Life (our formulation) clause in the proposed amendment might have unintended negative consequences such as “justifying the sacrifice of one adult ‘innocent person’ to save the life of another adult ‘innocent person’” (pg10). Notice that the Preserve Life clause says “This Amendment shall have no effect on medical treatment for life threatening physical conditions intended to preserve life.” The key phrase is “no effect”. With regard to any life-saving treatment, the amendment has no effect on current or even future law. If current law disallows the situation the AG imagines, the law will continue to disallow it after the amendment takes effect.

The AG supposes that the Preserve Life clause doesn’t mention the mother in order to avoid supposed “constitutional difficulties” (pg12 footnote). The Preserve Life clause is designed to handle not only the situation where a pregnant mother’s life is in danger but also rare situations, such as the case of twin-to-twin transfusion syndrome, where an unborn child’s life is in danger.

In this regard, we have changed the title to include “Allowing life saving medical treatment.”

9. Repeal and self-executing.

The AG claims that he is unable to summarize in the ballot title all laws that this amendment will repeal, therefore the repealing and reviving of “all conflicting laws” is ambiguous. Naturally, a new constitutional amendment repeals all conflicting laws. Although this language has been removed, it does not change the fact that all conflicting laws would be repealed. Under the AG’s reasoning, any amendment dealing with foundational principles would be impossible because he couldn’t list the conflicting laws that would be repealed.

The AG suggests that repealing “all conflicting laws” would require legislative action and therefore the repealing section contradicts the amendment’s self-executing section. It’s an interesting claim especially since he claims ignorance as to what laws would be repealed. The self-executing clause makes it clear that no legislative action is required, therefore no contradiction exists.

The AG believes that the self-executing section would require legislative action to implement penalties. The right to life of born persons is currently protected by the criminal code. The criminal code does not vary penalties based on the stage of development of the victim. Absent any legislative action, the criminal code would protect unborn victims as well.

10. The Constitutional Issues

It would be improper and presumptuous of us to predict what the Supreme Court might hold in this case, especially as passage of our Amendment would present a case of first impression.

Declaring abortion as a right beyond the control of the people, is deeply anti-democratic, and has been criticized by none other than Supreme Court justices themselves.

... by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish. We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining. Dissent in PLANNED PARENTHOOD v. CASEY , Jun 29, 1992

A strong minority of justices, have strongly disagreed with the court's interpretation in Roe v. Wade, going so far as to state that, "**We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases.**" Dissent in PLANNED PARENTHOOD v. CASEY , Jun 29, 1992

Additionally, were the proposed amendment to pass and be challenged in court, there is currently not a single case of Supreme Court precedent since Roe v. Wade, where a state has attempted to define a person to include all human beings regardless of their stage of development. In Roe, the court held in dicta that the fetus is not a person under the 14th amendment, but it did not rule on the ability of the states to define the term person to include all human beings under the 10th amendment police powers. In "Pruneyard Shopping v. Robbins" the Supreme Court recognized the legal principle of the rights of states to ensure "individual liberties more expansive than those conferred by the federal government."

The AG states that "under controlling federal law as defined by the Supreme Court, the states have been reserved no authority under the Tenth Amendment to restrict abortion in the manner your measure attempts to do." And yet, prominent members of the Supreme Court disagree with the AG in the most strenuous terms:

The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. **The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.** Dissent in PLANNED PARENTHOOD v. CASEY , Jun 29, 1992

The role of the AG during this process is to ensure that the voters are not misled by the amendment. In Plugge, the court held that "the title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke." In addition Plugge states that "the ballot title must be complete enough to convey an intelligible idea of the scope and import of the proposed law." The AG admits that the title is intelligible and that he fully understands the substance of the amendment and the title when he states that "your measure, particularly when read

in the light of your proposed ballot title, is clear in its intention to ban abortion, however defined, except to save the life of the mother.”

Regarding possible state and federal constitutional issues, it is most important to note that the court in Plugge actually reached the opposite conclusion from the AG with regards to preventing the people from voting on the Amendment:

Undoubtedly, a strong case can be made concerning the Term Limitation Amendment’s invalidity both under Arkansas’s and the United States’ Constitutions, and the voters should be aware that their votes for or against this measure may ultimately have value only as an expression of public sentiment on the subject. In short, a future judicial proceeding will be required to decide the Amendment’s validity if it is adopted by the people. If that occurs, the constitution arguments posited here will then be placed squarely before us and can be decided after due and proper consideration.

The controlling law unequivocally supports the approval of the title and ballot summary so long as the voter is apprised of the possible constitutional conflicts. To satisfy this requirement we the proponents are including the following warning within the title: “Possibly challenging U. S. Supreme Court decision of Roe v. Wade.”

The standard in Plugge is clear as to the role of AG vis-à-vis the Title and Summary review. The AG must ensure that the “ballot title must be complete enough to convey an intelligible idea of the scope and import of the proposed law.”

We feel that we have adequately addressed the AG’s concerns. We have no intention of misleading the voters or engaging in trickery of any kind. Although we understand the AG’s office cannot offer legal representation, we understand the role of the office to be one of supporting citizens engaged in the democratic initiative process by offering suggestions and rewrites where possible. If there are further concerns, we would appreciate a good faith effort on the part of the AG’s office without regard to the perceived merits of the measure.

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