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Colorado General Assembly

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MEMORANDUM

To: Angela Eicher and Rebecca Greenwood
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 8, 2021
SUBJECT: Proposed initiative measure 2021-2022 #51, concerning the equal protection of any living child in Colorado

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To create a crime that makes it unlawful to cause the death of a child before, during, and after the child's birth, and until adulthood, enforced by the attorney general;

2. To treat invalid any law that deprives a child before, during, or after birth of the child's constitutional rights and equal protections under the law; and
3. To permit any person to bring a civil action against any person who knowingly engages in conduct that aids or abets killing a child before, during, or after birth.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The effective date clause states in part "[t]his act takes effect from and after the date of the official declaration of the vote." However, this clause specifies neither that the result of the vote must be approved by the people for it to be effective nor states whom shall officially declare the vote. Would the proponents consider clarifying this clause?
3. The United States Supreme Court has recognized a woman's right to an abortion. Do you anticipate that the proposed initiative would conflict with legal precedent?
4. Section 18-6-901 (2) of the proposed initiative states in part "... and particular to this initiative paragraph 1." What is the provision intended to be referenced by "this initiative paragraph 1"? Furthermore, if approved by the voters, this will not be an initiative, but a statutory provision. Would the proponents consider changing "this initiative"?
5. Section 18-6-902 (1) of the proposed initiative defines "murder" for purposes of proposed initiative's part 9. However, the only use of the term "murder" is when stating that penalties must be equal to "murdering an adult." How does the proposed initiative's definition of murder apply in that context?
6. In section 18-6-902 (1) of the proposed initiative, the definition of "murder" includes "the intent to kill." However, the crime created in section 18-6-903 (1) of the proposed initiative states it is unlawful for any person to "intentionally or recklessly cause the death" and, under the penalties section, states that "[a]ny person who intentionally, knowingly, or recklessly causes the death [...] will be subject to criminal processes..." Why does murder only require the intent to kill

and not an actual death? How do these different provisions work together? Would the proponents consider clarifying this in the proposed initiative?

7. Section 18-6-902 (2) of the proposed initiative defines "living child" or "children" as "the scientific, biologically defined living human before, during, and after birth until reaching adulthood." What does it mean to be a scientific, biologically defined living human being? Would the proponents consider clarifying this in the proposed initiative?
8. Section 18-6-902 (2) of the proposed initiative defines "living child" or "children" as including "until reaching adulthood." Would the proponents consider specifying when one reaches adulthood?
9. The provisions in section 18-6-903 (1)(a) to (1)(f) of the proposed initiative appear to be declarations, rather than related to the crime itself. Would the proponents consider moving these provisions outside of the section that defines the crime with the other "declarations of the people" or create a new section for these objectives?
10. The proposed initiative states that a person is "subject to criminal processes, prosecution, and penalties equal to that of murdering an adult and with equal considerations and legal defense." Under title 18, there are different classes of homicide, each with different elements that are required to constitute the crime itself. There is overlap between the existing homicide offenses and the new offense. When a person is accused of a homicide offense and the victim is a child, which crime is prosecuted?
11. The proposed initiative requires the attorney general of Colorado to direct enforcement. Is the proponents' intent that local law enforcement and district attorneys do not have jurisdiction to investigate, arrest, and prosecute the unlawful conduct created pursuant to section 18-6-903, or does the attorney general have concurrent jurisdiction with local law enforcement and district attorneys?
12. The proposed initiative states "[t]he attorney general of Colorado shall direct enforcement and treat as void and of no effect any and all statutes, regulations, treaties, or court rulings that would deprive any living child before, during, or after birth their constitutional rights and equal protections under the law." What is the proponents' intent if a court rules the proposed initiative is unconstitutional?

13. The proposed initiative states "[a]ny person may bring a civil action against any person who knowingly engages in conduct that aids or abets killing a child before, during, or after birth, including payment or reimbursement for killing a child before, during, or after birth." Is the proponents' intent that any person has standing to bring a civil action, regardless of the person's relationship to the child? What permissible damages may a person seek and recover based on the varying relationships to the child?
14. Section 12-240-121 of the proposed initiative states "a violation of section 18-6-903" constitutes "unprofessional conduct." What constitutes "a violation"?
15. Section 12-240-125 of the proposed initiative states "[i]f the board finds a licensee committed unprofessional conduct in violation of section 12-240-121 (1)(nn), the board shall suspend the licensee's license indefinitely." What does "suspend indefinitely" mean? Is it revoked? Would the licensee have the opportunity to renew it at a future time?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Amending clauses should be in lowercase type. For example, the amending clauses should be stylized accordingly:

SECTION 1. In Colorado Revised Statutes, **add** part 9 to article 6 of title 18 as follows:
2. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

- (a) Paragraph
- (I) Subparagraph
- (A) Sub-subparagraph
- (B) Sub-subparagraph

- (II) Subparagraph
 - (b) Paragraph
 - (2) Subsection
 - (3) Subsection
3. It is common drafting practice to use "United States constitution" and "state constitution."
 4. It is standard drafting practice to use the following format when referencing a provision of a constitution: "section ____ of article ____ of the ____ constitution."
 5. It is standard drafting practice to use the following format for internal references within a section: "subsection (1) of this section."
 6. In the introductory portion to a definitions section, it is common drafting practice to write "[a]s used in this _____, unless the context otherwise requires:"
 7. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.
 8. Section 18-6-902 (2) of the proposed initiative states "'Living child' or 'children' refers to the scientific, biologically defined living human before, during, and after birth until reaching adulthood." It is standard drafting practice to state a term "means" rather than "refers to."
 9. It is standard drafting practice to alphabetize the definitions in the definitions section. Would the proponents consider placing the definition of "'living child' or 'children'" before the definition of "murder"?
 10. Section 2 of the proposed initiative adds "a violation of section 18-6-903" to the definition of "unprofessional conduct" as subsection 12-240-121 (1)(nn). It is standard drafting practice to create a new subsection immediately following the last existing provision. Would the proponents consider creating this new provision immediately after section 12-240-121 (1)(gg)?
 11. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;

- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
- c. The first letter of proper names.