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Legal Memorandum on the Mississippi Personhood Amendment

This memorandum of law has been prepared by Liberty Counsel in order to offer guidance on the Mississippi Personhood Amendment, Initiative Measure No. 26.

Liberty Counsel is a national public interest law firm specializing in constitutional law, particularly in freedom of speech, religious freedom and church-state matters. We have presented many briefs before the United States Supreme Court, and we have argued before the High Court and in many state and federal courts. Liberty Counsel has offices in Florida, Virginia, Texas and the District of Columbia, and hundreds of affiliate attorneys.

This memorandum of law provides an overview on the language of the proposed Amendment.

Introduction

It has been said that a society may be judged by its treatment of the most vulnerable within it. Americans are a generous and caring people, lending humanitarian aid all over the world when disaster strikes. Stories such as Baby Jessica falling into the well in west Texas and her courageous rescue made headlines all over the nation for days on end.

When it comes to the life of the unborn, though, we are often conflicted. On one hand, we want to help the poor, single mother who cannot seem to make ends meet and did not intend to become pregnant, but on the other we instinctively feel for the little child in her womb and its ultimate fate. We tend to be both for and against abortion depending on various circumstances and what we ate for breakfast that morning.

Double-mindedness is never a virtue. When it occurs in the context of arguably the most serious moral issue of our time, it is fatal, both to the precious unborn child and, eventually, to the nation as a whole.[1] The Personhood Amendment appears to be an

[1] *See, e.g., Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973) (criticizing the State of Texas for its inconsistencies in arguing that the fetus is a person but not treating it as such in the law: "If the fetus is a person, why is the woman not an accomplice? Further, the penalty for criminal abortion

attempt to set forth a principled position on the issue of the protection of human life from its very beginnings, whether naturally or artificially created.

Legal Analysis

In order to put the proposed Amendment in the proper perspective, a brief review of the history of our legal system and the balance of powers in our federalist structure is necessary.

A. Background

The Declaration of Independence unequivocally declares what every human being instinctively knows at some level: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration is our nation's charter, and should by right have the force of law. The legitimacy of our federal Constitution and our government itself is dependent on its harmonizing with and protecting the "unalienable" rights recognized (but not created) by the Declaration.

The most basic of these rights is the right to life. As Justice Adrian Burke wrote in his superb dissent in an early New York case purporting to confer a "right" to abortion, "the American concept of a natural law binding upon government and citizens alike, to which all positive law must conform, leads back through John Marshall to Edmund Burke and Henry de Bracton and even beyond the Magna Charta to Judean Law."[2] To concede to the state, and to a mere majority of nine unelected judges at that, the power to define what is human and so condone the slaughter of innocent children by the millions is to abrogate our national charter and arrogate to the government a supremacy that would make our founders shudder. The right to life supersedes all government decrees; a human being is not the mere creature of the state.

Moreover, as initially envisioned by the founders, the various branches of the federal government would owe their very existence to the states. *See, e.g.*, THE FEDERALIST No. 45 (Jas. Madison). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* It is generally accepted that absent these assurances, the Constitution would not have been ratified in the first place.

To further buttress this limitation on the scope of the authority of the federal government, and to satisfy the many anti-Federalists, the Tenth Amendment was adopted by the very first Congress. It provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It thus expressly limits the powers of the federal government, and affirms the sovereignty of the states in all matters not expressly delegated to the federal

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specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?").

[2] *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 200, 206, 286 N.E.2d 887, 335 N.Y.S.2d 390 (N.Y. 1972) (Burke, J., dissenting).

government.

For many years of our nation's history, this limitation on the federal government proved generally effective, and the protection of the rights of our citizens was largely a result of the bill of rights in the constitutions of the various states, not those in the federal Constitution. In fact, it was not until well into the twentieth century that the federal Constitution's protections were applied against the states.[3]

It may be persuasively argued that the current system, whereby the United States Supreme Court sits as the ultimate arbiter of the rights of our citizens, has *decreased* our freedoms rather than *increased* them. The issue of abortion is a case in point.[4] The Court's unconstitutional assumption of the role of superlegislature has also exacerbated rather than alleviated the controversy and heated national debate on such issues as abortion and homosexual rights.[5] The proposed Amendment appears to be intended to help restore some of the balance between state and national government that has been lost over the recent past.

Certainly, with respect to the interpretation of state constitutional rights, state courts

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[3] *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 701 (1970) (Douglas, J., dissenting) ("Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in State law" until "incorporation" of certain Amendments against the states).

[4] *See Lawrence v. Texas*, 539 U.S. 558, 591-592 (2003) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justice Thomas):

> What a massive disruption of the current social order, therefore, the overruling of *Bowers* [*v. Hardwick*, upholding law against sodomy] entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of, and restrictions upon, abortion were determined legislatively State by State. *Casey*, however, chose to base its *stare decisis* determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U.S., at 856, 112 S.Ct. 2791. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted**592 the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

[5] *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 995-996 (1992) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas):

> *Roe's* mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. . . . *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees.

should have the final say. Thus, a state constitutional amendment ought, in the first instance, to be a matter for interpretation by state courts, not federal. Nonetheless, it cannot be gainsaid that the final word on the constitutionality of the Amendment will undoubtedly by pronounced by the federal courts under our current system.

B. The Language of the Amendment

The operative language of the Amendment provides: "**Section 33. Person defined.** As used in this Article III of the state constitution, "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof."

1. "Moment of Fertilization"

The phrase "moment of fertilization" refers to the very beginning of human life when conceived either naturally or by in vitro fertilization. As stated by the American Bioethics Advisory Commission, "Due to advances in scientific biotechnology, we know with no doubt whatsoever that a human life begins at the moment of fertilization."[6] The Amendment thus extends equal protection of the laws to every human being from the earliest stages of life.

Most of us would likely use the more familiar term "conception" rather than "fertilization," but that term has been subjected to confusion and varying interpretations by some in the scientific, medical, and/or bioethics fields, thus rendering it less precise for purposes of the Amendment.[7]

Clever opponents of measures such as this one have suggested that the phrase "moment of fertilization" is imprecise, or that fertilization is a process. Of course, anyone can offer alternative understandings of any phrase he chooses. But the medical literature is replete with use of this very phrase. In fact, before being appointed to the Supreme Court, Justice Harry Blackmun, author of the majority opinion in *Roe v. Wade*[8], served as General Counsel to the Mayo Clinic. The Mayo Clinic's Chief Geneticist during that period was Dr. Hymie Gordon. Dr. Gordon himself wrote:

> From *the moment of fertilization*, when the deoxyribose nucleic acids from the spermatozoon and the ovum come together to form the zygote, the

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[6] Letter from Fr. Joseph C. Howard, Jr., Executive Director of American Bioethics Advisory Commission, to National Institutes of Health, circa January, 2000. *See also* Sherman J. Silber, M.D., "In Vitro Fertilization," The Infertility Clinic of St. Louis: "For conception to occur, twenty-three chromosomes from the husband's set of forty-six, and twenty-three chromosomes from the wife's set of forty-six, must meet **at the moment of fertilization** and become an embryo with a new normal set of forty-six chromosomes." (available online at www.infertile.com/infertility-treatments/ivf-in-vitro-fertilization.htm) (emphasis added).

[7] For example, the American College of Obstetrics and Gynecology has (re)defined conception as "implantation." *See* EC Hughes and Committee of Terminology of the American College of Obstetricians and Gynecologists, Obstetrics-Gynecologic Terminology (Philadelphia: F.A. Davis, 1972).

[8] 410 U.S. 113 (1973).

President Obama's signing statement at the time of issuing his Executive Order calling for federal funding of embryonic stem cell research emphatically declared his own opposition to reproductive cloning: "And we will ensure that our government never opens the door to the use of cloning for human reproduction. It is dangerous, profoundly wrong, and has no place in our society, or any society."[22]

D. Effect of the Proposed Amendment on Federal Law[23]

Thirty-six years after the Supreme Court's decision in *Roe v. Wade*, abortion on demand remains legal and readily available in all fifty states in the union, at almost any stage of pregnancy. National pro-life organizations which have voiced opposition to personhood amendments have in virtually every case favored a slow, incremental approach to ending abortion. While many of their legislative achievements have decreased the number of abortions, they have failed to end the practice or to directly confront the immorality of abortion.

Moreover, upon enactment of FOCA, every single restriction on abortion, state or federal, will be instantly invalidated[24], and we will find ourselves no better off in combating abortion than we were the day after *Roe v. Wade* was decided. Even if FOCA is not passed into law, there is no alternative to a personhood approach that offers any chance of ending abortion in the foreseeable future. If this be progress, we want no part of it. The blood of fifty million (50,000,000) innocent children cries out for justice and vindication, and the judgment of God is being visited upon us for this egregious national sin.

Predicting the effect of the Mississippi Personhood Amendment on federal law is difficult, because it is speculative to foretell the outcome of the various possible legal challenges and the rulings of different federal judges. Nevertheless, it may be safely assumed based on past practice[25] that a pro-abortion group would quickly file suit to assert that the Personhood Amendment impinges on the federal right to abortion, and that the federal right trumps even a state constitutional provision that limits that right.

It may also be safely assumed that the federal district court would find the Amendment unconstitutional under the federal Constitution under *Roe* (since lower federal courts are generally loathe to question Supreme Court pronouncements). However, that outcome is by no means certain, given the unique legal questions presented by the

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[22] *See* Remarks of President Barack Obama – As Prepared for Delivery, Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum, Washington, DC, March 9, 2009 (available online at www.whitehouse.gov).

[23] The Mississippi Personhood Amendment would have no effect on federal law with respect to cloning because there are no federal laws guaranteeing any such "right." Therefore this section will focus exclusively on the effect on the so-called federal right to abortion.

[24] *See, e.g.*, Statement of Sen. Barbara Boxer: "FOCA supersedes any law, regulation or local ordinance that impinges on a woman's right to choose." (January 22, 2004, when introducing the bill in a previous legislative session) (available at http://www.nrlc.org/FOCA/FOCA%20Boxer%20press%20release.pdf).

[25] *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (state partial birth abortion law held unconstitutional as "undue burden" on woman's right to abortion).

Personhood Amendment. It cannot be emphasized too strongly that the Amendment does nothing more than define the word "person." It does not criminalize abortion or otherwise enact law. What it does is set forth a constitutional principle that would apply to *all* persons in all applicable situations under the Mississippi Constitution.

Further, if the case were to reach the Supreme Court, the issue would pit the right of a state to define "person" under its own constitution as against the right of the federal government to overrule that definition, even where, as here, the federal Constitution does not specifically define the term.

Many courts have expressly recognized the right of states to define "person" in a manner more protective of the unborn, even when upholding a right to abortion.[26] Moreover, even in the worst case, there is a powerful educational component to the Personhood Amendment. The partial birth abortion cases provided opportunities to demonstrate to the world the grisly practices that pass for "medicine" in abortion clinics. In the same way, this case would present the opportunity to expose the truth about the unborn child, the innocent victims of the horror called abortion, whose silent screams are heard in the deep recesses of the conscience not only of thousands who have assisted in the procedure, but in the minds of all conscientious Americans.

Furthermore, as noted above, President Obama and the Democrat-controlled Congress have announced an aggressively pro-abortion agenda for the next four years, and maybe eight. Justice Ginsburg has recently stated that there will be another vacancy on the High Court very soon. Any expectation that President Obama would appoint a pro-life Justice is naïve, to say the least. Therefore, it would appear that the best chance for presenting a case that could end abortion is now, not later, especially in light of Justice Kennedy's most recent position in the partial birth abortion case of *Gonzales v. Carhart*.[27]

Another reason why the Personhood Amendment may be strategically situated for a reconsideration of *Roe* is the inclination of some conservative Justices to return the issue of abortion to the states, where it arguably belongs under our federalist system. Justices Scalia and Thomas have been the most outspoken champions of this position, but the newcomers on the Court, Chief Justice Roberts and Justice Alito (both devout Roman Catholics), may be more likely to favor this result as well, given their apparent dislike for

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[26] *See, e.g., McGarvey v. Magee-Womens Hospital,* 340 F.Supp. 751, 753 -754 (W.D.Pa. 1972) (the question whether to "afford fetal life constitutional protection" is "a problem for the legislatures of the various states. They must decide the problems in the light of the moral issues, the conflicting rights of the mother and child, the extent of medical knowledge and the interests of the state.") (cited with approval in *Roe v. Wade*); *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 200, 286 N.E.2d 887, 888-889, 335 N.Y.S.2d 390, 392 - 394 (N.Y. 1972) ("whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life . . . . is a policy question which in most instances devolves on the Legislature.") (cited with approval in *Roe v. Wade*).

[27] 550 U.S. __, 127 S. Ct. 1610 (2007). Justice Kennedy authored the majority opinion upholding the ban on partial birth abortions. In addition, in the case of *Carhart v. Stenberg*, 530 U.S. 914 (2000), Justice Kennedy expressed strong disagreement with his centrist colleagues from the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), signaling a more pro-life position in his abortion jurisprudence.

extremist positions. Again, however, it must be emphasized that predicting the ultimate outcome of a case that has not even been filed is an inherently speculative undertaking.

Finally, the general rule (outside the "abortion distortion" zone) is that states are free to enact laws and constitutional protections more expansive than their federal counterparts.[28] Here, it may be argued here that Mississippi has simply enacted more expansive due process rights for "persons" by means of the Amendment, and therefore it, too, should be permitted under the federal law.

Conclusion

When confronting a moral evil, waiting should not be an option. It is a legal maxim that justice delayed is justice denied. In the case of abortion, a moral evil of almost incomprehensible magnitude, justice has been denied untold millions of innocent children while pro-life leaders wring their hands and tell us to wait. The Mississippi Personhood Amendment is a principled and constitutionally defensible response to the onslaught of abortion on demand. It is, moreover, an attempt to restore the most basic human right for which our founders pledged their lives, their fortunes, and their sacred honor. We pledge our resources and efforts to defend the constitutionality of the Amendment, free of charge, wherever and whenever it is challenged.

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28 *E.g., Cooper v. California*, 386 U.S. 58, 62 (1967) (state free to provide greater protections in search and seizure arena); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (state free to provide greater protection for free speech rights exercised on private property).