

LEGAL REVIEW NOTE

Bill No.: HB136

LC#: LC804 To Legal Review Copy, as of
November 25, 2020

Short Title: Adopt Pain-Capable Unborn Child
Protection Act

Attorney Reviewer: Todd Everts/Alexis Sandru

Date: December 31, 2020

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

As drafted, HB136 adopts the Montana Pain-Capable Unborn Child Protection Act, which prohibits the abortion of an unborn child capable of feeling pain. The Act defines an unborn child capable of feeling pain as an unborn child whose probable gestational age is 20 or more weeks.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, section 10, of the Montana Constitution protect a woman's decision to terminate her

pregnancy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Armstrong v. St.*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The United States Supreme Court has interpreted this right to mean that a woman has a right to choose to have an abortion before viability without undue interference from the state, *Casey*, 505 U.S. at 846, and has acknowledged that viability may exist at 23 to 24 weeks since a woman's last menstrual period. *Id.* at 860. The federal Ninth Circuit Court of Appeals held that Idaho's Pain-Capable Unborn Child Protection Act, which banned the abortion of fetuses 20 or more weeks post-fertilization, was unconstitutional on its face because the act categorically banned pre-viability abortions and placed an arbitrary time limit on when woman can obtain abortions. *McCormack v. Herzog*, 788 F.3d 1017, 1032 (9th Cir. 2015).

Under Montana's unique constitutional guarantee to the right of privacy, which provides broader protection of the right of privacy than is afforded under the United State Constitution, the Montana Supreme Court has interpreted the right to mean that a woman has a right to choose to have an abortion before viability unless the state can demonstrate a compelling interest for infringing the right. *Armstrong*, 1999 MT 261, ¶ 75, 296 Mont. 361, 390, 989 P.2d 364, 384.

Because HB136 prohibits abortion entirely after a fetus has reached a gestational age of 20 or more weeks, the bill raises potential conformity issues with the requirements of the United States Constitution and Montana Constitution.

Requester Comments:

MCA 41-1-103 states that unborn children are deemed an existing person for interests in its birth. HB136 would protect unborn children from the pain of abortion. As medical science advances more is known about gestation and fetal development. In *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) the U.S. Supreme Court established that "the liberty of the woman to terminate her pregnancy is not unlimited. At a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." HB136 is reasonable policy for the state of Montana and does pass constitutional scrutiny.