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LEGISLATIVE MEMORANDUM

To: Members, Wisconsin State Legislature
From: Julaine K. Appling, President
Date: October 25, 2011
Re: Co-sponsorship of LRB 2859/1 (Constitutional Amendment to Establish Personhood and Ensure Protection of the Right to Life)

Wisconsin Family Action (WFA) urges you to co-sponsor LRB 2859/1, a proposed constitutional amendment that would define the terms “people” and “person” with respect to the right to life to include every human being at any stage of development.

Currently the definition of “person” within the Wisconsin Constitution does not include the unborn. Instead the definition of person only applies to persons who are born. A personhood amendment would remedy this shortcoming of the state constitution by allowing the citizens of Wisconsin through the constitutional amendment process to establish our state’s recognition that an unborn child is no less of a person than one who is born. This proposed amendment would merely allow the citizens of this state to make a value judgment and is not intended to prohibit abortion in light of current federal abortion case law.

This amendment does not violate *Roe v. Wade* or federal abortion case law, nor is it intended to be a direct challenge to this case law. A personhood amendment to the Wisconsin Constitution would not violate federal law because the amendment does not define when life begins under the 14th Amendment of the U.S. Constitution. The amendment only defines when life begins for purposes of our state constitution. Further, U.S. Supreme Court precedent and principles of federal jurisdiction and standing demonstrate that a challenge in federal court would be ill-advised because (1) states are free to make a policy judgment about when life beings as long as the state does not use this judgment to justify abortion regulations that would otherwise be unconstitutional, and (2) citizens lack standing to facially challenge a personhood amendment.

The Supreme Court held in *Webster v. Reproductive Health Services* that states are free to make policy judgments about when life begins as long as they do not use this judgment to justify abortion regulations that would otherwise be unconstitutional.¹ The Supreme Court concluded that when states make these value judgments, it is not the Court’s role to determine the constitutionality of this judgment.

This proposed amendment merely expresses a value judgment about when life begins and is not intended to prohibit abortion in this state while *Roe* is still the law. This amendment is “abortion-neutral” and “merely determines when life beings in a non-abortion context, a traditional state prerogative.” This amendment does not justify an abortion regulation that would otherwise be unconstitutional under current law. In sum, this amendment imposes no substantive restrictions on abortion.

Further, a claimant would not likely have standing to facially challenge a personhood amendment because they could not demonstrate an actual or imminent injury resulting from the amendment. This is because a claimant could not demonstrate that the amendment prevented them from obtaining an abortion (or engaging in any other protected action) since the amendment provides no substantive restrictions on abortion or any other action. Instead, a challenge to the amendment would be merely “conjectural or hypothetical.” Only if the state uses the amendment to justify through legislation, for example, a ban or regulation on abortion or some other activity that is protected by

¹ 492 U.S. 490, 504-05 (1989).

federal law could a court entertain a challenge to the proposed amendment. And even then, only the specific state action would be subject to challenge—not the entire amendment.

Some contend that the proposed amendment would invalidate section 940.04 and this state’s abortion regulations. These abortion regulations and any statute that would ban abortion would not be invalidated by a personhood amendment. Under principles of statutory construction, a statute that preceded a constitutional amendment is presumed to be constitutional and made invalid by the amendment as long as the two do not conflict.

The Wisconsin Supreme Court discussed this principle of statutory construction in *State v. Cole*.² In *Cole*, the court reaffirmed the principle that a statute is presumed to be constitutional and that this presumption does not depend on whether the statute predates or postdates a constitutional amendment. The court stated that in determining “[w]hether a statute predates or postdates a constitutional amendment, the legislature is still the more appropriate body for those considerations, and the judiciary rightly presumes the legislature makes such an assessment.” Therefore, unless a conflict exists between the personhood amendment and an abortion regulation or ban, in which case the constitutional amendment would prevail, the statutes are presumed to be constitutional and in effect.

It is clear that the intent of this amendment is not to invalidate previous statutes regarding abortion and abortion regulations. Consequently, barring any conflict between the proposed amendment and existing abortion regulations—a conflict that does not seem to exist—a court would presume that these existing statutes are constitutional and the enactment of a personhood amendment would not invalidate them.

Finally, a constitutional amendment rather than a statutory change is necessary. If our state constitution’s definition of “person” includes the unborn, then it would be difficult for the Wisconsin Supreme Court to conclude that our state constitution includes a right to abortion. If *Roe* is overturned, the question of whether abortion is legal is returned to the states. Even if a statute existed that banned abortion, the Wisconsin Supreme Court could conclude that the state constitution protects the right to abortion. But this would be extremely difficult with a personhood amendment in the state constitution.

Wisconsin Family Action thanks you for your careful consideration of this bill. We encourage you to co-sponsor this legislation that would extend the definition of “people” and “person” in our state constitution to the unborn. Co-sponsorship of this bill (lead sponsor, Representative André Jacque) is open through this Thursday, October 27. Please contact Representative Jacque to be added to the bill (LRB 2859/1).

If you have questions, please feel free to contact me at 608-268-5074.

² 665 N.W.2d 328 (Wis. 2003).