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INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

VIA PERSONAL DELIVERY

Office of the Attorney General
ATTN: Initiative Coordinator
1330 "I" Street
Sacramento, CA 95814

February 1, 2008

**Re: Request for Title and Summary- Initiative Constitutional Amendment
For the November 2008 Election**

Dear Initiative Coordinator,

Pursuant to Article II, Section 10(d) of the California Constitution, and Section 9002 of the Election Code, I hereby request that a title and summary be prepared for the amended version of the Ban on killing an unborn baby prior to birth which was filed January 23, 2008. The amended version will be called, "The ban of killing a viable unborn baby prior to birth."

Enclosed please find from the San Jose Group: 1) the language of the proposed initiative; 2) the executed certifications required by Election Code section 9608; 3) the \$200 check for the filing was given on January 23rd.

Should you have any questions or require further information, please contact Laura Storms, lstorms@comcast.net or the website www.sanjosegroupinitiatives.com

Sincerely

Laura Storms
San Jose Group

THE BAN ON KILLING A VIABLE UNBORN BABY PRIOR TO BIRTH

Section 1. Title.

This Act may be known and cited as the "Ban on Killing a Viable Unborn Baby Prior to Birth."

Section 2. Findings and Purposes.

The purpose of this Act is to save the lives of viable unborn babies (fetuses) and to enhance respect for life and parenthood. Many babies born prematurely at 23 or 24 weeks gestation now survive. Under California law unborn fetuses do have some protection from those who seek to kill them. The California criminal law, for example, protects the lives of unborn babies (fetuses) from murder and recognizes that the murder of a pregnant woman and her fetus may be a double homicide. Penal Code § 187(a); *People v. Davis* (1994) 7 Cal.4th 797.

The United States Supreme Court has ruled that the state has a high interest in protecting the lives and health of unborn babies who have attained viability. In *Planned Parenthood v. Casey* (1992) the Supreme Court held that the central ruling of *Roe v. Wade* (1973) was a right to abortion *before the point of the viability of the baby* and that the interest in preserving life permits states to ban abortions after viability. The Supreme Court in *Casey* said that "Roe's central holding [is] that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Planned Parenthood v. Casey* (1992) 505 U.S. 833, 860.

Under California law, in fact, aborting a viable unborn baby has been declared illegal, but under circumstances that in fact provide no protection for the baby's life. State law states that "The performance of an abortion is unauthorized [illegal] if . . . [t]he abortion is performed on a viable fetus," but only if the "continuation of the pregnancy pose[s] no risk to life or health of the pregnant woman." Health and Safety Code § 123468. A "no risk" standard of protection for viable unborn babies provides no protection at all. Everything in life carries some risk, even the continuation of a normal pregnancy. A "no risk" standard allows a healthy, viable, unborn baby to be aborted without any consideration of balancing the value of the life of the baby against any degree of risk, no matter how small, to the pregnant woman, who at the point of viability has already carried this baby for 5-6 months. This Act is intended to correct the imbalance in the law.

Protecting the health of pregnant women and the lives of unborn babies who have reached the stage of viability will not impose duties of motherhood on women who, for whatever reason, cannot or choose not to undertake the responsibilities of raising children born to them. California law provides choices to women to provide for these children by lawful newborn surrender procedures and by adoption. Nothing in this Act affects these alternative birth options of mothers.

The rights to life and medical care of viable unborn babies protected by this Act represent rights similar to those already guaranteed under California law for babies born during abortions or born prematurely. Health and Safety Code §123435 provides that "The rights to medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant of similar medical status prematurely born spontaneously."

The definition of a "viable fetus" applied in this Act is based on the definition "*Colautti v. Franklin* which further clarified *Roe v. Wade*. "A fetus is considered viable if it is potentially able to live outside the womb, albeit with artificial aid."

Section 3. Amendments to the California Constitution

The California Constitution is hereby amended by the addition of Article I, Section 33, to read as follows:

- a) The People of the great State of California find and declare that God is the Creator of all life.
- b) The people of the great State of California find and declare that God is the Author of all human life.
- c) "Viable fetus" means an unborn baby (human fetus) who has attained sufficient development of organs as to be capable of living outside of the uterus of the mother, with or without life support. A fetus means an organism of the species homo sapiens beginning at eight weeks development and shall be presumed viable at twenty-four (24) weeks of gestational age - as dated from the first day of the mother's last menstrual period.
- d) Notwithstanding Section 1 of Article I or any other provision of this Constitution, no person shall perform or induce an abortion on a viable fetus unless the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.
- c) The rights to life and medical care of a viable fetus shall be the same as the rights of an infant of similar medical status in the uterus of the mother or born alive prematurely, whether intentionally, spontaneously or during the course of a failed abortion.
- f) The provisions of this section are self-executing and supersede all conflicting provisions of the Constitution and laws of the state of California. Nothing in the California Constitution or laws this state grants the State of California, or any judge, public official or public agency in this state, authority to diminish the protection for viable human fetuses provided in this section.
- g) If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, this section shall be modified as necessary, by the narrowest construction possible consistent with the language and purposes of this section and applicable law, and shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision found to be legally invalid by the final decision of a court of competent jurisdiction shall be severed from the remainder of this section, and the section shall remain in full force and effect.

Section 4. Penal Code 187 amended.

Penal Code section 187 is amended to read:

187. (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus *provided the fetus was younger than 24 weeks of gestation; or, if the fetus was 24 weeks of gestation or older, the act was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.*

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

Section 5. Construction

- a) Nothing in the Act shall be construed as creating or recognizing a right to abortion.
- b) It is not the intention of this law to make lawful an abortion that is currently unlawful

Section 6. Severability

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof, or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

Section 7. Right to Intervention

The proponent of this initiative, or his or her designee, shall have the right to intervene in any action challenging the constitutionality or enforceability of this Act. The state shall be required to pay all legal costs and fees of the proponent of this initiative as intervenor in any action challenging the constitutionality or enforceability of this Act.

Section 8. Conflicting Ballot Measures.

Previous ballot measures that were passed prior the passage of this measure will not be allowed to violate this measure by law. Any ballot measure on the same ballot, during the passage of this measure, that is in direct violation of this act, whether it was passed by the voters or not, if this measure received more affirmative votes than the other measure, this measure hereby nullifies and voids their measure(s). If another opposing measure or opposing measures which passed by the voters in the same election on the same ballot received a greater number of affirmative votes, the provisions of this measure shall take effect, whether in whole or in part, that is permitted by law.

If this measure were passed by the voters but another opposing measure in the same election on the same ballot were passed by the voters and supersedes with affirmative votes, which is later determined to be invalid, for whatever reason, this measure shall become fully enforceable.