

## LEGAL REVIEW NOTE

**Bill No.:** SB 282

**LC#:** LC0816 To Legal Review Copy, as of  
February 2, 2017

**Short Title:** Revise abortion laws re: viable fetus

**Attorney Reviewer:** Todd Everts/Alexis Sandru

**Date:** February 7, 2017

### 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, LC816 revises the definition of a viable fetus and prohibits the abortion of a viable fetus in all situations, including situations in which the pregnant woman's life is at risk. If a pregnant woman's life is at risk, the draft provides that as an alternative to abortion, the medical practitioner shall induce labor or deliver the viable fetus by caesarean section and provide life-sustaining support to the viable fetus.

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. " [Subsequent] to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*' " *Casey*, 505 U.S. at 879, quoting *Roe v. Wade*, 410 U.S. 113, 164-165 (1973). (Emphasis added.) While the United States Supreme Court has upheld laws prohibiting specific abortion procedures when other abortion procedures were available, *see Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court has not abandoned the principle articulated above.

Because LC816 proscribes abortion entirely after a fetus is viable, the bill may raise potential conformity issues with the requirements of the United States Constitution and Montana Constitution.

**Requester Comments:**