



WISCONSIN FAMILY ACTION
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Testimony in Support of Assembly Joint Resolution 130
Assembly Committee on Health
Public Hearing, February 13, 2020
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Thank you, Chairman Sanfelippo and committee members, for the opportunity to testify on Assembly Joint Resolution 130.

Wisconsin Family Action strongly supports this joint resolution.

Currently, Article I, Section 1, of the Wisconsin Constitution provides that only those who are “born” are afforded certain “inherent rights,” including the right to life.

Joint Resolution 130 proposes to amend the language of Article 1, Section 1 of the Wisconsin Constitution to reflect that, as applied to the right to life, the term “persons” applies to every human being in any stage of development, born or unborn.

We support this change for five main reasons:

- 1. The current strategy of relying on incremental legislation to protect unborn persons from abortion has substantial limitations.**
 - The incremental approach to eliminating abortions in this state, and more broadly, this country, has not allowed society to fully recognize that life begins at conception and that a complete definition of “person” includes the unborn.
 - Further, the incremental approach as the sole strategy to eliminating abortion in this country is ineffective because it still allows a woman to obtain an abortion on demand at any stage of pregnancy given the broad “health” exception demanded by current U.S. Supreme Court abortion jurisprudence.
 - While the proposed personhood amendment would not result in an outright elimination of abortion on demand, it would allow Wisconsin to fully recognize the unborn as persons in our state constitution ***and*** prevent activist judges from creating a “fundamental right” to an abortion in our state constitution.
- 2. The current strategy of incremental legislation is threatened by recent U.S. Supreme Court jurisprudence.**
 - In 2016, the U.S. Supreme Court, in *Whole Woman’s Health v. Hellerstedt*, struck down two Texas state laws that imposed “health-justified” regulations on abortion. *Whole Woman’s Health* could become a huge obstacle for states’ efforts to enact legislation aimed at regulating abortion. This is because the Court appeared to heighten the state’s burden to justify the constitutionality of such regulations.
 - In light of *Whole Woman’s Health*, the proposed personhood amendment is a better approach to further the pro-life cause, as courts are becoming increasingly hostile to the argument that abortion regulations are necessary to protect a woman’s health.
- 3. A constitutional amendment rather than a statutory change is necessary.**
 - 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, without a personhood amendment, protects the right to abortion. But if our state constitution’s

definition of “person” includes the unborn, then it would be extremely difficult for the Wisconsin Supreme Court to conclude such.

- One-third of the nation’s highest appellate state courts have already explicitly or implicitly concluded that their states’ constitutions contain a right to an abortion.
- Specifically, in the last two years alone, activist judges on the Iowa and Kansas state supreme courts have created a right to an abortion in their state constitutions. They are not alone. It appears that the highest appellate courts in 12 other states have explicitly concluded that their state constitutions contain a right to an abortion. And the highest courts in three other states have implied that their state constitutions contain such a right.
- The recent decision from the Iowa Supreme Court, *Planned Parenthood v. Reynolds*, should further provide concern for the pro-life movement because this decision reflects the pro-abortion movement’s increasing reliance on state constitutions to raise legal challenges to abortion legislation. Notably, in *Reynolds*, the appellants challenged a 72-hour waiting period mandate *solely* under the state constitution. One reason for this shift in strategy away from challenging such laws under the U.S. Constitution is that state constitutions can grant broader rights than those afforded by the U.S. Constitution.

4. Personhood amendments are constitutional under federal law.

- The U.S. Supreme Court concluded 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.
- Wisconsin would be making a policy judgment about when life begins if the proposed personhood amendment passes. The proposed amendment itself imposes no substantive restrictions on abortion, or any other life matter. Instead, the proposed amendment requires that “[a]ny prohibition of conduct with regard to unborn persons shall be prescribed by the legislature by law.”

5. The proposed personhood amendment, if enacted, would not repeal any existing abortion ban or abortion regulations.

- Contrary to what critics of the amendment have stated, the proposed personhood amendment would not invalidate section 940.04, which is the pre-*Roe v. Wade* criminal abortion statute, because section 940.04 is no longer effective as an abortion statute. The Wisconsin Supreme Court construed section 940.04 as a feticide statute after the state legislature enacted section 940.15, the state’s current criminal abortion law. Section 940.15 essentially codifies *Roe* by criminalizing abortion after an unborn child reaches viability, but allowing for abortion after viability if it is “necessary to preserve the life or health of the woman,” thereby allowing abortion on demand.
- But even if section 940.04 were effective as an abortion statute, abortion would still be legal in Wisconsin after the reversal of *Roe*, absent the repeal of section 940.15, because section 940.15 would still be good law in Wisconsin.
- Finally, under basic principles of statutory construction, which are followed by the Wisconsin Supreme Court, the proposed personhood amendment, if enacted, would not invalidate any statute that bans or regulates abortion because a statute that preceded a constitutional amendment is presumed to be constitutional and not invalidated by the amendment as long as the two do not conflict.

It is time for Wisconsin to enshrine in law what many have long believed—that the unborn are persons, like each of us, and entitled to the same right to life. This committee should take the first step towards allowing the voters of Wisconsin to do this.

Wisconsin Family Action strongly urges committee members to vote yes on this joint resolution.