Gmail

Benjamin J.F. Cruz <senator@senatorbjcruz.com>

AG LEG 18-0291 / Bill 232-34 (LS) 6-26-18

2 messages

Pauline I. Untalan <puntalan@guamag.org> Tue, Jun 26, 2018 at 1:16 PM
To: Senator Therese Terlaje <senatorterlajeguam@gmail.com>
Cc: "senator@senatorbjcruz.com" <senator@senatorbjcruz.com>, "senatorbiscoelee@guamlegislature.org" <senatorbiscoelee@guamlegislature.org>, "tom@senatorada.org" <tom@senatorada.org>, "rose.senatorsa@gmail.com" <rose.senatorsa@gmail.com>, "senatortcnelson@gmail.com" <senatortcnelson@gmail.com>, "senatorsannicolas@gmail.com" <senatorsannicolas@gmail.com>, "senatordrodriguez@gmail.com" <senatordrodriguez@gmail.com>, "Office of Senator Frank Aguon, Jr. Admin" <admin@frankaguonjr.com>, "senjvespaldon@gmail.com" <senjvespaldon@gmail.com>, "tommy@senatormorrison.com" <tommy@senatormorrison.com>, "senatormary@guamlegislature.org" <senatormary@guamlegislature.org>, "senatorlouise@gmail.com" <senatorlouise@gmail.com>, "wilcastro671@gmail.com" <wilcastro671@gmail.com>, "senatoresteves@gmail.com" <senatoresteves@gmail.com>

Good Afternoon Honorable Speaker. Vice Speaker and Senators:

GL#34-18-2026
Speaker Benjamin J.F. Cruz

Attached is the Legal Opinion issued by AG Barrett-Anderson on June 26, 2018.

JUN 27 2018
Time: 2:46 [ ]AM [ ]PM File No.
Received By:

Respectfully,
Pauline I. Untalan

Special Assistant to Attorney General Elizabeth Barrett-Anderson

Office of the Attorney General of Guam

590 S. Marine Corps Dr. Suite 901

Tamuning, Guam 96913

(671)475-3324 ext. 5030 –phone

(671)477-4703 – fax

www.guamag.org

CONFIDENTIALITY NOTICE: This email and any files transmitted with it may be legally privileged and confidential and is intended solely for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any review, dissemination or copying of this email, or taking any action in reliance on the contents of this information is strictly prohibited. If you received this transmission in error, please notify us immediately by e-mail or telephone to arrange for the return of this email and any files to us or to verify it has been deleted from your system.

LEG 18-0291 Bill 232-34 6-26-18.pdf
1594K

Benjamin J.F. Cruz <senator@senatorbjcruz.com> Wed, Jun 27, 2018 at 2:44 PM
To: Guam Legislature Clerks <clerks@guamlegislature.org>
Cc: "<rennae@guamlegislature.org>" <rennae@guamlegislature.org>

06/26/18	06/26/18	Attorney General of Guam	AG LEG 18-0291 / Bill 232-34 (LS) 6-26-18. *Emailed	34-18-2026

[Quoted text hidden]

Speaker Benjamin J.F. Cruz
I Mina'trentai Kuåttro Na Liheslaturan Guåhan
T 671-477-2520 | F 671-477-2522
http://www.senatorbjcruz.com

LEG 18-0291 Bill 232-34 6-26-18.pdf
1594K

2018 JUN 28 AM 8:53

2026

Office of the Attorney General of Guam

590 S. Marine Corps Dr., Ste. 901, Tamuning, Guam 96913

Elizabeth Barrett-Anderson
Attorney General
Phone: (671) 475-3324
ext. 5015/ 5030
Fax: 477-4703
law@guamag.org

Jacqueline Z. Cruz
Chief of Staff
Administration
ext. 5010
jzcruz@guamag.org

Joseph B. McDonald

Chief Prosecutor
Prosecution
ext. 2410
jmcdonald@guamag.org

Karl P. Espaldon
Deputy AG
Solicitors
ext. 3115
kespaldon@guamag.org

Kenneth D. Orcutt
Deputy AG
Litigation
ext. 3225
korcutt@guamag.org

Fred S. Nishihira
Deputy AG
Consumer Protection
ext. 3250
fnishihira@guamag.org

Rebecca M. Perez
Deputy AG
Child Support
ext. 1610
rebecca.perez@guamcse.net

Carol M. Hinkle-Sanchez
Deputy AG
Juvenile
ext. 4040
csanchez@guamag.org

Pauline I. Untalan
Administrator
Victim Service Center & Notary Unit
ext. 5030
puntalan@guamag.org

June 26, 2018

Honorable Therese Terlaje
Vice Speaker
34th Guam Legislature
Guam Congress Building
163 Chalan Santo Papa
Hagatna, Guam 96910

RE: Legal Opinion on Constitutionality of Bill No. 232-34 (LS), "The Unborn Child Protection Act of 2018" (Ref. No. LEG 18-0291)

Hafa Adai Madam Vice Speaker:

This is in response to your May 21, 2018 request for a legal opinion on the constitutionality of Bill No. 232-34 (LS), "The Unborn Child Protection Act of 2018."

Once again, the Guam Legislature places itself in the midst of the national anti-abortion debate. Bill No. 232-34 (LS) proposes to limit the right of a woman to have an abortion to include the period wherein "it has been determined…that the probable fertilization age of the woman's unborn child is twenty (20) or more weeks…." And once again, as Attorney General I am pressed to provide legal guidance to Guam lawmakers in proceeding forward against the constitutional behemoth that is *Roe v. Wade* and its progeny.

Over 28 years ago the abortion debate divided our island when the 20th Guam Legislature passed a law that outlawed all abortions on Guam.[1] Prior to its passage, I advised the Guam Legislature that the proposed legislation was unconstitutional based on the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). The Guam Legislature, nonetheless, voted to pass the bill. Governor Joseph F. Ada signed the bill into law contrary to my advice. This began a legal battle in federal court from 1990 through 1996, needlessly costing the people of Guam over a million dollars in legal fees for both sides of the litigation. As predicted, the District Court of Guam struck down the law, which was affirmed by the Ninth Circuit Court of Appeals. *See*, *Guam Society of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 506 U.S. 1011 (1992).

[1] Bill 848-20, introduced by Senator Elizabeth P. Arriola and Theodore S. Nelson, became Public Law 20-134 on March 9, 1990.

Burdens on a Woman's Access to an Abortion Pre-Viability are Facially Unconstitutional

Viability is the touchstone by which the constitutionality of restrictions on a woman's access to an abortion are now measured. Viability refers to "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb." *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973)). The Supreme Court said, "in *Casey* we discarded the trimester framework [from *Roe v. Wade*], and we now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health." *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, ____,136 S.Ct. 2292, 2320 (2016). Whether measured in gestational age or post-fertilization age, statutory burdens on a woman's right of access to an abortion without regard to the viability of the fetus have been held to be facially unconstitutional.[2] We herein assume these principles for the purposes of this opinion.

Bill No. 232-34 (LS) proposes the following language:

> 91B104. Prohibition on Abortion for Fetus Age of Twenty Weeks or More. No person shall perform or induce, or attempt to perform or induce, an abortion upon a woman when it has been determined, by the physician performing or inducing the abortion or by another physician upon whose determination that physician relies, that the probable post fertilization age of the woman's unborn child is twenty (20) or more weeks. . . .

In *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), *cert. den.* 134 S.Ct. 905 (2014), the Ninth Circuit Court of Appeals examined an Arizona statute the stated purpose of which was to "[p]rohibit abortions at or after twenty weeks of gestation, except in cases of a medical emergency, based on the documented risks to women's health and the strong medical evidence that unborn children feel pain during an abortion at that gestational age." *Id.*, 716 F.3d 1218. The court held that Arizona's outright prohibitions on abortions, measured 20 weeks from the last menstrual period and without regard to viability, was unconstitutional.

In *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), the Ninth Circuit Court of Appeals addressed the constitutionality of an Idaho law which contained a categorical ban on abortions of fetuses of twenty or more weeks postfertilization, regardless of whether the fetus had attained viability, except in particular circumstances. *Id.*, 788 F.3d 1022 n. 6. The court held that "the broader effect of the statute is a categorical ban on all abortions between twenty weeks gestational age and viability" which it found to be "directly contrary to the Court's central holding in *Casey* that a woman has the

---

[2] "Viability refers to the stage of pregnancy when 'there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.' *Colautti v. Franklin*, 439 U.S. 379, 388 (1979). At the time the Supreme Court decided *Roe v. Wade*, 410 U.S. 113, 160 (1973), viability usually occurred at 'approximately 28 weeks,' but by the time the Court decided *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), almost twenty years later, viability occurred earlier, 'at 23 to 24 weeks.' *Casey*, 505 U.S. at 860. *See also Fetal Extrauterine Survivability: Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law*, New York State Task Force on Life and the Law, Jan. 1988, at 12 (1988)." Linton, *Twenty-Week Abortion Bans: Ineffective, Unconstitutional and Unwise*, 30 BYU J. Pub. L. 83 n. 1 (2015)(editorial brackets in original). "Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 846.

right to 'choose to have an abortion *before viability* and to obtain it without undue interference from the State.' " *Id.*, 788 F.3d at 1029 (quoting *Casey*, 505 U.S. at 846; emphasis supplied by the court). Whether measured 20 weeks or 22 weeks from a woman's last menstrual period, the failure to reference viability as the point of demarcation at which the state may interfere with a woman's right of access to an abortion will prove fatal to the law.

Courts around the country continue to measure the constitutionality of burdens on a woman's ability to access abortions in pre- and post-viability terms. Federal courts, and specifically our Ninth Circuit of Appeals, have unanimously found state laws that proscribe pre-viability abortions to be unconstitutional. There is no doubt that the twenty-week period recommended by Bill 232-24(LS) operates as a ban on pre-viability abortion, and that it cannot stand under the viability rule enunciated repeatedly by the United States Supreme Court, the Ninth Circuit Court of Appeals which has jurisdiction over Guam, and other circuits.

It is our opinion that if Bill 232-34 (LS) is enacted into law, it will be held unconstitutional when, not if, it is challenged.

Respectfully,

ELIZABETH BARRETT-ANDERSON
Attorney General

cc: Governor of Guam
All Senators