



## **PROBLEMS OF THE "REPRODUCTIVE FREEDOM" INITIATIVE**

James S. Cole, Esq.

### **INTRODUCTION: THE NEW SUPER-STRICT STANDARD OF SCRUTINY IN THE COURTS**

The so-called "Right to Reproductive Freedom Initiative" proposes an amendment to the Missouri Constitution that would have a devastating impact on the pro-life laws currently in force in our state.

The purposes of having a written constitution include setting limits on ordinary law-making by the state legislature, city councils, and other legislative bodies. Any ordinary law (e.g., statute, ordinance, regulation, etc.) is null and void to the extent that it conflicts with the state constitution. Adoption of the initiative[1] will inevitably lead to lawsuits for court declarations that certain laws have been nullified because they now conflict with the new constitutional amendment.

Challenged statutes will not survive unless they satisfy the applicable standard of scrutiny. Ordinarily, statutes must only be shown to be rational in their purpose and in the means that are involved in carrying out that purpose. That is "rational basis" scrutiny. However, in some cases involving individual rights, the courts often apply what is called "strict scrutiny," a much higher test for the State to meet. In such cases, the State must prove that to the extent a law impinges on a constitutional right, the statute is (i) "narrowly tailored" in the circumstances of the case (ii) to serve a "compelling state interest." Many statutes fail to survive such strict scrutiny.

Think of surviving strict scrutiny as kicking a field goal in football. Ordinary scrutiny is like kicking through ordinary goal posts. Strict scrutiny is like aiming at goal posts that have been narrowed and moved several yards further past the end line.

The proposed amendment imposes not just strict scrutiny, but what may be called "super-strict scrutiny." Subsection 3 requires the State to justify a regulation of reproductive freedom by showing "a compelling governmental interest achieved by the least restrictive means." Current strict scrutiny does not require "the" least restrictive means, as the initiative requires, but only "a" narrowly tailored means. As to "compelling" governmental interests, under "rational basis" scrutiny the State could assert a wide range of purposes, depending on the subject matter (in abortion laws, e.g., safeguarding health or insuring informed consent). However, the initiative provides that a purpose will count as "compelling" only if it satisfies three conditions, as follows:

(1) The law is "for the limited purpose and has the limited effect of improving or maintaining the health of a person seeking care,"

1. In this paper, "proposed amendment" and "initiative" will be used interchangeably. At the beginning of the initiative, it states it will add "Section 36" to the Missouri Constitution. After that, each paragraph is numbered as a subsection of "Section 36" and is referred to in this paper as "subsection 2," "subsection 3," etc.

(2) It is "consistent with widely accepted clinical standards of practice and evidence-based medicine, and"

(3) It "does not infringe on that person's autonomous decision-making." [2]

The "and" at the end of the second condition is important. If it was "or," then proving any one of the three conditions would suffice to show that the governmental interest was compelling. However, it is not "or," but "and." That means that all three conditions must be satisfied, not just one or two. Therefore, the third condition gives a person who invokes "reproductive freedom" a veto power over applying any abortion law that the person does not agree with. Let that sink in for a while.

Any regulations, including those for health, may narrow the choices available to a woman and thus infringe them by affecting the cost, availability, or method of abortion. It is obvious that any limitation of abortion that a woman would disagree with will, by the very fact of the woman's choice to have an abortion, infringe on her "autonomous decision-making." Thus, under the third condition above for a "compelling" governmental interest as defined in the initiative, any regulatory law is subject to nullification simply because it infringes on the woman's autonomous choice.

Yet another new rule is contained in the initiative. When a law is challenged as unconstitutional, the usual presumption is that it is valid until proven otherwise. However, another portion of subsection 3 turns that presumption on its head. The relevant language reads, "Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid." This is like turning the presumption of innocence in criminal cases into a presumption of guilt until proven innocent. It represents another new barrier to defending the validity of abortion statutes in the courts.

The importance of these obstacles to upholding pro-life laws cannot be overstated. They create difficult obstacles to the survival of any law that may be challenged under the initiative.

Keep in mind that the proposed amendment, if adopted, cannot be changed by ordinary legislation, but only by a new amendment. It could be decades, if ever, before any change in this initiative's proposed amendment is presented to the voters. During that lengthy time, the state legislature's hands would be tied up by the amendment, so it could not enact the protections that this initiative disregards.

The prospect of nullification of laws under the super-strict scrutiny of subsection 3 will arise in almost every issue that the amendment will affect.

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2. Proposed amendment, subsec. 3.

## **TEN REASONS TO OPPOSE THE INITIATIVE**

The bulk of this paper provides the rationales for the "Ten Reasons to Oppose the Initiative" flier that has been disseminated by Missouri Right to Life.

### **1. Parental Consent Laws Will Be Eliminated**

Because parental notice and consent requirements would face the gauntlet of the presumption of invalidity and super-strict scrutiny, Missouri's parental consent law<sup>[3]</sup> would be subject to nullification if voters approve the initiative.

A law professor was quoted in a recent St. Louis Post-Dispatch article as assuring that parents have a "fundamental constitutional right to the care, custody, and control of their minor children." In this argument, parental rights proceed from the Due Process Clause of the U.S. Constitution. Federal constitutional rights trump state laws.<sup>[4]</sup> Therefore, it is said, the current Missouri parental notice and consent statute would survive voter approval of the initiative.

Unfortunately, the interaction of federal rights and the proposed state constitutional amendment in this instance is not as simple as that.

While decisions of the U. S. Supreme Court outside the context of abortion have sometimes described the parents' right to the upbringing of children as a "fundamental right" under the U.S. Constitution's Due Process Clause<sup>[5]</sup>, in the context of abortion parental rights have never been accorded that respect. Three years after *Roe v. Wade*, the Court held in a case arising in Missouri that no parental rights could ever outweigh the right of a pregnant minor to have an abortion.<sup>[6]</sup>

A few years later, the Court gave a weak nod to the reality that some (if not all) minors were just too young to make life-altering decisions about aborting their offspring. The Court approved state laws under which a judge would make the decision whether a minor's abortion would be allowed when parents would not consent to the abortion. The minor could seek an expedited court order either that the minor was sufficiently mature to give her own consent to the abortion or, if not, that the abortion was in the minor's best interests.<sup>[7]</sup> In this "judicial bypass," the judge's decision would substitute for the judgment of the minor's parents.

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3. RSMo sec. 188.028.1.

4. This is pursuant to the Supremacy Clause of the U. S. Constitution, Art. VI, clause 2.

5. For example, *Wisconsin v. Yoder*, 406 U.S. 205, 214, 232 (1972).

6. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976). All later Supreme Court cases have been in accord. See, e.g., *Bellotti v. Baird II*, 443 U.S. 622, 643 (1979); *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990).

7. *Bellotti* and *Hodgson*, *supra*.

In view of these cases, in the abortion context, the federal Due Process rights of parents were legally next to nonexistent. Although *Dobbs* canceled any federal "right" to abortion under *Roe*, it had no reason to address or change the status of parents of pregnant minors. The result is that if the proposed amendment to the Missouri Constitution is adopted, the federal Due Process Clause will not protect parental rights.

Pro-abortion supporters have always been opposed to parental consent requirements.[8] If Missouri voters adopt the proposed amendment, lawsuits attacking the current parental notice and consent laws are bound to be filed.

The plaintiff in such an attack (e.g., ACLU) will assert, among other things, the inconsistency of the parents' notice statute with the new state constitutional amendment because parental notice causes delays and increases the costs of obtaining an abortion to the detriment of pregnant minors. Plaintiff is likely to argue further that the burdens of pregnancy on a minor are immediate and more urgent than her parents' concerns for the physical and emotional health of their daughter and their emotional and family hardships of losing a grandchild. In view of these factors and the veto for "autonomous decision-making" under subsection 3 as discussed in the Introduction, defending the validity of the parental consent statute will be quite difficult.

Do Missourians really want to run the risk of establishing in the state constitution the principle of depriving the parents of a minor of all rights when it comes to their daughter's abortion?

In view of the prospect of nullification of the parental notice and consent rights, voters should reject the initiative.

## **2. Late-Term Abortions On Demand and Abortion – All Nine Months**

The proposed amendment would allow an abortion after "Fetal Viability" up to the time of birth if a "treating health care professional" expressed a judgment that an abortion "is needed to protect the life or physical or mental health of the pregnant person." [9] Subsection 8 defines "Fetal Viability" as "the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."

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8. See, e.g., American Civil Liberties Union, "Laws restricting teenagers' access to abortion," Apr. 1, 2001, accessed at [www.aclu.org/documents/laws-restricting-teenagers-access-abortion](http://www.aclu.org/documents/laws-restricting-teenagers-access-abortion); Center for Reproductive Rights, "Mandatory parental consent and notification laws," Mar. 1, 2001, accessed at <https://reproductiverights.org/mandatory-parental-consent-and-notification-laws/>.

9. "Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, interfere with, delay, or otherwise restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person." Amendment, subsec. 4.

Using viability as a line for demarcation of legal rights has no medical or scientific basis. Planned Parenthood itself has lambasted the use of viability for this purpose. "Viability is not a medical construct and has no relevance to clinical care. It is a political construct set under *Roe v. Wade*. We now know that the viability standard tried and failed to balance state and personal interests, and it did not work." [10]

Even if the child is deemed viable under the definition found in subsection 8, he or she can still be aborted for reasons of the "physical or mental health" of the mother. "Physical or mental health" is not defined in the amendment. In the *Roe* years, the U.S. Supreme Court held that the woman's "health" should encompass all factors, "physical, emotional, psychological, familial, and the woman's age," relevant to her well-being. [11] The intentionally vague language of the proposed amendment invites courts to adopt a similar meaning again.

Obviously some of the factors mentioned by the Supreme Court are not medical at all. Non-physicians--"treating health care professionals"--may well be making the final decision on whether the amendment's health exception applies in any particular case. And no one will be in the treatment room who wants the child to live.

Missouri law already has a health exception in its current abortion laws. It allows abortions when medical conditions "necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." [12] This definition needs no change.

Most Missourians do not want late-term abortions for any conditions that our law does not already take into account. The amendment should be rejected accordingly.

### **3. An Unborn Child Is a Human Being, Not "Tissue"**

The initiative assumes that when a woman becomes pregnant unexpectedly, there is automatically a conflict between mother and child. The proposed amendment does not even mention that there is a living being in the womb of the mother, created from human parents, with an entire lifetime ahead if allowed to continue his or her life.

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10. Advocates of Planned Parenthood of the St. Louis Region and Southwest Missouri, "Abortion restrictions under the guise of protections," Feb. 27, 2023, p.2, accessed at <https://www.plannedparenthoodaction.org/planned-parenthood-of-the-st-louis-region-and-southwest-missouri/pressroom/interested-parties-memos/ipm022723>.

11. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). While *Doe v. Bolton* may not be controlling precedent after the *Dobbs* decision, its reasoning may still be considered by the courts.

12. Revised Statutes of Missouri [RSMo.] sec. 188.015(7).

At no point does the initiative take seriously that all human beings are entitled to equal justice under law. In only one place, the passing reference to "Fetal Viability" in subsection 4, is there even a hint that the life of another human being is involved. The proponents would rather ignore the existence of a human being than find ways to help him or her to develop and grow.

We should "follow the science" in respect to the unborn. It is long-established in biology that a new human being is created at conception, with a unique set of chromosomes. The little human is not and cannot be merely "tissue" of the mother when it is distinct in its genetic composition. This is easy to see when one considers that half the time the child is biologically male, not female.

A full description of human development of the unborn would take pages. Readers will find a concise depiction of an unborn child's development in a video produced by Live Action and available at <https://www.lifesitenews.com/news/new-window-to-the-womb-interactive-app-shows-reality-of-preborn-babies>. All people should consider alternatives to abortion that are available at Pregnancy Resource Centers. An unexpected pregnancy should not be made into a mortal conflict between mother and child, but as the beginning of a relationship that may last a lifetime.

The lives of unborn children depend on voting "no" on the initiative.

#### **4.1 Elimination Of Health & Safety Standards**

If the initiative is adopted, the laws and regulations for health and well-being of women in regard to abortion will again become subjects of contention. Abortionists attacked them before the *Dobbs* decision and lost many challenges, but the initiative will give them a new legal basis for attacking them again.

Still on the books from the *Roe v. Wade* days are many common-sense regulations for everyday operations of abortion ambulatory surgical centers including regulations for licensing, assuring safe and sterile facilities, record-keeping, regular health inspections, and enforcement procedures.[13]

Other standards have been enacted with a view toward the extraordinary impact of abortions on the lives of women, often with consequent mental and emotional burdens. These include requirements for provision of factual materials about the development of unborn babies throughout pregnancy and the opportunity to view a video sonogram of the child (RSMo. section 188.027.1(4)), a 72-hour reflection period to sort out all the considerations that are involved in the abortion decision (RSMo. section 188.027.1 & .8), and mandatory reporting of abuse of minors (RSMo section 188.023).

Many more beneficial regulations could be cited, but the important point is that all

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13. Revised Statutes of Missouri [RSMo.] secs. 197.200 & 197.215; 19 Code of State Regulations 30-30.050-070.

such regulations, and more, would be subject to nullification under the provisions of the initiative under the scrutiny described in the Introduction. Compliance with safety regulations that might increase the cost of abortions could be interpreted as one type of infringement of reproductive freedom, and such infringements are presumed null and void unless the State satisfies the super-strict standard of scrutiny described above.

It is worth noting that under subsection 3 of the initiative, the State has to justify its health regulations by meeting the tests for "compelling interest," but the woman and her abortionist do not. The woman's "autonomous decision" need not be consistent with "widely accepted clinical standard and evidence-based medicine," as the State's health regulations must.

Missouri voters should vote "no" on the initiative to preserve the State's ability to make health and safety regulations in favor of women.

## **4.2 Who Can Perform or Prescribe Abortions?**

If the proposed state constitutional amendment is adopted, the current Missouri statute that limits doing or prescribing abortions to physicians will be endangered. The prospect of nullification arises from the presumption of invalidity and super-strict scrutiny that are created in subsection 3, as explained above.

Pro-abortionists already assert that there is a shortage of physicians who are willing to perform abortions, especially in rural areas.[14] They will argue that limiting abortions to physicians may well be considered as creating a "delay" of, or "interference" with, the "right to reproductive freedom." That would make the existing physician-only statute void because it would conflict with the new constitutional amendment. Thus the initiative represents a potent threat to the continued validity of the physician-only statute.

Subsection 3 puts the physician-only law[15] at risk without any description in the initiative on who else may do abortions. The broad term, "health care professionals," appears only in subsection 4, describing who will pass judgment on whether an abortion after "Fetal Viability" "is needed to protect the physical or mental health of the pregnant person." The initiative lacks any statement on what qualifications this person must have.

Physicians' assistants, advanced practice registered nurses,[16] and certified

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14. See, e.g., G. Henderson, "There's an Abortion Provider Shortage Across the U.S. Here's How We Address It," Nov. 18, 2021, accessed 4-17-2024 at [www.elle.com/culture/career-politics/a38257180/abortion-provider-shortage-how-to-fix](http://www.elle.com/culture/career-politics/a38257180/abortion-provider-shortage-how-to-fix).

15. RSMo secs. 188.020 and 334.245, among other statutes. All statutes prohibiting non-physicians from performing abortions are referred to collectively in this paper as "the physician-only" law.

16. Physicians' assistants are defined in Missouri in RSMo. sec. 334.735.1, and advanced practice registered nurses are defined in sec. 335.016(2). Both are currently barred from performing or prescribing abortions by RSMo secs. 334.245 and 334.735.3.

nurse-midwives[17] are likely to be first to seek a declaration by the courts that the physician-only statute is unconstitutional. One of those associations has adopted a formal policy calling for certain types of abortions to be added to the scope of certified midwives' practice.[18] If the initiative is approved, certified nurse-midwives will probably invoke it to declare that the physician-only laws are void as to them.

The logic of the initiative proceeds further. Should clinical psychologists be allowed to prescribe abortions? What happens if a woman insists on having an unlicensed midwife perform an aspiration abortion? Or what if she insists on using old-time folk remedies prepared by a lay person to induce an abortion at home?[19]

We are assured by an attorney quoted in the St. Louis Post-Dispatch article that the State would have a "compelling interest" in providing regulations that legitimately seek to protect the health of people receiving care. However, the article contained no mention about the three conditions of "compelling state interest" as defined in the initiative. The third condition, respecting a woman's autonomous choice, is one of the most important provisions in the initiative. It makes a woman's choice of practitioner a greater priority than State licensing requirements. Under the initiative, she has just as much right to choose an unlicensed midwife or a purveyor of folk remedies as she does to select one of the State's licensed professionals.

Note that the language of the initiative does not require the woman to prove safety and consistency with clinical standards for her choice to count; only the State must do that in connection with its restrictions.

Ultimately, the initiative provides no assistance in answering whether unlicensed practitioners should be allowed to perform or prescribe abortions. In the initiative, the best answer to the question, "Who else must be allowed to serve as an abortion health professional according to a woman's choice?" is, "Who knows?" It could be anyone the woman herself wants. Missourians should say "no" to non-physician abortions.

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17. In Missouri, certified nurse-midwives constitute a specialty within the broader category of licensed advance practice registered nurses. To be licensed, the midwives must be certified to practice midwifery by an association approved by the State. RSMo. secs. 335.016(2) & (6). They also are barred from performing abortions by the current physician-only statute.

18. American College of Nurse-Midwives, Position Statement: Access to Comprehensive Sexual and Reproductive Health Care Services, April 12, 2017, accessed at [www.midwife.org/default.aspx?bid=59&cat=3&button=Search](http://www.midwife.org/default.aspx?bid=59&cat=3&button=Search). The other major certification body, the North American Registry of Midwives, does not appear to have either adopted or rejected such a policy.

19. See, e.g., K. Hiraishi, "Abortion care has a long history among Hawai'i's Indigenous people," Hawaii Public Radio, June 29, 2022, accessed at <https://www.hawaiipublicradio.org/local-news/2022-06-29/native-hawaiian-traditions-and-perspectives-on-abortion-centers-health-care-womens-rights>, and C. Alonso, Integrating the midwifery model of care into abortion services, Soc. & Reprod. Health Matters 2020, 28(1), pp. 66-68, accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7888103/>.



## **5. Missouri's Pro-Life Laws Will be Subject to Elimination**

*Roe v. Wade* was promulgated on January 22, 1973. The Missouri General Assembly responded to *Roe* in 1974<sup>[20]</sup> in legislation that, among other things, to protect the interests of fathers of unborn children and parents of a pregnant minor. The U. S. Supreme Court struck down several items enacted in the statute in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

Ever since then, Missouri has challenged the reign of the abortion mentality in the law. In almost every session of the Legislature since 1974, Missouri Right to Life, along with other pro-life organizations, has worked hard to obtain laws designed to protect women and infants from the harm that abortion does to them. In addition, beginning in the late 1970s, MRL undertook the hard task of establishing a state-wide Political Action Committee and creating a systematic approach to making endorsements of legislative candidates from both major parties in order to obtain pro-life legislators.

Some of the laws and policies enacted by the state legislature and local governments resulted in turning points for the pro-life movement in the country as a whole. In 1983, the Court approved in part Missouri's 1979 statute that required parental consent for pregnant minors (with a judicial bypass available). *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).<sup>[21]</sup> The Supreme Court's 1989 decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), a case from Missouri, shook the pro-abortion world by reducing the standard of scrutiny to be applied to pro-life laws. It also approved bans on using governmental funds and facilities for abortions. This decision galvanized the pro-life movement all around the country and paved the way for further diminishment of the abortion empire in America.

Dozens of additional pro-life laws have been enacted in the Missouri statutes since 1974. Over sixty sections of the Revised Statutes of Missouri deal with abortion in some fashion. But the record of fifty years of hard work by a multitude of MRL volunteers is threatened by the proposed amendment. Anything that helps to reduce abortions in Missouri is at risk if this radical amendment passes. Missourians should reject it.

## **6. Women Would Lose The Ability To Sue For Malpractice**

In subsection 5 of the proposed amendment we find the following language: "Nor shall any person assisting a person in exercising their right to reproductive freedom with that person's consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so." On its face, this language is quite clear: it is a broad, all-embracing grant of immunity from any "adverse action" for assisting a woman to obtain an abortion. That presents a huge problem for patients who may be wronged by negligence or reckless conduct of physicians and other health care professionals.

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20. HCS HB 1211 (1974).

21. The statute has been strengthened since *Ashcroft*. See RSMo. sec. 188.028.

Does the phrase, "adverse action," include lawsuits for damages arising from malpractice? Almost every person who has been sued for damages will find it easy to answer "yes, of course." The filing of a lawsuit is obviously an action adverse to the defendant who is sued. In fact, malpractice suits may often constitute the most adverse of all civil actions because of the probable hit to a professional's reputation if word gets around that the lawsuit has been filed.

A spokesperson for the initiative's proponents has claimed that the language, "adverse action," was only directed to preventing criminal charges or other penal sanctions to be filed against abortion providers. That claim is not consistent with the actual language of subsection 5. If it covered only criminalization or being penalized for assisting an abortion, it would have used such language as "shall not be penalized or prosecuted," and no more. But the subsection's language does not stop there; it adds to "penalized" and "prosecuted" the phrase, "or otherwise subjected to adverse action for doing so." The plain language of the subsection, therefore, clearly prohibits any "adverse action," not just penalties and prosecutions.

It is telling that two of the lawyers contacted by the St. Louis Post-Dispatch, including a St. Louis attorney who defends against health care malpractice suits, stated that the language of subsection 5 is ambiguous. Their statements reflect that the language is indeed susceptible to the meaning that abortionists will be immunized if the proposed amendment is adopted.

Should citizens abandon women by removing all possibility of obtaining redress for any injuries committed by the negligence of those who participate or assist in abortions? Missourians should reject such an outrageous proposal.

## **7. PRCs Forced To Refer For Abortion**

The pro-abortion movement, aided by several state governments that are managed by liberal Democrats, has begun an all-out war against Pregnancy Resource Centers (PRCs, also called CPCs--Crisis Pregnancy Centers). The PRCs have become very effective across the country.[22] The Attorneys General of New York and California have formed an alliance with at least 14 other state Attorneys General as well as with private abortion organizations to coordinate efforts to put PRCs out of business. Their legal grounds are false. One such ground is refusing to make referrals for abortion.

Attorney General Rob Bonta of California wrote an "Open Letter"[23] dated

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22. Care Net reports that 75% of mothers who view ultrasounds of the child decide for life, not abortion. M. Gaul & M. Maxon, "Lives Saved Impact at U.S. Pregnancy Help Centers," Charlotte Lozier Institute, text at note 31 (June 23, 2022), accessed at <https://lozierinstitute.org/lives-saved-impact-at-us-pregnancy-help-centers/>.

23. R. Bonta, *Open Letter*, p. 3, accessed at [http://oag.ca.gov/system/files/attachments/press-docs/Open Letter re Crisis Pregnancy Centers FINAL.pdf](http://oag.ca.gov/system/files/attachments/press-docs/Open%20Letter%20re%20Crisis%20Pregnancy%20Centers%20FINAL.pdf).

October 23, 2023, in which he complained,

CPCs also generally will not even refer for abortion services. Referrals are “often used in medical care to ensure patients have access to specialty care as needed.” Providing referrals for necessary healthcare when the provider will not, or is not able to, provide that care is a crucial part of the standard of care. [Footnotes omitted.]

Pro-abortion organizations and their professional or academic allies display deep-seated animosity toward CPCs. Here is how Planned Parenthood (the national umbrella office) describes them:

Crisis pregnancy centers (also called CPCs or "fake clinics") are clinics or mobile vans that look like real health centers, but they're run by anti-abortion activists who have a shady, harmful agenda: to scare, shame, or pressure you out of getting an abortion, and to tell lies about abortion, birth control, and sexual health.[24]

Remember, if the amendment is adopted, it will likely be in place for decades. We cannot rely on pro-life conservatives to occupy the office of the Missouri Attorney General during all that time. When the uncertainties of politics finally result in a pro-abortion Democrat as the Attorney General, we may expect that he or she will be working with private parties and other Attorneys General to put PRCs out of business. He or she may even refuse to perform his or her duty to defend the laws of Missouri that support PRCs.

The targets for such litigation, for instance, will likely include such statutes as those forbidding using state Medicaid funds for abortions, protecting the conscience rights of medical personnel, and forbidding giving assistance in abortions (e.g., in making abortion referrals for girls).

Consider how these statutes will be treated if the abortion proponents claim the statutes interfere, delay, or restrict the "right to reproductive freedom": They will be presumed invalid, and to overcome that presumption, the State will need to satisfy the super-strict scrutiny standard. In view of the current war against PRCs and the new legal world that the amendment would create, one may well foresee that the fight to defend against mandatory referrals for abortion by PRCs will be long and hard if the proposed amendment is adopted.

Missourians should reject this attack on PRCs.

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24. Kendall @ Planned Parenthood, "What are Crisis Pregnancy Centers?" Nov. 4, 2021, accessed at <https://www.plannedparenthood.org/blog/what-are-crisis-pregnancy-centers>.

## **8. Ultrasounds Eliminated**

Ultrasound videos of unborn children often have a dramatic effect on the decision of women whether to go through with an abortion.[25] "Seeing is believing," it is said, and ultrasounds of the unborn bear it out.

Missouri's informed consent requirements for abortion require abortionists to provide the opportunity for women to view real-time video ultrasounds of their unborn children and to review certain written materials that describe the growth and development of unborn children. Women have the choice to view or not view the ultrasound and materials.[26]

There are good health reasons as well as policy reasons for these requirements. ThriVe St. Louis, one of the centers that offer free and confidential ultrasounds to women by licensed medical professionals, suggests they are needed to confirm that a woman is pregnant and to check whether the child is developing within the uterus so as to spot an ectopic pregnancy. [27] They are beneficial for the health of pregnant women.

The purveyors of abortion habitually deny that the unborn child is nothing but "tissue" or "a blob of cells." Ultrasounds prove them wrong.

The proposed amendment would nullify these health and informed consent requirements along with the other health and safety laws that "delay" an abortion that were mentioned in Part 4.1. It is a regression that the people should reject.

## **9. Significant Monetary Loss to Missouri**

Unlimited abortion in Missouri of the type mandated by the amendment would very likely result in a significant blow to Missouri's economy in the future. The major factor in this scenario will be the cumulative effect of the loss of thousands of lives every year over an unforeseeable length of time.

Last year, when the State Auditor prepared the mandatory "fiscal note" and "fiscal note summary" for the ballot language voters will see, he solicited opinions from state and local agencies on fiscal consequences of the initiative. The Missouri Department of Health and Senior Services responded, describing the adverse effects the amendment could have but providing no estimate of their financial cost. The detriments? The Department responded that the amendment "potentially would --

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25. Matthew McDonald, "Life in View: Is Ultrasound the Pro-Life Equalizer?" National Catholic Register, June 15, 2023, accessed at [www.ncregister.com/news/life-in-view-ultrasound](http://www.ncregister.com/news/life-in-view-ultrasound).

26. RSMo. sec. 188.027.1(2) & (4).

27. Thrive St. Louis, "Why an Ultrasound Should be Part of Your Pregnancy Decision," [no date], accessed at [www.thrivestlouis.org/why-an-ultrasound-should-be-part-of-your-pregnancy-decision](http://www.thrivestlouis.org/why-an-ultrasound-should-be-part-of-your-pregnancy-decision).

--void all or most of the current statutes outlined in Chapter 188 that regulate abortion;

--remove the Department's authority to license abortion facilities;

--remove the Department's authority to regulate abortion facilities;

--negate promulgated rules surrounding abortion; and/or

--expand the practice of abortion and number of abortion facilities in Missouri; however, by how far is unpredictable."[28]

The Auditor noted in his Fiscal Note Summary, "State governmental entities estimate no costs or savings, but unknown impact." [29] On a first reading, this wording gave the impression that there was no negative impact at all, when in actuality, the Department predicted the severe impacts described above but only refrained from guessing at the dollar amount involved.

While projections of dollar amounts by private parties may vary, substantial negative economic effects are quite predictable. Most of them follow from the reduction in the projected population by wide-open abortion as time goes on.

Rachel U. Greszler, Senior Research Fellow in Economics, Budgets, and Entitlements at The Heritage Foundation, writing to the State Auditor on her own behalf, described several detrimental consequences arising from the initiative, [30] including –

**A reduced labor force.** . . . [T]he additional measurable work and earnings of women as a result of having an abortion is minuscule compared to the potential lifetime work and earnings of another human being.

**Healthcare strain.** . . . [The loss of population] means the proposed laws could exacerbate healthcare worker shortages, limit Missourians' access to healthcare, and potentially drive up the state's healthcare costs as shortages lead to higher prices.

**Reduced tax revenues.** . . . [Over time, ] the absence of potentially tens of thousands of workers would lead to reduced income tax revenues.

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28. Missouri State Auditor's Office, Fiscal Note 24-077, pp. 2-3, incorporated into Fiscal Note 24-086, p. 3 (Mar. 21, 2023), accessed at <https://auditor.mo.gov/FiscalNote/Notes?SearchYearStart=2024&SearchYearEnd=2024>

29. Fiscal Note 24-086, p. 27.

30. Rachel U. Greszler, letter to Missouri State Auditor, March 17, 2023, found in Fiscal Note 24-086, pp. 23-25.

An *amicus curiae* brief in *Dobbs* submitted by over 240 professional women made many points that overcome common pro-abortion claims about the economy.[31] One particularly noteworthy finding: "[We] have gathered the empirical evidence available after half a century of constitutional protection for a virtually unfettered right to abortion, and that evidence does not support the . . . claim [in *Planned Parenthood v. Casey*] that abortion has played a necessary and causal role facilitating women's participation in the economic and social life of the country." [32]

The initiative points the wrong way to solve whatever economic problem may exist for women. It offers despair and the death of a woman's own helpless child rather than hope and a future for both mother and child. It should be defeated in November.

## **10. Taxpayer-funded Abortion**

Medicaid is a joint federal-state enterprise in which the federal government provides most of the money and sets most of the rules. States who enter the Medicaid program (and all have done so) must pay a share of the Medicaid funds for their state and are allowed only certain leeway in setting rules.

Congress enacted the Hyde Amendment in 1976 to keep federal Medicaid and other federal social service funding from being used for abortions. Some states followed the federal lead and outlawed using state money for abortions. Abortionists cried foul and took their case up to the Supreme Court. The U. S. Supreme Court ruled that the U. S. Constitution was not violated by either the federal government (under the Due Process clause) or the state governments (under the Equal Protection clause)[33] that the right to obtain an abortion did not carry with it a right to have the government pay for an abortion, just as the right of free speech does not carry with it a right to pay for publishing a person's words.

Calls for Congress and state legislatures to compel Medicaid coverage of abortions for all Medicaid-eligible patients have never ceased. President Biden and his party dramatically increased the pressure to expand coverage soon after he was inaugurated, but the Hyde Amendment and similar provisions survived.[34]

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31. "Brief of 240 Women Scholars and Professionals, and Pro-life Feminist Organizations in Support of Petitioners," *Dobbs v. Jackson Women's Health Organization*, Supreme Court Case No. 19-1392, Aug. 8, 2021. See Katie Yoder, "Do Women Need Abortion to Succeed?", Catholic News Agency, Oct. 4, 2021, accessed at <https://www.catholicnewsagency.com/news/249157/supreme-court-dobbs-roe-abortion-women-progress>.

32. "Brief of 240 Women Scholars," at p. 12.

33. *Harris v. McRae*, 448 U.S. 297 (1980) (federal Medicaid contributions); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (Illinois state contributions to Medicaid).

34. "Departments of Labor, Health & Human Services, & Education and Related Agencies Appropriations Act, 2024," Division D, Title V, secs. 506 & 507 of Public Law 118-47 (Mar. 23, 2024).

The Hyde Amendment does not cover all federal funds, but only those appropriated for the Departments of Labor, Health & Human Services, Education, and related agencies. The largest single covered agency by expenditures is the Medicaid program operated by DHHS. In that regard, note that the Hyde Amendment only covers the federal funds provided to the Medicaid program, not state funds.

State constitutions and laws may have provisions regarding state funds that differ from federal restrictions on the use of federal funds. The proposed "Right to Reproductive Freedom" amendment has such broad language that it would open the door to forcing Missouri's state government to pay for abortions and for other procedures that are connected with reproduction.

This may well follow because pro-abortion lawyers will argue that in Missouri, some people cannot easily find the money or the means of travel to obtain an abortion. They will assert that the laws that obstruct the State from paying for abortions "delay" and "interfere with" poorer women's "reproductive freedom." The new super-strict standard of review, combined with the initial presumption that such laws are invalid, will make defending against such lawsuits quite difficult.

For all of the reasons mentioned in this paper, the initiative should be turned down.

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