Overview of Michigan Ballot Initiative: "Right to Reproductive Freedom"

The Michigan Right to Reproductive Freedom Initiative, which would add Article 28 to amend the Michigan state constitution, is likely to be on the ballot in November 2022.[1] Reproductive Freedom for All, the campaign supporting the proposed amendment, is comprised of ACLU of Michigan, Michigan Voices, and Planned Parenthood Advocates of Michigan. According to the campaign's website, the proposed amendment would "ensure that all Michiganders have the right to safe and respectful care during birthing, everyone has the right to use temporary or permanent birth control, everyone has the right to continue or end a pregnancy pre-viability, and no one can be punished for having a miscarriage, stillbirth, or abortion."[2]

This memo is intended to identify a number of likely issues raised by the amendment, and in particular to highlight those abortion restrictions vulnerable to being struck down should the amendment pass. This memo is a high-level summary, and each issue warrants individual attention and further detailed analysis.

"Individual"

The proposed constitutional amendment provides that every "individual has a fundamental right to reproductive freedom." The word "individual" is not defined and therefore a question arises as to whether it would grant minors the fundamental rights described therein. It is axiomatic that children enjoy constitutional rights.[3] Nevertheless, due to their immaturity and vulnerability, and the importance of parental rights, children's rights are not co-extensive with adults in every context and setting.

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[1] In order to be placed on the ballot, 425,059 signatures must be collected within a 180-day window and filed with the secretary of state 120 days prior to the election (i.e., by July 11, 2022). The signatures must be verified by the board of state canvassers. On July 11, the Reproductive Freedom for All campaign submitted 753,759 signatures to qualify for the ballot. As of the date of this memo, the signatures had not yet been verified. *See* https://ballotpedia.org/Michigan_Right_to_Reproductive_Freedom_Initiative_(2022).

[2] https://mireproductivefreedom.org/learn-more/.

[3] *See, e.g., In re Gault*, 387 U.S. 1, 13 (1967) (holding that the protections of the 14th Amendment apply to juvenile delinquents and noting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

In the context of abortion, the Supreme Court has held that the rights of pregnant minors are not coextensive with adults and therefore states may require parental consent as long as they provide a judicial bypass or other procedure to waive parental involvement.[4] However, it is not clear from the text of the proposed amendment whether a Michigan court would interpret protections of "individual" more broadly under state law to give minors an absolute right to abortion. For example, in *In re T.W.*, the Florida Supreme Court interpreted its state constitutional guarantee of privacy (which protects every "natural person") to apply fully to minors stating, "Minors are natural persons in the eyes of the law and '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, ... possess constitutional rights.'"[5] Similarly, a Michigan court could determine that minors are "individuals" and therefore should have the full protection of the amendment.

Additionally, the term "individual" is not gender-specific and suggests that the fundamental rights protected by the amendment apply to men, as well as to "gender non-conforming" persons.

"Reproductive Freedom"

The next interpretive question raised by the proposed amendment relates to the scope of the term "reproductive freedom." The language provides that it "entails the right to make and effectuate decisions about all matters relating to pregnancy." Is this clause (relating to pregnancy decisions) merely illustrative of the scope of "reproductive freedom" or is it definitional and therefore exhaustive? Even if the scope of "reproductive freedom" is limited to specifically pregnancy-related decisions, the language is breathtakingly broad. Within its scope, it includes "decisions about all matters" related to "prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care." None of these terms is defined. For example, could "infertility care" implicate a fundamental right to *in vitro* fertilization or other assisted reproductive technologies? Could "sterilization" implicate a fundamental right to gender-reassignment surgeries? Is every decision related to prenatal care, childbirth, or postpartum care "fundamental"? Would the broad term "abortion care" justify a new constitutional protection for partial-birth abortions, in direct conflict with the federal prohibition on partial-birth abortions?[6]

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[4] *See Bellotti v. Baird*, 443 U.S. 622 (1979). This falls within the jurisprudence of *Roe/Casey* and because there is no longer a federal constitutional right to abortion, it ought no longer constrain a more robust understanding of parental rights in the context of abortion.

[5] *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989) (quoting *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (holding state parental consent statute unconstitutional); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003) (holding state parental notification statute unconstitutional), *superseded by constitutional amendment*, Fla. Const. art. X, § 22.

[6] 18 U.S.C. § 1531, available at https://www.govinfo.gov/content/pkg/PLAW-108publ105/html/PLAW-108publ105.htm.

These, and other questions regarding the scope of protection raised by the broad and vague language of the proposed amendment, are likely to be the subject of extensive, expensive litigation.[7]

Implications of "Fundamental Right" and Strict Scrutiny Standard

The language provides that "reproductive freedom" is a "fundamental right" and therefore may not be "denied, burdened nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means." This test is known as the "strict scrutiny" standard.

Federal case law under *Roe v.* Wade, which adopted the strict scrutiny test, and case law from those states that have found independent state constitutional rights to abortion and adopted strict scrutiny, demonstrates that very few abortion restrictions survive challenge under this rigorous test.[8] Therefore, a number of existing laws in Michigan which likely have substantial public support, including its parental consent laws, waiting period, public funding restrictions, clinic safety regulations, and late-term restrictions, are all vulnerable to being struck down by a court applying this standard.

Moreover, reproductive freedom is further protected under the amendment by its narrow definition of those state interests that qualify as "compelling." Under the amendment, the state only has a compelling interest in "protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine" and furthermore that interest may not "infringe on that individual's autonomous decision-making."

This narrow standard excludes interests recognized by the Supreme Court in numerous abortion cases such as the states' interest in protecting minors, interest in fetal life, interest in protecting parental rights, interests in preferring childbirth over abortion, and interests in ensuring the integrity of the medical profession. Any interest the state might have in prohibiting eugenic abortions (i.e., those performed based on race, gender, or disability) would not qualify as compelling. In *Planned Parenthood of Se. Pa. v. Casey*, the Supreme Court rejected the strict scrutiny test because it undervalued such legitimate state interests and "led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision."[9]

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[7] A useful resource indicating the proponent's desired scope of "reproductive freedom" is "The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the 14th Amendment," published by the Center for Reproductive Rights, available at https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf.

[8] *See* Elizabeth R. Kirk, "Impact of the Strict Scrutiny Standard of Judicial Review on Abortion Legislation under the Kansas Supreme Court's Decision in *Hodes & Nauser v. Schmidt*," (Charlotte Lozier Institute, On Point ser. No.42, 2020) (contains extensive analysis and examples of abortion laws struck down by federal and state courts using the strict scrutiny standard).

[9] 505 U.S. 833 at 875.

Moreover, the state may only act to protect the health of the person seeking care and even then, it must do so according to standards set by the abortion industry itself. Informed consent provisions, especially those that include risks of abortion to the woman, information relating to fetal development, or resources and assistance available should she carry the pregnancy to full term, are commonly targeted by the abortion industry as not evidence-based and are therefore vulnerable to being struck down.[10]

Post-Viability Exception

The proposed amendment permits the state to regulate abortion after viability "provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or *mental health* of the pregnant individual." (*emphasis added*) There are a number of concerning issues raised by this provision. This memo describes three concerns.[11]

First, an exception for "mental health" is widely acknowledged to be so broad as to justify abortion on demand until birth.[12]

Second, under the amendment, "fetal viability" is defined as the point in pregnancy when "there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures." The Supreme Court in *Casey* defined viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb" and went on to identify the evolution of viability based on enhanced medical abilities to support fetal respiratory capacity. This description suggests viability had an objective meaning, even as the line was shifting earlier due to medical advancements. Moreover, this description acknowledges the reality that the likelihood of survival outside the womb will *require* significant medical intervention. The proposed Michigan amendment, however, defines viability as completely subjective "based on the particular facts of the case" and is linked to sustained survival *without* "extraordinary medical measures." This term is not defined. Any prematurely born infant—or full-term infant with health problems—can require "extraordinary" medical measures to sustain life but can also respond to those measures and live a happy, healthy life. Arguably, the amendment could allow medical care to be withheld even from an infant born alive after a failed abortion who would have otherwise responded to treatment and survived. The result of the amendment would be to abandon current medical

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[10] *See, e.g.,* Rachel Benson Gold and Elizabeth Nash, "State Abortion Counseling Policies and the Fundamental Principles of Informed Consent," 10 Guttmacher Policy Review No. 4 (Fall 2007), *available at* https://www.guttmacher.org/gpr/2007/11/state-abortion-counseling-policies-and-fundamental-principles-informed-consent.

[11] Of course, in any case, fetal viability is a shifting line fraught with challenges and was rightly rejected by the Supreme Court in *Dobbs v. Jackson Women's Health Organization* as a meaningful balance between a woman's liberty interest and the state's interest in prenatal life.

[12] *See also Doe v. Bolton,* 410 U.S. 179, 192 (1973) (companion case to *Roe v. Wade* which defined health as "all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.").

standards and best practices for treating infants, and replacing those medical standards with a vague, subjective standard that priorities abortion over the life of unborn children who are otherwise able to live healthy lives with proper medical care.

Finally, determinations of both fetal viability and that the abortion is medically indicated are left entirely up to the judgment of an attending "health care professional." Though not defined in the proposed amendment, elsewhere in Michigan law a "health care professional" is defined as a professional licensed or registered under Article 15 of the Public Health Code, which includes chiropractors, acupuncturists, dentists, audiologists, midwives, nurses, optometrists, pharmacists, physical therapists, and others.[13] Putting aside the question of whether this paves the way for non-physicians to perform abortions, the amendment creates a conflict of interest by vesting sole decision-making relating to the state's very limited ability to protect both the woman and her child in the hands of the person "attending" the abortion, without any second opinion or alternative perspectives.

In conclusion, the "fetal viability" exception, purporting to allow the state to regulate abortion to a greater extent later in pregnancy is so full of holes as to allow abortion on demand, for any reason, up to the moment of birth and perhaps even justify the denial of life-saving care to an infant born alive.

Anti-Discrimination Provision

The proposed amendment states that the "state shall not discriminate in the protection or enforcement of this fundamental right." The Michigan Supreme Court has previously held that a limit on public funding for abortion, unless necessary to save the woman's life, does not violate the Equal Protection Clause of the Michigan Constitution.[14] Nevertheless, the proposed amendment's use of "fundamental rights" language along with the strict scrutiny test is likely to lead to constitutionally required state funding of those services, procedures, or resources determined to be in furtherance of an exercise of the right.

With the exception of the Florida Supreme Court,[15] every state court that has recognized an independent state constitutional right to abortion and that has also adopted the strict scrutiny standard of judicial review has struck down restrictions on public funding of abortion when those restrictions have been challenged. For example, restrictions have been declared unconstitutional on state constitutional grounds by the supreme courts of Alaska, California,

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[13] *See* Mich. Comp. Laws §§ 333.16101–333.18838 *available at* http://www.legislature.mi.gov/(S(0pmoctaeuzynuemtacjfyctf))/mileg.aspx?page=GetObject&objectname=mcl-368-1978-15.

[14] *Doe v. Dep't of Social Services*, 487 N.W.2d 166 (Mich. 1992).

[15] *See Renee B. v. Florida Agency for Health Care Administration,* 790 So.2d 1036 (Fla. 2001).

Massachusetts, Minnesota and New Jersey.[16] And, applying the equivalent of a "strict scrutiny" analysis under the state's equal right provision, the New Mexico Supreme Court has also invalidated restrictions on public funding of abortion.[17] Restrictions on public funding of abortion have been struck down on state constitutional grounds even under a standard of review that is less exacting than strict scrutiny.[18]

Given the overwhelming weight of state constitutional authority, Michigan restrictions on public funding of abortion likely would be struck down, if challenged on the basis of the proposed amendment. Moreover, on similar grounds, constitutionally required state funding of other "reproductive" procedures, drugs, or services may be justified under the broad language of the proposed amendment.

Limits on Prosecution or Adverse Action

The proposed amendment states that the "state shall not penalize, prosecute, or otherwise take adverse action" against an individual based on their "pregnancy outcomes." This provision raises serious concerns that reasonable prosecutorial actions or tort claims relating to intentional crimes, intentional torts, or negligence will be precluded, that persons harmed during pregnancy, childbirth, or abortions will be unable to recover damages for injury or death, and that the state will be hampered in its role to protect the public health, safety, and general welfare.

The provision further provides that the state shall not penalize "someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent." This raises serious concerns about the unauthorized practice of medicine, as it suggests that self-administered abortions with assistance could be permitted. Moreover, if courts interpret the amendment to mean that minors have a full, fundamental right to abortion, this provision may protect those that would seek to assist the minor in exercising that right. Although the provision requires "voluntary consent," in other areas of law, minors typically lack capacity and are unable legally to provide such consent. This would render minors legally able to consent to and procure an abortion, but in reality, they would be vulnerable to coercion and exploitation especially by those with an interest in covering up non-consensual sexual activity (e.g., rapists or sex traffickers). In such contexts, it is also possible that this

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[16] *See State of Alaska*, *Dep't of Health & Human Services v. Planned Parenthood of Alaska*, *Inc*., 28 P.3d 904 (Alaska 2001); Committee *to Defend Reproductive Rights v. Myer*s, 625 P.2d 779 (Cal. 1981); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982). *See also Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (under state constitutional right to abortion, nonprofit hospital which accepted public funds was "quasi-public" institution and therefore could not refuse to permit its facilities to be used for elective abortions).

[17] *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

[18] *See Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002); *Humphreys v. Clinic for Women*, *Inc*., 796 N.E.2d 247 (Ind. 2003) (limited partial invalidity); *Women's Health Center of West Virginia*, *Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993) (overturned by a state constitutional amendment in 2018).

section would shield from liability or extradition those who might transport minors into Michigan to receive an abortion against the law of their home state.

Summary of Impact

Based upon the language of the "Right to Reproductive Freedom" amendment, if the amendment is adopted many common-sense, long-standing policies would be repealed and numerous new "constitutional rights" would be asserted. This amendment is not merely a return to the *Roe v. Wade* standard but a breathtaking removal of virtually all protections for life as well as the removal of existing protections for parents, victims of medical malpractice, victims of sex trafficking, especially minors, and of barriers preventing state funding of abortion.

The following is an enumeration of examples of the most direct changes were this measure to be adopted by voters:

- Parents would be prohibited from having a role in decisions regarding abortion made by their minor children
- Abortions based on gender, race or disability would become protected
- Abortions would be legal throughout all 9 months of pregnancy
- Premature babies or babies with health problems could legally be denied "extraordinary health care"
- Public funding for abortion would become a constitutional right, reversing long-standing Michigan prohibitions on use of public funds to pay for abortion
- Protections for victims of medical malpractice would see their legal rights curtailed and the definition of medical professionals would be broadened in such a way that there would be a high risk of unqualified persons actually performing abortions.

The bottom line is in Michigan, abortion—even late-term abortions when unborn children can feel pain—would be widely permitted and protected if this amendment passes. Elected officials would be prohibited from imposing nearly any limitation on abortions, including widely supported policies such as prohibiting the use of taxpayer dollars to fund abortions, providing protections for minor children, and protecting the rights of parents to be involved in the decisions of their minor children regarding abortion.[i]

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