



Constitutional Battle in Nebraska: The Legal and Policy Implications of Nebraska’s Dual Ballot Initiatives

By Bradley N. Kehr, J.D.¹ Danielle Pimentel, J.D.², and Guzi He³

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¹ Government Affairs Director, Americans United for Life.

² Policy Counsel, Americans United for Life. Email: Danielle.Pimentel@aul.org.

³ Summer Fellow, Americans United for Life, American Univ. Washington College of Law, Class of 2025.

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Introduction

Since the fall of *Roe v. Wade*, the battle to protect preborn life wages on not only in the legislature, but also on the ballot. Over the past two years, several states have been faced with an emerging threat to life: ballot initiatives and measures seeking to enshrine an unfettered "right" to elective abortion in state constitutions. The efforts of abortion activists to authorize abortion-on-demand across the states pose a serious threat to pro-life laws and the protection of preborn human beings, women, and adolescents. Both Michigan and Ohio are harrowing examples of the impact abortion ballot measures have on life-affirming policies. Michigan residents voted to enshrine a "right" to elective abortion in their state constitution in 2022. In 2023, Ohioans followed suit and passed a constitutional amendment contriving a right to elective abortion throughout all nine months of pregnancy. Since voters passed these measures, abortion activists have challenged life-affirming policies in both the legislatures and the courts. For example, after Michigan residents voted to insert constitutional allowance for elective abortion, the Michigan legislature repealed numerous protections for women and preborn children, including the state's ban on partial-birth abortions and provisions requiring abortion facilities to be licensed and operated under necessary health and safety standards.

Nebraska is one of numerous states facing a similar dilemma this November. However, Nebraska is in a unique position because the state has two ballot initiatives in play, the "Protect the Right to Abortion" initiative and the "Protect Women and Children" initiative. The first initiative seeks to contrive a right to abortion-on-demand throughout all nine months of pregnancy whereas the second initiative protects life after 12 weeks gestation. This memo will analyze both ballot initiatives and the impact of their potential passage.

A. "Protect the Right to Abortion" Initiative

One of ballot initiatives that may appear on the November ballot is the "Protect the Right to Abortion" (PRA) initiative. If passed, the ballot initiative would amend the Nebraska Constitution to state:

[a]ll persons shall have a fundamental right to abortion until fetal viability, or when needed to protect the life or health of the pregnant patient, without interference from the state or its political subdivisions. Fetal viability means the point in pregnancy when, in the professional judgment of the patient's treating health care practitioner, there is a significant likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures.⁴

⁴ Protect the Right to Abortion - Constitutional Initiative (Neb. 2024).

The consequences of affording such allowance for abortion will be devastating, especially for the welfare of Nebraskan women and their preborn children. The PRA initiative authorizes abortion-on-demand throughout pregnancy, threatens to eliminate protections for women’s welfare and parental involvement laws, increases the risk of coerced abortions in Nebraska, and furthers the anti-woman narrative that abortion is necessary for women’s equality and success in America. The PRA initiative allows abortion activists to turn Nebraska into an abortion destination that endangers the health and safety of its residents both inside and outside the womb.

I. The PRA Initiative Authorizes Abortion-On-Demand Throughout All Nine Months of Pregnancy.

Passage of the PRA initiative will effectuate abortion-on-demand up until a preborn baby’s birth date. Although the proposed amendment appears to allow Nebraska to protect the preborn after fetal viability, it creates broad exceptions in the name of “protect[ing] the life or health of the pregnant patient.”⁵ The U.N.’s World Health Organization (WHO) understands health to be “the state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.”⁶ Courts, including the U.S. Supreme Court, have likewise interpreted the term “health” liberally in the abortion context. In *Doe v. Bolton*,⁷ which was the companion case to *Roe*, the Supreme Court understood “health” to encompass “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”⁸ Since then, “whenever and wherever used in abortion law, ‘health’ means ‘emotional well-being, and it’s a trap door for any state regulation. A state regulation cannot be applied if ‘emotional well-being of the patient—including any minor—might be affected by the regulation.’”⁹

Existing Nebraska law permits abortions after 12 weeks of pregnancy when necessary “to avert [the pregnant woman’s] death or for which a delay in terminating her pregnancy will create a serious risk of substantial and irreversible physical impairment of a major bodily function.”¹⁰ The all-encompassing concept of “health” offered by the PRA initiative is an exception that swallows the rule, as opposed to the narrower exceptions under Nebraska’s current law. By embracing the expansive health exception, Nebraska will be authorizing abortion-on-demand throughout all nine months of pregnancy limited only by the creativity of the abortionist. The abortionist simply has to find the abortion necessary to protect the patient’s “health.” This could be any foreseeable social reason such as the

⁵ *Id.* (emphasis added).

⁶ *Constitution of the World Health Organization*, WORLD HEALTH ORG., <https://www.who.int/about/accountability/governance/constitution> (last visited Apr. 29, 2024).

⁷ Although *Doe v. Bolton* was the companion case for *Roe*, the Supreme Court did not overturn *Doe* in the *Dobbs* decision.

⁸ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

⁹ Clarke D. Forsythe, *Feingold and Kagan on the Doe ‘Health’ Exception*, NAT’L REV. (June 29, 2010), <https://www.nationalreview.com/bench-memos/feingold-and-kagan-doe-health-exception-clarke-d-forsythe/>.

¹⁰ Neb. Rev. Stat. § 79-6912 *et seq.*

woman’s age, the ending of the relationship between the mother and the father of the baby, financial concerns, *etc.*

Although it is a common misconception that abortions performed under a health exception, or late-term abortions, are only performed for reasons of medical necessity, “most abortions are done for social reasons.”¹¹ “Overall, common exceptions to abortion restrictions are estimated to account for less than five percent of all abortions meaning that 95 percent of abortions are for elective or unspecified reasons.”¹² Dr. James Studnicki published a similar outcome in *Health Services Research and Managerial Epidemiology* regarding late-term abortions. As he says, “[t]he Guttmacher Institute has provided a number of reports over 2 decades which have identified the reasons why women choose abortion, and they have consistently reported that childbearing would interfere with their education, work, and ability to care for existing dependents; would be a financial burden; and would disrupt partner relationships.”¹³ Accordingly, most abortions occur for elective reasons of the mother, not because of either the baby’s or the mother’s medical condition.

Furthermore, it is estimated that abortionists perform around 10,000 abortions at 21 weeks’ gestation or later each year.¹⁴ Although the number of late-term abortions is likely significantly higher given that the Centers for Disease Control and Prevention’s (“CDC”) data is limited by voluntary state reporting and abortion destination states, such as California and Maryland, refuse to provide any data to the CDC.¹⁵ The PRA initiative will only increase the number of late-term abortions due to its broad health exception, putting more women at risk of suffering severe and life-threatening complications, as well as subjecting preborn children to painful abortion procedures. Passing this amendment is not in the best interest of women and only deepens the abortion industry’s pockets while subjecting women to dangerous late-term abortions that threaten their physical and emotional well-being.

a. The PRA Initiative Increases the Number of Late-Term Abortions, Which Carry Higher Risks of Health Complications.

By opening the door for late-term abortions in the state, the PRA initiative puts more women at risk of suffering severe and life-threatening complications. Abortions carry a higher medical risk when done later in pregnancy. Even Planned Parenthood, the largest abortion business in the United States, agrees that abortion becomes riskier later in pregnancy. On its national website, Planned Parenthood states: “The chances of problems

¹¹ Am. Assoc. of Pro-Life Obstetricians & Gynecologists, *State Restrictions on Abortion: Evidence-Based Guidance for Policymakers*, Comm. Op. 10, at 10 (updated Sept. 2022).

¹² *The Assault on Reproductive Rights in a Post-Dobbs America: Hearing before the S. Comm. on the Jud.*, 118th Cong. 15 (2023) (written testimony of Monique Chireau Wubbenhorst, MD, MPH).

¹³ James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Apr. 9, 2019, at 1, 1.

¹⁴ *Induced Abortion in the United States*, GUTTMACHER INST. (2019), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

¹⁵ See *Questions and Answers on Late-Term Abortion*, CHARLOTTE LOZIER INST. (May 16, 2022), <https://lozierinstitute.org/questions-and-answers-on-late-term-abortion/>.

gets higher the later you get the abortion, and if you have sedation or general anesthesia,” which would be necessary for an abortion at or after 20 weeks of gestation.¹⁶

Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications is significantly higher after 20 weeks’ gestation.¹⁷ Compared to an abortion at 8 weeks’ gestation, the relative risk of mortality increases exponentially (by 38 percent for each additional week) at higher gestational ages.¹⁸ Further, researchers have concluded that it may not be possible to reduce the risk of death in later-term abortions because of the “inherently greater technical complexity of later abortions.”¹⁹ This is because later-term abortions require dilation of the cervix to a greater degree, and the increased blood flow predisposes women to hemorrhage, and the myometrium relaxes and is more subject to perforation.²⁰

Later-term abortions also pose an increased risk to the woman’s physical and mental health. Some immediate complications from abortion include blood clots, hemorrhaging, incomplete abortions, infection, and injury to the cervix and other organs.²¹ Immediate complications affect approximately 10% of women undergoing abortion, and approximately one-fifth of these complications are life-threatening.²² If Nebraskans pass the PRA initiative and authorize abortion-on-demand, more women will experience life-threatening complications from late-term abortions.

b. The PRA Initiative Subjects Preborn Children to Painful Abortion Procedures.

In addition to harming women’s physical and mental health, abortion also subjects preborn children to fetal pain. There is ample research on fetal pain in the 50 years after *Roe*. As one example, in 2019, scientists found evidence of fetal pain as early as 12 weeks’ gestation.²³ A 2010 study found that “the earlier infants are delivered, the stronger their response to pain”²⁴ because the “neural mechanisms that inhibit pain sensations do not begin to develop until 34–36 weeks[] and are not complete until a significant time after birth.”²⁵ As a result, preborn children display a “hyperresponsiveness” to pain.²⁶ According

¹⁶ See Planned Parenthood, *How Safe Is an In-Clinic Abortion?*, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion> (last visited Apr. 29, 2024).

¹⁷ Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004).

¹⁸ *Id.* at 731; Pro. Ethics Comm. of Am. Assoc. of Pro-Life Obstetricians & Gynecologists, *Induced Abortion & the Increased Risk of Maternal Mortality*, Comm. Op. 6 (Aug. 13, 2019).

¹⁹ Bartlett, *supra* note 17, at 735.

²⁰ *Id.*

²¹ See Planned Parenthood, *supra* note 16.

²² REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 48 (2005).

²³ Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. MED. ETHICS 3 (2020).

²⁴ Lina K. Badr et al., *Determinants of Premature Infant Pain Responses to Heel Sticks*, 36 PEDIATRIC NURSING 129 (2010).

²⁵ *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INST. (Sept. 2022), https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/#_ednref14.

²⁶ CHRISTINE GRECO & SOORENA KHOJASTEH, PEDIATRIC, INFANT, AND FETAL PAIN *in* CASE STUDIES IN PAIN MANAGEMENT 379 (2014).

to one group of fetal surgery experts, “[t]he administration of anesthesia directly to the fetus is critical in open fetal surgery procedures.”²⁷

Given the medical advancements in fetal medicine and the evidence of fetal pain early in a pregnancy, it is well within the state’s legitimate interests to enact laws that preserve prenatal life as well as minimize fetal pain as much as possible.²⁸ Accordingly, Nebraska prohibits various abortion procedures such as dismemberment²⁹ and Intact Dilation and Extraction (partial-birth abortions).³⁰ However, the PRA initiative will make it difficult for Nebraska to maintain these restrictions to the extent that they are deemed by abortion activists to be hampering a women’s “right” to abortion under the state constitution, even though such laws further the state’s legitimate interest to preserve prenatal life and mitigate fetal pain. Given the PRA initiative’s expansive definition of “health,” one can expect existing protections for the woman and the child to be challenged and removed.

c. The PRA Initiative’s Viability Definition Imposes a Vague Standard that Will Shift in Favor of Abortion.

The PRA initiative theoretically gives the state of Nebraska the authority to regulate abortion after viability. Yet, it interprets viability in such a way as to maximize the number of abortions. The PRA initiative defines viability as “the point in a pregnancy when, in the professional judgment of the pregnant patient’s treating physician, the fetus has a significant likelihood of survival outside the uterus without the application of extraordinary measures.”³¹ Prior to *Roe v. Wade*, a viable pregnancy simply “meant a pregnancy that was progressing.”³² However, the Supreme Court justices in *Roe* “defined ‘viability,’ for the purposes of abortion law, as the ability of the unborn child to survive outside the mother’s womb. In that sense, viability in 1973 was thought to generally occur at twenty-eight weeks of pregnancy.”³³ Today, given the advancements in medical technology, viability is generally understood to be around 22–23 weeks gestation.³⁴ The world’s youngest premature child to survive, Curtis Means, was born even earlier at 21 weeks and one day.³⁵ A recent study of premature babies in the United States shows that “[s]urvival among actively treated infants [is] 30.0% . . . at 22 weeks and 55.8% . . . at 23 weeks.”³⁶ As medical technology advances, it is likely preborn babies will survive at even earlier gestations with medical intervention.

²⁷ Maria J. Mayorga-Buiza et al., *Management of Fetal Pain During Invasive Fetal Procedures. Lessons Learned from a Sentinel Event*, 31 EUROPEAN J. ANAESTHESIOLOGY 188 (2014).

²⁸ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

²⁹ Neb. Rev. Stat. § 28-347.

³⁰ *Id.* at § 28-328.

³¹ Protect the Right to Abortion - Constitutional Initiative (Neb. 2024).

³² CLARKE FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* 8 (2013).

³³ *Id.*

³⁴ Noelle Younge, et al., *Survival and Neurodevelopmental Outcomes among Periviable Infants*, 7 NEW ENG. J. MED. 617, 617-28 (2017).

³⁵ *Alabama Boy Certified as World’s Most Premature Baby*, BBC (Nov. 11, 2021), <https://www.bbc.com/news/world-us-canada-59243796>.

³⁶ Edward F. Bell et al., *Mortality, In-Hospital Morbidity, Care Practices, and 2-Year Outcomes for Extremely Preterm Infants in the US, 2013–2018*, 327 JAMA 248, 248 (Jan. 18, 2022).

Despite advancements in medical technology that allow for preborn children to survive outside the womb as early as 21 weeks gestation, the PRA initiative's definition of viability applies only to fetuses who "ha[ve] a significant likelihood of survival outside the uterus without the application of extraordinary measures."³⁷ In other words, under the PRA initiative, abortionists may disregard medical interventions that ensure survival of 94.0% of babies born prematurely at 28 weeks³⁸ when making their "professional judgment" as to whether a child is viable. On top of that, the very nature of the abortionist's occupation is such that he is primarily concerned not with keeping the preborn child alive, but with ending the preborn child's life. This bias inherently favors an abortion and colors an abortionist's "professional judgment" when it comes to determining viability.

Nebraska currently requires physicians to take "all reasonable steps, in accordance with the sound medical judgment of the attending physician," to preserve the life of any child "born alive."³⁹ A child is "born alive" if he or she is completely expelled or extracted from the mother's womb,

irrespective of the duration of the pregnancy and after such expulsion or extraction such child breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles whether or not the umbilical cord has been cut or the placenta is attached.⁴⁰

This language shows that Nebraska is fully aware that many more newborn children will be viable should there be a concerted effort to care for them.

However, the PRA initiative's definition of viability allows abortionists to entirely usurp Nebraska's ability to regulate abortion after viability because 1) the question of whether a baby is viable is left up to the abortionist's implicitly pro-abortion judgment, and 2) even if a preborn baby will be viable with medical intervention, the abortionist is free to disregard that factor. This standard is so vague and unworkable that Nebraska will have extreme difficulty enacting or maintaining any laws that regulate abortion after viability.

II. The PRA Initiative Leads to the Elimination of Protections for Women, Adolescents, and Preborn Children, and Impedes the State's Ability to Enact Future Safeguards.

The PRA initiative's passage places protections for women, adolescents, and their preborn child at risk of being challenged in court or being removed by the legislature. Nebraska has several life-affirming laws, including the following:

³⁷ Protect the Right to Abortion - Constitutional Initiative (Neb. 2024).

³⁸ Bell, *supra* note 36.

³⁹ Neb. Rev. Stat. § 28-331.

⁴⁰ *Id.*

1. a comprehensive informed consent process that ensures abortionists inform women of the risks of abortion as well as available alternatives, and gives women a 24-hour reflection period;⁴¹
2. parental consent laws;⁴²
3. ban on dismemberment⁴³ and partial-birth abortions;⁴⁴
4. abortion reporting laws that require abortionists to report necessary data, such as the number of abortion complications;⁴⁵
5. conscience protections for persons who refuse to participate in an abortion;⁴⁶
6. protections for infants born alive after an attempted abortion;⁴⁷ and
7. criminalization of abortions performed by non-physicians and requiring the physician to be physically present in the same room as the patient.⁴⁸

These laws serve to protect women and adolescents from the inherent harms of abortion, as well as protect preborn children. However, all of these laws are subject to attack if Nebraska voters put the PRA initiative on the ballot and pass the measure. With protection for abortion enshrined in Nebraska’s constitution, abortion activists may—and likely will—argue that the state’s existing safeguards “burden” or “interfere with” a woman’s “right” to abortion pursuant to the constitutional amendment, leading to legislative repeal or judicial injunction.

III. The PRA Initiative Threatens Nebraska’s Parental Involvement Laws.

The elimination of Nebraska’s existing protections is particularly hazardous for adolescents. The PRA initiative’s passage may lead to the elimination of Nebraska’s parental consent law, which says that “no person shall perform an abortion upon a pregnant woman unless, in the case of a woman who is less than eighteen years of age, he or she first obtains the notarized written consent of both the pregnant woman and one of her parents or legal guardian....”⁴⁹ Parental involvement laws recognize the fundamental rights of parents to make healthcare decisions for and with their children. These laws also protect the physiological and emotional wellbeing of children who, with developing decision-making capabilities and facing the stress and uncertainty of an unexpected pregnancy, need love and guidance from the people who care about them most, not the “quick fix” of a secret or coerced abortion.

Parents can help their daughters understand the physical and psychological risks of undergoing an abortion, and they usually possess information essential to a physician’s

⁴¹ *Id.* at § 28-327.

⁴² *Id.* at §§ 28-327.09, 71-6902.

⁴³ *Id.* at § 28-347.

⁴⁴ *Id.* at § 28-328

⁴⁵ *Id.* at §§ 28-343, 28-3,107.

⁴⁶ *Id.* at § 28-338.

⁴⁷ *Id.* at §§ 28-342 (sale and transfer for the experimentation purposes), § 28-346 (experimentation), and § 28-331 (requires life-saving treatment).

⁴⁸ *Id.* at § 28-335.

⁴⁹ *Id.* at § 71-6902.

exercise of his or her best medical judgment concerning the minor. Additionally, if parents are aware that their daughter has obtained an abortion, they may better ensure she receives the best post-abortion medical attention, especially if the minor suffers post-abortive complications. Due to their developing bodies, adolescent girls have a “biological predisposition for high-risk pregnancies.”⁵⁰ The high-risk nature of adolescent pregnancy is compounded by the fact that pregnant adolescent patients often delay care.⁵¹ Pregnant adolescent girls delay care for multiple reasons, such as “lack of knowledge about the importance of prenatal care and lack of understanding of the consequences of its absence; history as a victim of violence, desire to hide pregnancy, fear of potential apprehension of the baby, contemplation of abortion services . . .”⁵² Delay of care may also lead adolescents to seek an abortion when they are farther along in their pregnancies, which subjects them to increased risks of health complications.

Nebraska’s current parental notification laws respond to the need to protect the welfare and safety of adolescents by ensuring that abortionists notify parents of their daughter’s desire to obtain an abortion. This ensures pregnant adolescents receive proper and prompt care. If Nebraska voters approve the PRA initiative, such laws will be in the crosshairs of abortion activists and likely to be challenged and removed.

IV. The PRA Initiative Enables Sex-traffickers and Abusers to Coerce Victims into Having Abortions Against their Will.

If Nebraskans enshrine a right to abortion in their state constitution, more women and adolescents will be subject to coercive abuse. Nebraska law currently prohibits coerced abortions⁵³ and requires an abortionist to notify the woman that “she cannot be forced or required by anyone to have an abortion and is free to withhold or withdraw her consent for an abortion.”⁵⁴ Moreover, at least one hour before the abortion, “a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker...or a professional counselor” must have “evaluated the pregnant woman to identify if the pregnant woman had the perception of feeling pressured or coerced into seeking or consenting to an abortion.”⁵⁵ The PRA initiative, however, may lead to abortion activists challenging and eliminating laws that protect against coerced abortions on the grounds that such laws frustrate abortion access—a similar pretext abortion activists use against parental consent laws. In that sense, the PRA initiative strips Nebraskan women of the necessary safeguards to ensure that they can exercise authentic choice. This raises serious concerns for women’s health and safety as coerced abortions are not a trivial issue.

⁵⁰ Nadia Akseer et al., *Characteristics and Birth Outcomes of Pregnant Adolescents Compared to Older Women: An Analysis of Individual Level Data from 140,000 Mothers from 20 RCTs*, ECLINICALMED., Feb. 26, 2022, at 1, 3.

⁵¹ Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 743 (2015).

⁵² *Id.*

⁵³ Neb. Rev. Stat. § 71-6902.02.

⁵⁴ *Id.* at § 28-327.

⁵⁵ *Id.*

For example, a woman seeking an abortion may be facing intimate partner violence (IPV). There are “[h]igh rates of physical, sexual, and emotional IPV . . . among women seeking a[n] abortion.”⁵⁶ For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.⁵⁷ Post-abortive IPV victims also have a “significant association” with “psychosocial problems including depression, suicidal ideation, stress, and disturbing thoughts.”⁵⁸

Similarly, intimate partners, family members, and sex traffickers may be asserting reproductive control over the woman, which are “actions that interfere with a woman’s reproductive intentions.”⁵⁹ In the context of abortion, reproductive control not only produces coerced abortions or continued pregnancies, but it also affects whether the pregnancy was intended in the first place.⁶⁰ Reproductive control is a prevalent issue for women. “As many as one-quarter of women of reproductive age attending for sexual and reproductive health services give a history of ever having suffered [reproductive control].”⁶¹

There are several studies that highlight the prevalence of coerced abortions. A recent peer-reviewed study showed that 43% of post-abortive women described their abortion as “accepted but inconsistent with their values and preferences,” while 24% indicated their abortion was “unwanted or coerced.”⁶² Similarly, another study found that 61% of women reported experiencing “high levels of pressure” to abort from “male partners, family members, other persons, financial concerns, and other circumstances.”⁶³ This study found that:

These pressures [to abort] . . . are strongly associated with more negative emotions about [a woman’s] abortion; more disruptions of their daily life, work, or relationships; more frequent . . . intrusive thoughts about their abortions; more frequent feelings of loss, grief, or sadness about their abortion; . . . [and] a perceived decline in their overall mental health that they attribute to their abortions⁶⁴

Furthermore, victims of sex-trafficking are among the number of women who experience reproductive control. A 2014 study on the health consequences for sex-trafficking victims found that 66 sex-trafficking victims had a total of 114 abortions,

⁵⁶ Megan Hall et al., *Associations Between Intimate Partner Violence and Termination of Pregnancy: A Systematic Review and Meta-Analysis*, 11 PLOS MED. 1, 15 (Jan. 2014).

⁵⁷ Comm. on Health Care for Underserved Women, Reproductive and Sexual Coercion, Comm. Op. No. 554, at 2 (Feb. 2013).

⁵⁸ Hall, *supra* note 56, at 11.

⁵⁹ Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ SEXUAL & REPROD. HEALTH 61, 62, 65 (2019).

⁶⁰ *Id.* at 62–63.

⁶¹ *Id.* at 62.

⁶² David C. Reardon et al., *The Effects of Abortion Decision Rightness and Decision Type on Women’s Satisfaction and Mental Health*, CUREUS, May 11, 2023, at 1.

⁶³ David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women’s Emotional Responses and Mental Health*, CUREUS, Jan. 31, 2023, at 1.

⁶⁴ *Id.* at 1.

“[w]ithout accounting for possible underreporting.”⁶⁵ “The [sex-trafficking] survivors in this study [] reported that they often did not freely choose the abortions they had while being trafficked.”⁶⁶ A majority of the 66 sex-trafficking victims “indicated that one or more of their abortions was at least partly forced upon them.”⁶⁷ Given the prevalence of coerced abortions among sex-trafficking victims, the authors of the study note how “[h]ealthcare providers can play a crucial role in the trafficking rescue process by identifying possible victims and following up on those suspicions with careful, strategic questions, and actions that catalyze rescue or help create exist strategies.”⁶⁸

If Nebraskans pass the PRA initiative, abortion activists may seek to challenge and eliminate critical protections for women experiencing IPV or reproductive control. They may also challenge any attempt to enact new laws to protect against coercive abuse, arguing that such laws create “barriers” to abortion. Removing protections against coerced abortions incentivizes abusers to continue forcing women to obtain abortions in order to cover up their violent acts, leaving women unprotected, victimized, and silenced.

V. The PRA Initiative Furthers the False Narrative that Abortion is Necessary for Women s Equality in American Society.

By purporting that there should be and is a “right” to abortion on demand, the PRA initiative furthers the narrative that women need abortion in order to secure socioeconomic success and equality in American society. This belief is unfounded and harms women. First, the language used in the PRA initiative is deceptive and does not describe the reality of what abortion is. Elective abortion is not healthcare. It is the intentional destruction of innocent human life. According to the American Association of Pro-life Obstetricians and Gynecologists (“AAPLOG”), “elective abortion is defined as those drugs or procedures used with the primary intent to end the life of the human being in the womb.”⁶⁹ Elective abortions are not medically required, as AAPLOG explains, “[e]lective . . . refers to inductions done in the absence of some condition of the mother or the fetus which requires separation of the two in order to protect the life of one or the other (or both).”⁷⁰ Indeed, “there is no medical indication for elective induced abortion, since it cures no medical disease.”⁷¹

Additionally, abortion activists often imply that pregnancy is some sort of illness or disability, rather than a natural, physiological process that many women experience. As AAPLOG notes, “[p]regnancy is not a disease, and the killing of human beings in utero is not

⁶⁵ Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 ANNALS HEALTH L. 61, 73 (2014).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 84.

⁶⁹ AAPLOG Statement: Clarification of Abortion Restrictions, AM. ASS’N PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (July 14, 2022), <https://aaplog.org/aaplog-statement-clarification-of-abortion-restrictions/>.

⁷⁰ Rsch. Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, Concluding Pregnancy Ethically, Prac. Guideline No. 10, at 5 (Aug. 2022).

⁷¹ Pro. Ethics Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, Hippocratic Objection to Killing Human Beings in Medical Practice, Comm. Op. No. 1, at 8 (May 8, 2017).

medical care.”⁷² Despite these evident truths, abortion activists continue to push forth false narratives about pregnancy and women’s alleged “need” for abortion. However, the evidence abortion activists rely upon, which “claim[s] to show that abortion has facilitated women’s health and equality is feeble and/or scientifically invalid.”⁷³ Indeed, women are harmed by “the repetition and acceptance of the ‘equality’ argument for favoring legal abortion,” because it “easily communicates that women’s pregnancy and parenting is a disability most females suffer. It explicitly or implicitly assumes that the male body and reproductive model is the norm, to which women should conform in order to achieve ‘agreed’ measures of success—good, well-paying employment outside of the home.”⁷⁴

Pregnancy is neither an illness nor a disability and to imply that it is such results in discriminatory treatment towards women. “A system that undervalues both mothering and fathering severely disadvantages women as well as men and children, and interferes with children receiving the care they require.”⁷⁵ Additionally, this leads to both a “public and private resistance to accommodating motherhood in employment,” which “leads to additional disadvantages for women.”⁷⁶ “For example, discrimination on the basis of pregnancy and motherhood has succeeded outright discrimination on the basis of sex.”⁷⁷

Women deserve better than to have the abortion industry subject them to deceptive language surrounding abortion, which is a life-altering—and at times, life-threatening—decision. The PRA Initiative furthers the abortion industry’s false narratives and efforts to mask the realities of abortion, which is to the detriment of women’s health, safety, and success and equality in America.

B. “Protect Women and Children” Initiative

In addition to the PRA initiative, Nebraskans may face another ballot question in November. The “Protect Women and Children” (PWC) initiative states that, absent several exceptions, “unborn children shall be protected from abortion in the second and third trimesters.”⁷⁸ Contrary to the PRA initiative, the PWC initiative would ensure constitutional protection of preborn life after 12 weeks’ gestation, allows the Nebraska legislature the opportunity to enact protections for life in the first trimester, is consistent with the majority of American’s views on abortion, protects the welfare of pregnant women and adolescents in Nebraska, and includes exceptions that addresses abortion concerns.

⁷² *Id.*

⁷³ Helen M. Alvare, *Nearly 50 Years Post-Roe v. Wade and Nearing its End: What is the Evidence that Abortion Advances Women’s Health and Equality*, 35 REGENT L. R. 165, 216 (Feb, 2022).

⁷⁴ *Id.* at 213.

⁷⁵ *Id.* at 214.

⁷⁶ *Id.* at 214.

⁷⁷ *Id.* at 216.

⁷⁸ Protect Women and Children - Constitutional Amendment (Neb. 2024).

I. The PWC Initiative Ensures Protections for Preborn Life after 12 Weeks Gestation.

The PWC initiative seeks to safeguard preborn children from abortion violence by explicitly affording constitutional protection to preborn children in the second and third trimesters. As discussed in Section A (I)(b), preborn children can experience fetal pain as early as 12 weeks gestation.⁷⁹ “Pain receptors (nociceptors) begin forming at seven weeks’ gestational age, with the nerves linking pain receptors to the pain-sensing part of the brain, the thalamus, forming at 12 weeks.”⁸⁰ Furthermore, by 12 weeks’ gestation a preborn baby has almost every organ and tissue formed⁸¹ and has arms, legs, fingers, toes, a face, and eyelids.⁸² The preborn baby is beginning to form unique fingerprints,⁸³ is able to suck his or her thumb,⁸⁴ and has a fully developed heart.⁸⁵ Under the PWC initiative, the lives of these viable preborn children who can feel pain will be safeguarded from late-term abortions. In doing so, the PWC initiative recognizes the humanity of preborn children and protects them from abortion violence.

The PWC initiative is also consistent with Nebraska’s current law, which limits abortions after 12 weeks’ gestation.⁸⁶ Both the PWC initiative and Nebraska’s current law allow for exceptions when there is a medical emergency and in cases of rape or incest. A constitutional amendment safeguarding preborn life in the second and third trimester affords more secure protection that cannot be repealed by the legislature. Ultimately, the PWC initiative permanently protects Nebraska’s unborn from partial-birth abortion and other horrific late-term abortion practices.

II. The PWC Initiative Does Not Preclude Future Protections for Life at Earlier Gestations

If Nebraskans place the PWC initiative on the ballot and approve the measure, the state legislature will still have authority to enact additional protections for life in the first trimester. One might argue that the PWC initiative is simply following the ruling of *Roe v. Wade*, especially as it adopts a trimester-based framework. But unlike *Roe*, the PWC initiative does not say that the state must refrain from restricting abortions within the first trimester. Contrary to the PRA initiative, the PWC initiative preserves Nebraska’s ability to do such

⁷⁹ Derbyshire & Bockmann, *supra* note 23 at 3.

⁸⁰ *12 Facts at 12 Weeks*, CHARLOTTE LOZIER INST. (Apr. 25, 2023), <https://lozierinstitute.org/12-facts-at-12-weeks/>.

⁸¹ Thomas Sadler, *MEDICAL EMBRYOLOGY* 14th ed. (2019).

⁸² *Carnegie Stage 23 Introduction*, VIRTUAL HUM. EMBRYO: DIGITALLY REPRODUCED EMBRYONIC MORPHOLOGY, <https://www.ehd.org/virtual-human-embryo/intro.php?stage=23> (last visited Apr. 25, 2024).

⁸³ J. W. Babler, *Embryologic Development of Epidermal Ridges and Their Configurations*, 27 *BIRTH DEFECTS ORIGINAL ARTICLE SERIES* 95, 95-112 (1991).

⁸⁴ See Peter Hepper et al., *Prenatal Thumb Sucking Is Related to Postnatal Handedness*, 43 *NEUROPSYCHOLOGIA* 313 (JAN. 2005).

⁸⁵ See M. A. Hill, *Cardiovascular System Development*, *EMBRYOLOGY* (Apr. 26, 2024), https://embryology.med.unsw.edu.au/embryology/index.php/Cardiovascular_System_Development.

⁸⁶ Neb. Rev. Stat. § 79-6912 *et seq.*

things as ensure parents are involved in their minor daughter's lives, ensure abortion procedures meet health and safety requirements, and protect against coerced abortions and sex trafficking.

When the Supreme Court in *Dobbs v. Jackson Women's Health Organization* overturned *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and returned the abortion issue to the people and their elected representatives, the Court opened the door for individual states to amend their state constitutions to reimpose *Roe* and *Casey's* regime within their borders. However, by putting forth constitutional amendments that authorize abortion-on-demand throughout all nine months of pregnancy, abortion activists seek to go well beyond the overruled decisions of *Roe* and *Casey*. The PWC initiative, on the other hand, offers the people of Nebraska a chance to fight to maintain and strengthen protections for preborn life within the first trimester. Should Nebraskans pass the PWC initiative, and the state constitution amended accordingly, the state legislature would be allowed to continue its work to address the serious concerns raised by abortion instead of having its hands tied.

III. The PWC Initiative is Consistent with the Majority of American's Views on Abortion.

Across America, abortion activists are seeking to enact laws or amend state constitutions to allow for abortions up until a baby's birthdate, *e.g.* the PRA initiative. Both Michigan and Ohio residents recently voted for constitutional amendments that authorize abortion-on-demand throughout all nine months of pregnancy. Similarly, states like Maine have passed legislation broadening their abortion laws to allow for abortions up until birth as long as an abortionist deems it "necessary." Yet, neither the recent pro-abortion ballot initiatives nor pro-abortion legislation authorizing abortion-on-demand represent the views of most Americans. In fact, A 2023 poll found that 66% of Americans believe that there should be some limitations on abortion.⁸⁷

The PWC initiative is consistent with the majority of American's views on abortion. By voting in favor of the PWC initiative, Nebraskans are affirming their stance that they will not abandon women and preborn children to the harms of late-term abortions like many other states have. By protecting against abortions in the second and third trimester, the PWC initiative not only safeguards preborn children from barbaric and gruesome abortion procedures as discussed above in Section B (I) but it also safeguards the welfare of women.⁸⁸

IV. The PWC Initiative Protects Maternal Health and Safety.

The Supreme Court in *Dobbs* held that states have a legitimate interest in "the protection of maternal health and safety."⁸⁹ Abortion threatens women's health and safety by subjecting them to grave health risks. In efforts to protect pregnant women and

⁸⁷ See *Americans' Opinions on Abortion*, KNIGHTS COLUMBUS 14 (Jan. 18, 2024), <https://www.kofc.org/en/resources/communications/polls/marist-poll-results2024.pdf>.

⁸⁸ See *supra* Section B (I).

⁸⁹ See *Dobbs*, 142 S. Ct. at 2284.

adolescents against such harm, the PWC initiative prohibits later-term abortions. Late-term abortion carries higher risks of health complications, as discussed in Section A (I)(a). Additionally, abortion negatively impacts women’s mental wellbeing, as shown by numerous studies.

[P]regnancy loss (natural or induced) is associated with an increased risk of mental health problems.”⁹⁰ Research on mental health subsequent to early pregnancy loss as a result of elective induced abortions has historically been polarized, but recent research indicates an increased correlation to the genesis or exacerbation of substance abuse and affective disorders including suicidal ideation.”⁹¹

Scholarship shows that the emotional reaction or grief experience related to miscarriage and abortion can be prolonged, afflict mental health, and/or impact intimate or parental relationships.”⁹² In fact, a recent 2023 study found that American women whose first pregnancy ends in induced abortion are significantly more likely than women whose first pregnancy ends in a live birth to experience mental health problems throughout their reproductive years.”⁹³ Similarly, [s]everal recent international studies have demonstrated that repetitive early pregnancy loss, including both miscarriage and induced abortions, is associated with increased levels of distress, depression, anxiety, and reduced quality of life scores in social and mental health categories.”⁹⁴ Notably, “[t]o date, the medical literature offers no support for the claim that abortion improves mental health or offers protection to mental health.”⁹⁵

In sum, abortion already takes a severe physical and emotional toll on women. However, later-term abortions exacerbate the physical and psychological trauma a woman may experience. The PWC initiative seeks to safeguard pregnant women and adolescents from this abortion violence. In doing so, the initiative affirms the state’s interest in protecting the welfare of pregnant women and adolescents.

⁹⁰ David C. Reardon & Christopher Craver, *Effects of Pregnancy Loss on Subsequent Postpartum Mental Health: A Prospective Longitudinal Cohort Study*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 1, 1 (2021).

⁹¹ Kathryn R. Grauerholz et al. *Uncovering Prolonged Grief Reactions Subsequent to a Reproductive Loss: Implications for the Primary Care Provider*, 12 FRONTIERS IN PSYCH. 1, 2 (2021).

⁹² *Id.*

⁹³ James Studnicki et al., *A Cohort Study of Mental Health Services Utilization Following a First Pregnancy Abortion or Birth*, 15 INT’L J. WOMEN’S HEALTH 955, 959 (2023).

⁹⁴ Grauerholz, *supra* note 91; see, e.g., Louis Jacob et al., *Association Between Induced Abortion, Spontaneous Abortion, and Infertility Respectively and the Risk of Psychiatric Disorders in 57,770 Women Followed in Gynecological Practices in Germany*, 251 J. AFFECTIVE DISORDERS 107, 111 (2019) (finding “[a] positive relationship between induced abortion . . . and psychiatric disorders”).

⁹⁵ Rsch. Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *supra* note 70, at 5.

V. The PWC Initiative's Exceptions Address Abortion Concerns.

The PWC initiative offers two exceptions for abortion in the second and third trimester for pregnant women and adolescents in difficult or life-threatening situations: “when a woman seeks an abortion necessitated by a medical emergency,” and “when the pregnancy results from sexual assault or incest.”⁹⁶ In doing so, the PWC initiative addresses the main arguments abortion-activists use to promote the PRA initiative. In reality, the PRA initiative does not actually provide protection for pregnant women experiencing a life-threatening medical emergency or pregnancy resulting from rape or incest. Instead, the PRA initiative uses the fear of those situations to create a broad and expansive allowance to terminate human life in the womb, while the PWC initiative addresses those situations head on. Ultimately, the PRA initiative allows for all preborn life to be terminated for the sake of those in difficult circumstances. Conversely, the PWC initiative addresses the difficult circumstances so that many might live.

Conclusion

Depending on which, if any, initiative voters approve of, Nebraska’s legal and cultural makeup could look drastically different. While both initiatives seek to protect what their respective proponents would consider a fundamental right, the interests the two initiatives seek to protect are in direct conflict with one another. The PRA initiative seeks to protect the purported “right” to unfettered abortion access throughout all nine months of pregnancy, while the PWC initiative seeks to protect the basic human right to life of preborn children in the second and third trimester. In other words, the PRA initiative seeks to contrive an unfettered “right” to terminate human life in the womb in Nebraska’s state constitution whereas the PWC initiative seeks to protect women, children, and the preborn from abortion violence.

The two initiatives would also have different impacts on Nebraska’s current legal landscape, which includes numerous life-affirming protections for preborn children and women seeking abortions. The PRA initiative would significantly change the state’s legal makeup by threatening the existence of current life-affirming protections as well as impeding the state’s ability to enact any future protections. The PWC initiative would have the opposite effect. The PWC initiative would implement constitutional protections that are consistent with Nebraska’s existing laws as well as leave the door open for the legislature to implement further safeguards for women and preborn children in the first trimester.

In effect, the PRA initiative would abandon both women and preborn children to an unregulated abortion regime that would subject its residents to widespread abortion violence. The PWC initiative, on the other hand, would ensure that there are necessary constitutional safeguards in place to protect women and preborn children from the harms of abortion, recognizing the human dignity of both the mother and the child in her womb.

⁹⁶ Protect Women and Children - Constitutional Amendment (Neb. 2024).