



Constitutional Crisis in Arkansas: The Legal and Policy Implications of Enshrining a Right to Abortion in Arkansas’s Constitution

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Introduction

The pro-life movement has accomplished many victories in the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,³ while also facing new challenges. Now that the Supreme Court has overturned *Roe v. Wade*⁴ and returned the abortion issue to the democratic process, abortion activists have sought to enshrine a “right” to abortion in state constitutions across the country. These efforts pose a serious threat to pro-life laws and the protection of preborn human beings, women, and young girls. Michigan is a harrowing example of the impact of abortion ballot measures on life-affirming policies. Last year, Michigan residents voted to enshrine a “right” to abortion in their state constitution. Since then, the legislature has sought to repeal numerous protections for women and preborn children, including the state’s ban on partial-birth abortions, informed consent safeguards, and provisions requiring abortion facilities to be licensed and operated under necessary health and safety standards.

This November, citizens of Arkansas may face a similar ballot initiative entitled, the “Arkansas Abortion Amendment of 2024” (a.k.a. “Amendment”). If passed, the ballot initiative would amend the Arkansas constitution to say the state “shall not prohibit, penalize, delay, or restrict abortion services within 18 weeks of fertilization” and the state, at any point in the development on the child, “shall not prohibit, penalize, delay, or restrict abortion services in cases of rape, in cases of incest, in the event of fatal fetal anomaly, or when, in a physician’s good-faith medical judgement, abortion services are needed to protect a pregnant female’s life or to protect a pregnant female from a physical disorder, physical illness, or physical injury.”⁵ This language essentially prohibits Arkansas from protecting life in the womb prior to five months for most children and at no point children unfortunate enough to fall into a listed category. This is a drastic reversal from existing law. Arkansas’s current law, the Human Life Protection Act, protects all human beings in the womb “except to save the life of a pregnant women in a medical emergency.”⁶ The Amendment, if passed, would drastically change the face of life in Arkansas.

Arkansas is currently the safest state in the nation for children in the womb. The Amendment would place Arkansas in the company of such nations as China, North Korea, and the handful of other nations who do not protect life at or prior to three months. It is explicit in stating that Arkansas’s hands would be tied until six months, and then, the state would only be allowed to protect those lives the Amendment declares

³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵ The Arkansas Abortion Amendment of 2024.

⁶ ARK. CODE ANN. § 5-61-304 (2024).

as being worth saving. Even then, the Amendment sets several arbitrary and vague standards as to when the state can and can't regulate abortion. Such as, cases of rape, incest, fatal fetal anomaly, or when a physician decides abortion is necessary to protect the pregnant patients life and physical health.⁷ The amendment defines fatal fetal anomaly as deciding before birth "in a physician's good-faith medical judgment, [that continued pregnancy] will lead to fetal or neonatal death and for which life-saving medical intervention would be futile."⁸ In other words, the Amendment would make allowance for a physician to terminate a child because the baby may lack a likelihood of survival. This standard is too vague and does not allow the baby to have a fighting chance. This will increasingly become a problem as medicine advances, making this a very dangerous standard to enshrine into the Arkansas constitution.

Despite some of the vague standards, the Amendment's purpose is straightforward – Arkansas cannot protect life in the womb in any way until that child has reached six months. Furthermore, the Amendment does not hide behind a veil of misleading phrasing of this amendment to make it appear as though Arkansas currently restricts or is attempting to restrict individuals from making decisions about contraception, fertility treatment, miscarriage treatment, or "continuing one's own pregnancy," as individuals in Arkansas can freely obtain fertility and miscarriage treatments, or contraception. The Amendment's sole intent, as it is written, is to ensure the state of Arkansas cannot prohibit the intentional taking of human life in the womb.

Although the language in the amendment tries to obfuscate the definition of abortion as healthcare, it fails immediately. Abortion services is defined as "medical interventions provided to pregnant females to end the medical condition of pregnancy but do not include accidental or unintentional injury or death of an embryo or fetus prior to birth."⁹ A child cannot be both an embryo (or fetus) when the injury or death is unintentional, but only a medical condition of pregnancy when the death is intentional. In both cases, the death or injury is that of a human being. The difference is the intent. The Amendment itself makes it clear that abortion is not healthcare as discussed below in Section V. It is the intentional destruction of innocent preborn human life. Additionally, as the Supreme Court acknowledges in *Dobbs v. Jackson Women's Health Organization*, states have a legitimate interest in preserving prenatal life, mitigating fetal pain, and protecting maternal health.¹⁰ Thus, Arkansas can regulate abortion in furtherance of these important interests.

However, if the Amendment passes in Arkansas, the amendment's fallout will be devastating, especially for the welfare of Arkansas women and their preborn children. The Amendment authorizes abortion-on-demand through five months of pregnancy (and through nine months in some cases), threatens to eliminate protections for women's welfare and parental involvement laws, gives abortionists free rein to operate

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Dobbs*, 142 S. Ct. at 2284.

clinics without health and safety regulations, increases the number of coerced abortions in Arkansas, furthers the harmful and false narrative that abortion is necessary for women to have equality and success in America, and attempts to silence the voices of women harmed by abortion.¹¹ The Amendment allows abortion activists to turn the life-affirming state of Arkansas into an abortion destination that endangers the health and safety of its residents both inside and outside the womb.

I. The Amendment Authorizes Abortion-on-Demand Through Five Months of Pregnancy (and Throughout in Some Cases).

Passage of the Amendment will effectuate abortion-on-demand without limitation through five months. In context, the Amendment would legalize well over 95% of abortions in Arkansas – for any reasons.¹²

Although the proposed amendment includes language that seemingly allows Arkansas to prohibit abortion in the remaining cases after six months, it allows for several specified exceptions: “in cases of rape, in cases of incest, in the event of a fatal fetal anomaly, or when, in a physician’s good-faith medical judgment, abortion services are needed to protect a pregnant female’s life or to protect a pregnant female from a physical disorder, physical illness, or physical injury.”¹³ This language not only contradicts Arkansas’s current law, but it also imposes a vague, arbitrary standard for determining if a preborn child can survive outside the womb. The last two exceptions, fatal fetal anomaly and protecting the pregnant women’s life are incredibly subjective. This means different doctors will react differently in the same circumstance. They are also incredibly broad, giving the physician plenty of leeway to terminate a child in the sixth, seventh, eighth, or ninth month rather than deliver or separate the child from the mother.

Fatal fetal anomaly as defined by the initiative is “a medical condition diagnosed before birth that, in a physician’s good-faith medical judgment, will lead to fetal or neonatal death and for which life-saving medical intervention would be futile.”¹⁴ The abortionist here, is granted leave to decide the baby, for whatever reason, is incompatible with life outside the womb without an unspecified amount of medical intervention, and that is enough to terminate at any point, including in the ninth month. By including a gestational limit before which the state cannot act, life and physical health exceptions (including neurological), and fatal fetal anomaly exceptions. Conversely, Arkansas’s current law sets out that “[a] person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.”¹⁵ This language of the Amendment will expand seemingly limited

¹¹ “All provisions of the Constitution, statutes, and common law of this State to the extent inconsistent or in conflict with any provision of the Amendment are expressly null and void.”

¹² James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Apr. 9, 2019, at 1, 1.

¹³ The Arkansas Abortion Amendment of 2024.

¹⁴ The Arkansas Abortion Amendment of 2024.

¹⁵ ARK. CODE ANN. § 5-61-304 (2024).

exceptions to be broader and more encompassing than it appears to be. This Amendment, as written, is intended to provide an unlimited ability to terminate children in the womb through five months and a pathway for abortions at and past six months.

Even in the five months, it is helpful to note “that 95 percent of abortions are for elective or unspecified reasons.”¹⁶ Those reasons include “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.”¹⁷ 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 likely the Amendment’s exceptions are only the beginning of allowing late-term abortions. These exceptions are putting more women at risk of suffering severe and life-threatening complications, as well as subjecting her preborn child 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. The amendment flips Arkansas’s hard-earned pro-life culture on its head, enshrining abortion into their constitution.

a. The Amendment 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 Amendment 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 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.¹⁸ To put this in context, a 2019 study indicates “[i]t is estimated that about 1% of all abortions in the United States are performed after 20 weeks, or approximately 10,000 to 15,000 annually.”¹⁹

Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications is significantly higher after 20 weeks’ gestation.²⁰ For example, 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

¹⁶ *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).

¹⁷ Studnicki, *supra* note 12, at 1.

¹⁸ 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 Oct. 20, 2023).

¹⁹ Studnicki, *supra* note 16, at 1.

²⁰ Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004).

ages.²¹ 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.”²² This is because later-term abortions need to dilate 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.²³

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.²⁴ Immediate complications affect approximately 10% of women undergoing abortion, and approximately one-fifth of these complications are life-threatening.²⁵ If the people of Arkansas pass the Amendment and authorize abortion-on-demand, more women will experience life-threatening complications from late-term abortions.

b. The Amendment Furthers the Psychological Harm of Abortion on Women.

Amending Arkansas’s constitution to enshrine a “right” to abortion will result in more women suffering post-abortive psychological harms. “[P]regnancy loss (natural or induced) is associated with an increased risk of mental health problems.”²⁶ “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.”²⁷

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.”²⁸ 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.”²⁹ Similarly, “[s]everal recent international studies have demonstrated that repetitive early pregnancy loss, including both miscarriage and

²¹ *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).

²² Bartlett, *supra* note 20, at 735.

²³ *Id.*

²⁴ See Planned Parenthood, *supra* note 18.

²⁵ REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 48 (2005).

²⁶ 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).

²⁷ 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).

²⁸ *Id.*

²⁹ 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).

induced abortions, is associated with increased levels of distress, depression, anxiety, and reduced quality of life scores in social and mental health categories.”³⁰

The Amendment authorizes dangerous abortion procedures on women and young girls that negatively impact their mental and emotional well-being. By authorizing abortion-on-demand, the rates of mental health issues—such as depression, anxiety, and suicidal ideation—will increase and diminish their overall quality of life.

c. The Amendment 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.³¹ A 2010 study found that “the earlier infants are delivered, the stronger their response to pain”³² 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.”³³ As a result, preborn children display a “hyperresponsiveness” to pain.³⁴ According to one group of fetal surgery experts, “[t]he administration of anesthesia directly to the fetus is critical in open fetal surgery procedures.”³⁵

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.³⁶ Accordingly, Arkansas has full protections for life unless there is a medical emergency.³⁷ The Amendment’s passage will make it near impossible for Arkansas to enact or maintain any protections prior to six months whatsoever. Abortion activists may argue that such laws interfere with a women’s “right” to abortion under the state constitution, even though the laws further the state’s legitimate interest to preserve prenatal life and mitigate fetal pain. This rhetoric disregards the humanity of preborn children and subjects them to painful abortion procedures.

d. The Amendment Will Shift Medical Practice in Favor of Abortion.

³⁰ Grauerholz, *supra* note 21; *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”).

³¹ Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. MED. ETHICS 3 (2020).

³² Lina K. Badr et al., *Determinants of Premature Infant Pain Responses to Heel Sticks*, 36 PEDIATRIC NURSING 129 (2010).

³³ *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INST. (Sept. 2022), https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/#_ednref14.

³⁴ Christine Greco & Soorena Khojasteh, *Pediatric, Infant, and Fetal Pain*, CASE STUDIES PAIN MGMT. 379 (2014).

³⁵ 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).

³⁶ *See Dobbs*, 142 S. Ct. at 2284.

³⁷ ARK. CODE ANN. § 5-61-304 (2024).

The Amendment's provision for abortion goes well beyond even *Roe* which allowed states to protect life in months four through six if the state had a compelling interest.³⁸ It goes further than *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁹ which allowed states to protect women, girls, and the unborn so long as there was no undue burden on access to abortion. Yet, the Amendment would enshrine an unlimited right to abortion, up until the six-month mark, and make life protecting laws that align with medical evidence extremely difficult to enact.

Just as the definition of viability is consistently changing (viability in 1973 was thought to generally occur at twenty-eight weeks of pregnancy),⁴⁰ medical inventions are constantly improving. Consider that today, given the advancements in medical technology, viability is generally understood to be around 22–23 weeks gestation.⁴¹ The world's youngest premature child to survive, Curtis Means, was born even earlier at 21 weeks and one day.⁴² 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.”⁴³ As medical technology advances, it is likely preborn babies will survive at even earlier gestations and with various diagnosis with medical intervention

Contrary to established modern medical principles, abortionists do not consider a preborn child as a second patient. Further, the abortionist's direct intent in the abortion is not to keep the preborn child alive with medical intervention, but it is to end the preborn child's life. Naturally, these beliefs inform an abortionist's “professional judgment” when it comes to determining “medical intervention” and will most likely always end in an abortion.

Ultimately, the Amendment's gestational limit and exceptions provide abortionists a trump card. It allows abortionists to entirely usurp Arkansas's ability to regulate abortion because 1) the question of the futility of medical intervention for the baby is left up to the abortionist's subjective opinion, and 2) even if a preborn baby could survive with medical intervention, as long as the abortionist deems the child to qualify for an abortion, the state cannot prohibit it. This futility standard is a vague and unworkable measure that abortionists will use to continuously shift the line of in favor of abortion rather than the health and safety of women and their preborn children. Furthermore, since the decision on futility is left up to the abortionist's subjective opinion, Arkansas will have extreme difficulty enacting or maintaining any laws that protect these children determined by the abortionist to be incompatible with life.

³⁸ 410 U.S. 113.

³⁹ 505 U.S. 833 (1992).

⁴⁰ Clarke Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* 137 (2013).

⁴¹ *Id.*

⁴² *Alabama Boy Certified as World's Most Premature Baby*, BBC (Nov. 11, 2021), <https://www.bbc.com/news/world-us-canada-59243796>.

⁴³ 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).

II. The Amendment Leads to the Elimination of Protections for Women, Minor Girls, and Preborn Children, and Makes it Difficult for the State to Enact Future Safeguards.

The Amendment's passage places protections for women, young girls, and their preborn child at risk of being challenged in court, as shown by current activist litigation against pro-life laws, or being removed by the legislature. Arkansas has several life-affirming laws, including the following:

- a comprehensive informed consent process that ensures abortionists inform women of the risks of abortion as well as available alternatives, and gives women a 72-hour reflection period;⁴⁴
- protections against coerced abortions;⁴⁵
- parental consent laws;⁴⁶
- a ban on gruesome partial birth abortions;⁴⁷
- conscience protections for health care professionals and public and private hospitals that object to abortion based on their beliefs and convictions;⁴⁸
- a prohibition on discriminatory abortions based solely on a baby's Down syndrome diagnosis;⁴⁹ and
- protections for infants born alive after an attempted abortion.⁵⁰

These laws serve to protect women and girls from the inherent harms of abortion, as well as protect preborn children. However, each of these laws are subject to attack if the Amendment passes. Abortion activists may argue these safeguards “prohibit”, “penalize”, “delay”, or “restrict” a woman's access to “abortion services” pursuant to the constitutional amendment, leading to legislative repeal or judicial injunction.

In addition to the elimination of current protections, Arkansas will face difficulty in passing any future protections for women, girls, and preborn children if voters approve the Amendment. The Amendment appears to impose a strict scrutiny standard on abortion regulations, similar to the Supreme Court in *Roe*. Specifically, the Amendment gives no leniency to the state in regulating abortion even including when the state has a compelling state interest.⁵¹ Even under *Roe*, a state could act to protect women, girls, and the unborn if it could pass strict scrutiny. Strict scrutiny is the highest and strictest standard a court uses when reviewing the constitutionality of a challenged law. Courts apply strict scrutiny when analyzing laws that restrict constitutionally guaranteed rights. Under this standard, courts require states to demonstrate that they have a compelling governmental interest to restrict the constitutional right and did so

⁴⁴ ARK. CODE ANN. § 20-17-2703 (2024).

⁴⁵ *Id.* at § 20-16-1705.

⁴⁶ *Id.* at § 12-18-210.

⁴⁷ *Id.* at § 20-16-1203.

⁴⁸ *Id.* at § 20-16-601.

⁴⁹ *Id.* at § 20-16-2103.

⁵⁰ *Id.* at § 20-16-604.

⁵¹ The Arkansas Abortion Amendment of 2024.

through the least restrictive means possible. In *Roe*, the Supreme Court found that restrictions on abortion require strict scrutiny review because abortion was a purported fundamental right.⁵² The Supreme Court quickly found strict scrutiny was unworkable in the abortion context, and discarded this litigation in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, although it implemented the equally unworkable undue burden standard.⁵³ Later, the Supreme Court in *Dobbs* overturned *Roe* entirely, holding that there is no right to abortion in the U.S. Constitution.⁵⁴ Here, the language of the Amendment does not offer even that strictest of standards to the State.

This places the Amendment in contradiction to the Supreme Court. In *Dobbs*, the Court applied the lowest standard of review, known as “rational basis review.” Under this standard, if the law is rationally related to a legitimate governmental interest, the law is permissible. *Dobbs* acknowledges that states have legitimate governmental interests in regulating abortion in order to protect maternal health and safety, to preserve prenatal life, to mitigate fetal pain, to prohibit barbaric medical procedures, to preserve the integrity of the medical profession, and prevent discrimination on the basis of race, sex, or disability.⁵⁵ However, despite the Supreme Court overturn of *Roe*, the Amendment declares all protections in contradiction to the text of the Amendment to be “null and void”, a far stricter standard than that which the Supreme Court has disavowed twice—first in *Casey*, then in *Dobbs*. This makes it difficult for Arkansas to pass any protections for women and preborn children even though these laws further the state’s legitimate interests to do so.

Michigan residents are currently facing a similar challenge. Only one year after the residents voted to amend their constitution to enshrine a right to abortion, the legislature is seeking to repeal virtually all pro-life policies in the state, such as their informed consent process, licensing requirements for abortion clinics, abortion reporting requirements, prohibitions on gruesome partial-birth abortions, etc. Some of the language in Michigan’s abortion amendment is similar to the language in the Amendment. Michigan’s abortion amendment allows for a broad exception for late-term abortions to protect the woman’s “physical or mental health,” and prohibits the state from regulating abortion unless “justified by a compelling state interest achieved by the least restrictive means.⁵⁶ Yet, the Amendment’s exception is even broader because it uses the word, “health,” rather than qualifying it to just the physical or mental health of the woman. Thus, the ramifications of Arkansas passing the Amendment may be even more devastating than those seen in Michigan.

III. The Amendment Threatens Arkansas’s Parental Involvement Laws.

The elimination of Arkansas’s protective policies is particularly hazardous for minor girls. The Amendment’s passage may lead to the disallowance of Arkansas having

⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

⁵³ 505 U.S. 833 (1992).

⁵⁴ *Dobbs*, 142 S. Ct. at 2284.

⁵⁵ *Id.*

⁵⁶ MICH. CONST. art. I, § 28.

a parental consent law requiring abortionists to obtain the consent of one of the minor's parents prior to the abortion.⁵⁷ Parental involvement laws recognize the fundamental rights of parents to make healthcare decisions for and with their children. These laws also protect children's physiological and emotional wellbeing 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 exercise of his or best medical judgement 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, minor girls have a "biological predisposition for high-risk pregnancies."⁵⁸ The high-risk nature of adolescent pregnancy is compounded by the fact that pregnant adolescent patients often delay care.⁵⁹ 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 . . .".⁶⁰ Delay of care may also lead minors to seek an abortion when they are farther along in their pregnancies, which subjects them to increased risks of health complications.

Arkansas's current parental notification laws respond to the need to protect the welfare and safety of minors by ensuring that abortionists notify parents of a minor daughter's desire to obtain an abortion. This ensures pregnant minors receive proper and prompt care. If Arkansas voters approve the Amendment, such laws will be at risk of challenges by abortion activists seeking to eliminate them.

IV. The Amendment Gives Abortionists Free Rein to Operate Without Any Health and Safety Restrictions.

Passing the Amendment opens the door for the elimination of important laws regulating abortion clinics. Just like in Michigan, abortion activists may seek to challenge any Arkansas law regulating abortion clinics. Currently, Arkansas has a regulatory framework in place for the inspection and monitoring of abortion businesses.⁶¹

⁵⁷ ARK. CODE ANN. § 12-18-210 (2024).

⁵⁸ 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.

⁵⁹ Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 743 (2015).

⁶⁰ *Id.*

⁶¹ ARK. CODE ANN. §§ 20-9-302, 20-77-129.

However, even with these safeguards, the state has cited several abortion facilities for “failure to properly clean facilities, and failure to perform accurate drug counts of controlled substances.”⁶² There were also incidents of “over prescribing opioids.”⁶³ Further, there were “citations for discharging patients before the 48-hour waiting period.”⁶⁴

Unfortunately, if the Amendment passes in Arkansas, these occurrences will happen more frequently, endangering more women and girls. It is evident from the numerous health and safety citations that abortion facilities do not have women’s best interest in mind. Abortion already subjects women to physical and psychological harm. Unregulated abortion clinics will only exacerbate these harms. Women deserve dignified treatment and quality care, not forced abortions in a facility that will subject them to additional health risks and emotional trauma.

V. The Amendment Enables Sex-traffickers and Abusers to Coerce Victims into Having Abortions Against their Will.

The Amendment subjects women to coerced abortions while protecting their abusers. The Amendment states that the state “shall not prohibit, penalize, delay, or restrict abortion services.”⁶⁵ Therefore, under the Amendment, Arkansas cannot “interfere with” or prohibit a sex trafficker or abusive partner from bringing their victim to an abortion clinic to have an abortion. Further, the Amendment may lead to abortion activists challenging and eliminating Arkansas’s current laws against forced abortions, which require abortionists to obtain a woman’s written confirmation that no one is coercing her to have an abortion,⁶⁶ and require abortion facilities to have notices that inform women of their legal protections against forced abortions.⁶⁷ As a result, the Amendment strips Arkansas women of necessary safeguards for authentic choice and increases the number of coerced abortions.

Sadly, many women have coerced abortions. 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].”⁶⁸ For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.⁶⁹ Post-abortive IPV victims also have a “significant association” with “psychosocial problems including depression, suicidal ideation, stress, and disturbing thoughts.”⁷⁰

⁶² *Unsafe: America’s Abortion Industry Endangers Women*, AMS. UNITED FOR LIFE, 2021, at 59.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ The Arkansas Abortion Amendment of 2024.

⁶⁶ ARK. CODE ANN. § 20-16-1703 (2024).

⁶⁷ *Id.* at § 20-16-1705.

⁶⁸ 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).

⁶⁹ COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *Reproductive and Sexual Coercion*, Comm. Op. No. 554, at 2 (Feb. 2013).

⁷⁰ Hall, *supra* note 71, at 11.

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.”⁷¹ 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.⁷² 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].”⁷³

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.”⁷⁴ 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.”⁷⁵ 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 abortions⁷⁶

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, “[w]ithout accounting for possible underreporting.”⁷⁷ “The [sex-trafficking] survivors in this study [] reported that they often did not freely choose the abortions they had while being trafficked.”⁷⁸ A majority of the 66 sex-trafficking victims “indicated that one or more of their abortions was at least partly forced upon them.”⁷⁹ 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

⁷¹ Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 *BMJ SEXUAL & REPROD. HEALTH* 61, 62, 65 (2019).

⁷² *Id.* at 62–63.

⁷³ *Id.* at 62.

⁷⁴ 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.

⁷⁵ David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women’s Emotional Responses and Mental Health*, *CUREUS*, Jan. 31, 2023, at 1.

⁷⁶ *Id.* at 1.

⁷⁷ 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).

⁷⁸ *Id.*

⁷⁹ *Id.*

identifying possible victims and following up on those suspicions with careful, strategic questions, and actions that catalyze rescue or help create exist strategies.”⁸⁰

Despite the prevalence of coercive abuse among women seeking abortions, the Amendment prohibits Arkansas from penalizing, prohibiting, delaying, or restricting abortion services, even when sought by abusers or sex traffickers who are “assisting” a woman seeking an abortion. Arkansas may not “prohibit, penalize, delay, or restrict abortion services” within the first five months of pregnancy.⁸¹ This restrictive language will give Arkansas no room to prevent coerced abortion. Abortion activists utilize this restrictive language to further abortion rights without understanding the full scope of what this language implicates. For example, the American College of Obstetricians and Gynecologists’ (ACOG) abortion policy states, “[a]ll people should have access to the full spectrum of comprehensive, *evidence-based health care*. Abortion is an essential component of comprehensive, *evidence-based health care*.”⁸² Given that abortion activists purport that abortion is “evidenced-based” care, they may argue that any limitation on abortion, even coerced abortions, fails to “advance the individual’s health in accordance with widely accepted and evidence-based standards of care.”

Currently, Michigan’s legislature is seeking to repeal a Michigan law that requires doctors to screen for coercion and provide victims of coercive abuse with helpful resources. Proponents of the repeal argue that the law creates barriers to women’s access to abortion. Thus, because abortion activists consider any law that limits abortions as a burden on women, Arkansas will likely not meet the Amendment’s standard to enact laws that would protect against coercive abuse.

If the Amendment is passed, 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.

VI. The Amendment 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 Amendment furthers the narrative that women need abortion in order to obtain socioeconomic success and equality in American society. This belief is unfounded and harms women.

⁸⁰ *Id.* at 84.

⁸¹ The Arkansas Abortion Amendment of 2024.

⁸² *Abortion Policy*, ACOG, <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy> (last updated May 2022) (emphasis added).

First, as stated above, the language used in the Amendment is deceptive and does not describe the reality of what abortion is. Abortion is not healthcare. It is the intentional destruction of innocent preborn 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.”⁸³ 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).”⁸⁴ Indeed, “there is no medical indication for elective induced abortion, since it cures no medical disease.”⁸⁵

Additionally, abortion activists often imply that pregnancy is some sort of illness or disability, rather than a natural process that many women experience. As AAPLOG notes, “[p]regnancy is not a disease, and the killing of human beings in utero is not medical care.”⁸⁶ Further, “[t]o date, the medical literature offers no support for the claim that abortion improves mental health or offers protection to mental health. In fact, there is evidence to the contrary.”⁸⁷ 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.”⁸⁸ 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.”⁸⁹ Yet, converse to the cultural narrative, a 2005 national study shows that 93% of mothers felt “overwhelming love for [their] children unlike anything [they’ve felt] for anyone else,” and 81% said that “being a mother[] is the most important thing [they] do.”⁹⁰ Notably, only 3% of mothers expressed dissatisfaction with motherhood.

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

⁸³ 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/>.

⁸⁴ Rsch. Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *Concluding Pregnancy Ethically*, Prac. Guideline No. 10, at 5 (Aug. 2022).

⁸⁵ 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).

⁸⁶ *Id.*

⁸⁷ Rsch. Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *supra* note 87, at 5.

⁸⁸ Helen M. Alvarez, *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).

⁸⁹ *Id.* at 213.

⁹⁰ *Id.* at 213-14.

with children receiving the care they require.”⁹¹ Additionally, this leads to both a public and private resistance to accommodating motherhood in employment, which “leads to additional disadvantages for women. For example, discrimination on the basis of pregnancy and motherhood has succeeded outright discrimination on the basis of sex.”⁹² 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 Amendment furthers the abortion industry’s lies and efforts to mask the realities of abortion, which is to the detriment of women’s health, safety, and socioeconomic success and equality in America.

Conclusion

Enshrining a “right” to abortion in Arkansas’s constitution will negatively impact the welfare of women and preborn children in Arkansas. The Amendment targets and undermines the life-affirming policies Arkansas fought so hard to implement, potentially leading to the elimination of such laws. The strong pro-life policies in Arkansas will be at risk of being replaced with an anti-life culture that threatens the health and safety of Arkansas residents both inside and outside the womb. Further, having a constitutionally protected “right” to abortion will make it difficult for Arkansas to enact any future protections for women and girls seeking abortion, which subjects women to an unregulated, dangerous abortion industry. This amendment does not give “freedom” to women but hands control to self-interested abortionists who financially benefit from abortion-on-demand as well as to sex-traffickers and abusers who seek to cover up their crimes by forcing their victims to obtain abortions. Abortion is not healthcare, and contriving a state constitutional right to abortion will be disastrous for Arkansas.

⁹¹ *Id.* at 214.

⁹² *Id.* at 216.