



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

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Table of Contents

Introduction.....	2
I. The Arizona Right to Abortion Initiative Will Increase the Number of Late-Term Abortions in the State.....	3
a. Late-Term Abortions Carry a Higher Risk of Health Complications.....	5
b. The Arizona Right to Abortion Initiative Furthers the Psychological Harm of Abortion on Women.....	6
c. The Arizona Right to Abortion Initiative Subjects Preborn Children to Painful Abortion Procedures.....	7
II. The Arizona Right to Abortion Initiative Leads to the Elimination of Protections for Women, Minor Girls, and Preborn Children, and Makes it Difficult for the State to Enact Future Safeguards.....	9
III. The Arizona Right to Abortion Initiative Threatens Arizona’s Parental Involvement Laws.....	11
IV. The Arizona Right to Abortion Initiative Enables Sex-traffickers and Abusers to Coerce Victims into Having Abortions Against their Will.....	12
V. The Arizona Right to Abortion Initiative Furthers the False Narrative that Abortion is Necessary for Women’s Equality in American Society.....	14
Conclusion.....	15

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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 elective 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 adolescent girls. Recently, voters in Ohio and Michigan amended their state constitutions to enshrine a "right" to elective abortion. Upon the passage of these amendments, abortion activists were quick to challenge life-affirming laws in both states. For example, in the year following Michigan's abortion amendment, the legislature successfully repealed numerous protections for women and preborn children, including the state's ban on partial-birth abortions and provisions requiring abortion facilities to be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.

This November, Arizonans will face a similar ballot initiative entitled, the "Right to Abortion Initiative" ("Initiative"). If passed, the Initiative would amend the Arizona constitution to state:

A. Every individual has a fundamental right to abortion, and the state shall not enact, adopt or enforce any law, regulation, policy or practice that does any of the following:

1. Denies, restricts or interferes with that right before fetal viability unless justified by a compelling state interest that is achieved by the least restrictive means.
2. Denies, restricts or interferes with an abortion after fetal viability that, in the good faith judgment of a treating health care professional, is necessary to protect the life or physical or mental health of the pregnant individual.
3. Penalizes any individual or entity for aiding or assisting a pregnant individual in exercising the individual's right to abortion as provided in this section.⁵

The Initiative's language is forthright in its goal: a constitutional right to intentionally terminate human beings in the womb (also known as elective abortion) at any point of gestation. Current Arizona law protects preborn children after 15 weeks, with limited exceptions.⁶ In other words, even if voters reject this Initiative, Arizona residents can still terminate children in the womb if they are less than 15 weeks of development.

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

⁴ 410 U.S. 113 (1973).

⁵ The Arizona Right to Abortion Initiative (Arizona 2024).

⁶ Ariz. Rev. Stat. § 36-2322.

While clear in its goal, the Initiative seeks to obfuscate its impact and application. Appearing to constrain abortion at the point of viability, it creates an exception that swallows the rule – an allowance for abortion “to protect the life or physical or mental health of the pregnant individual.”⁷ By definition, viability is when a child can survive outside the womb. At that point, terminating the child is never necessary. The proper course of action to protect the health of both the mother and the child through an early delivery. The Initiative instead guarantees a right to terminate a healthy child who can survive outside the womb with no more than the abortionist’s approval as a safeguard.⁸

Further, the misleading language of the Initiative attempts to disguise abortion as healthcare. As discussed below in Section V, abortion is not healthcare. It is the intentional destruction of innocent preborn human life. Additionally, as the Supreme Court acknowledges in *Dobbs*, states have a legitimate interest in preserving prenatal life, mitigating fetal pain, and protecting maternal health.⁹ Thus, Arizona can regulate abortion in furtherance of these important interests.

If Arizona passes the Initiative, the ramifications will be devastating, especially for the welfare of Arizona women and their preborn children. The Initiative increases the number of late-term abortions, threatens to eliminate protections for women’s welfare and parental involvement laws, gives abortionists free rein to operate clinics without health and safety regulations, increases the number of coerced abortions in Arizona, and furthers the harmful and false narrative that abortion is necessary for women to have equality and success in America. The Initiative will decimate Arizona’s pro-life culture by undermining and preventing laws protecting women, adolescent girls and the unborn.

I. The Arizona Right to Abortion Initiative Will Increase the Number of Late-Term Abortions in the State.

By affording constitutional protection to elective abortion, the Initiative will change a state seeking to be a pro-life oasis into an abortion destination. This will lead to more late-term abortions. In turn, more women and preborn children will be subject to abortion violence in the state. Although the Initiative’s language seemingly allows the state to prohibit abortion after fetal viability, it also allows for a broad “health” exception. The Initiative states that abortion may be prohibited after fetal viability, except if the termination “is necessary to protect the life or physical or mental health of the pregnant individual.”¹⁰

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.”¹¹ Courts, including the U.S. Supreme Court, have likewise

⁷ The Arizona Right to Abortion Initiative (Arizona 2024).

⁸ See Section I.

⁹ *Dobbs*, 142 S. Ct. at 2284.

¹⁰ The Arizona Right to Abortion Initiative.

¹¹ *Constitution of the World Health Organization*, WORLD HEALTH ORG., <https://www.who.int/about/accountability/governance/constitution> (last visited Apr. 29, 2024).

interpreted the term “health” liberally in the abortion context. In *Doe v. Bolton*,¹² 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.”¹³ 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.”¹⁴

Under the Initiative’s broad health exception, if a pregnancy is affecting a woman’s “mental health” for whatever reason (in the opinion of the abortionist), she can have an abortion up to the date of her preborn child’s birth. By including this health exception, the Initiative would authorize abortion-on-demand throughout all nine months of pregnancy. 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 woman’s age, the ending of the relationship between the mother and the father of the baby, financial concerns, etc.

Existing Arizona law permits abortions after 15 weeks of pregnancy when there exists “a condition that ... so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.”¹⁵ The all-encompassing concept of “health” offered by the Initiative is an exception that swallows the rule, as opposed to the narrower exceptions under Arizona’s current law. By embracing the expansive health exception, Arizona will be authorizing abortion-on-demand throughout all nine months of pregnancy limited only by the creativity of the abortionist.

Although it is a common misconception that abortions performed under a health exception, or late-term abortions, are only performed in rare circumstances for medically necessary reasons, as the American Association of Pro-Life Obstetricians and Gynecologists (“AAPLOG”) states, “most abortions are done for social reasons.”¹⁶ “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.”¹⁷ Dr. James Studnicki published a similar outcome in *Health Services Research and Managerial Epidemiology* regarding late-term abortions. As he says,

¹² Although *Doe v. Bolton* was the companion case for *Roe*, the Supreme Court did not overturn *Doe* in the *Dobbs* decision.

¹³ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

¹⁴ 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/>.

¹⁵ Ariz. Rev. Stat. § 36-2321.

¹⁶ AM. ASSOC. OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, STATE RESTRICTIONS ON ABORTION: EVIDENCE-BASED GUIDANCE FOR POLICYMAKERS, Comm. Op. 10, at 10 (updated Sept. 2022).

¹⁷ *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).

[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.¹⁸

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.¹⁹ Although, the number of late-term abortion 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 Arizona itself, refuse to provide any data to the CDC.²⁰ The Initiative will enshrine this devastating reality into the foundation of Arizona law and increase the difficulty in repealing statutes that 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. The Initiative will also broaden these protections to all matters affecting pregnancy. Passing this Initiative 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. Late-Term Abortions Carry a Higher Risk of Health Complications.

By enshrining constitutional protection for late-term abortions in the state, Arizona will put 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 pregnancy²¹

Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications is significantly higher after 20 weeks' gestation.²² 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 ages.²³ Further, researchers have concluded that it may not be possible to reduce the

¹⁸ James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Apr. 9, 2019, at 1, 1.

¹⁹ Guttmacher Institute, *Induced Abortion in the United States*, GUTTMACHER (2019), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

²⁰ See Questions and Answers on Late-Term Abortion, CHARLOTTE LOZIER INST. (May 16, 2022), <https://lozierinstitute.org/questions-and-answers-on-late-term-abortion/>.

²¹ 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).

²² Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004).

²³ *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).

risk of death in later-term abortions because of the “inherently greater technical complexity of later abortions.”²⁴ 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.²⁵

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.²⁶ Immediate complications affect approximately 10% of women undergoing abortion, and approximately one-fifth of these complications are life-threatening.²⁷ If Arizona memorializes these laws into its constitution and supports abortion-on-demand, more women will experience life-threatening complications from late-term abortions.

b. The Arizona Right to Abortion Initiative Furthers the Psychological Harm of Abortion on Women.

Amending Arizona’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.”²⁸ “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.”²⁹

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.”³⁰ 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.”³¹ 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.”³²

²⁴ Bartlett, *supra* note 20, at 735.

²⁵ *Id.*

²⁶ See Planned Parenthood, *supra* note 18.

²⁷ REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 48 (2005).

²⁸ 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).

²⁹ 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).

³⁰ *Id.*

³¹ 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).

³² 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”).

If Arizona authorizes dangerous abortion procedures on women and young girls, it will negatively impact their mental and emotional well-being. By constitutionally protecting 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 Arizona Right to Abortion 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.³³ “Pain receptors [] 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.”³⁴ Furthermore, by twelve weeks’ gestation almost every organ and tissue has formed in a preborn baby³⁵ and the baby has arms, legs, fingers, toes, a face, and eyelids.³⁶ The preborn baby is also beginning to form unique fingerprints,³⁷ is able to suck his or her thumb,³⁸ and has a fully developed heart.³⁹

Additionally, a 2010 study found that “the earlier infants are delivered, the stronger their response to pain”⁴⁰ 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.”⁴¹ As a result, preborn children display a “hyperresponsiveness” to pain.⁴² According to one group of fetal surgery experts, “[t]he administration of anesthesia directly to the fetus is critical in open fetal surgery procedures.”⁴³

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

³³ Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. MED. ETHICS 3 (2020).

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

³⁵ Thomas Sadler, *MEDICAL EMBRYOLOGY* 14th ed. (2019).

³⁶ *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).

³⁷ J. W. Babler, *Embryologic Development of Epidermal Ridges and Their Configurations*, 27 BIRTH DEFECTS ORIGINAL ARTICLE SERIES 95, 95-112 (1991).

³⁸ See Peter Hepper et al., *Prenatal Thumb Sucking Is Related to Postnatal Handedness*, 43 NEUROPSYCHOLOGIA 313 (JAN. 2005).

³⁹ See M. A. Hill, *Cardiovascular System Development*, EMBRYOLOGY (Apr. 26, 2024), https://embryology.med.unsw.edu.au/embryology/index.php/Cardiovascular_System_Development.

⁴⁰ Lina K. Badr et al., *Determinants of Premature Infant Pain Responses to Heel Sticks*, 36 PEDIATRIC NURSING 129 (2010).

⁴¹ *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INST. (Sept. 2022), https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/#_ednref14.

⁴² Christine Greco & Soorena Khojasteh, *Pediatric, Infant, and Fetal Pain*, CASE STUDIES PAIN MGMT. 379 (2014).

⁴³ 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).

preserve prenatal life as well as minimize fetal pain as much as possible.⁴⁴ If the Initiative is passed, Arizona will have a legal fig-leaf at viability through which to attempt to enact protections for women, adolescent girls, and their preborn children. 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 Arizona Right to Abortion Initiative’s Viability Definition Imposes a Vague Standard that Will Shift in Favor of Abortion.

The Initiative theoretically gives the state of Arizona the authority to regulate abortion after viability. Yet, it interprets viability in such a way as to maximize the number of abortions. The Initiative defines viability as “the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus’s sustained survival outside the uterus without the application of extraordinary medical measures.”⁴⁵ Prior to *Roe v. Wade*, a viable pregnancy simply “meant a pregnancy that was progressing.”⁴⁶ 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.”⁴⁷ Today, given the advancements in medical technology, viability is generally understood to be around 22–23 weeks gestation.⁴⁸ The world’s youngest premature child to survive, Curtis Means, was born even earlier at 21 weeks and one day.⁴⁹ 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.”⁵⁰ As medical technology advances, it is likely preborn babies will survive at even earlier gestations with medical intervention.

Despite advancements in medical technology that allow for preborn children to survive outside the womb as early as 21 weeks gestation, the 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.”⁵¹ In other words, under the Initiative, abortionists may disregard medical interventions that ensure survival of 94.0% of babies born prematurely at 28 weeks⁵² when making their “professional judgment” as to whether a child is viable. On top of that, the very nature of the

⁴⁴ See *Dobbs*, 142 S. Ct. at 2284.

⁴⁵ Protect the Right to Abortion - Constitutional Initiative (Neb. 2024).

⁴⁶ CLARKE FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* 8 (2013).

⁴⁷ *Id.*

⁴⁸ Noelle Younge, et al., *Survival and Neurodevelopmental Outcomes among Perivable Infants*, 7 *NEW ENG. J. MED.* 617, 617-28 (2017).

⁴⁹ *Alabama Boy Certified as World’s Most Premature Baby*, BBC (Nov. 11, 2021), <https://www.bbc.com/news/world-us-canada-59243796>.

⁵⁰ 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).

⁵¹ Protect the Right to Abortion - Constitutional Initiative (Neb. 2024).

⁵² Bell, *supra* note 36.

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.

Arizona currently requires physicians to take "all available means and medical skills are used to promote, preserve and maintain the life," of any child "delivered alive."⁵³ A child is "delivered alive" if he or she is completely expelled or extracted from the mother's womb,

regardless of the state of gestational development, who, after expulsion or extraction, whether or not the umbilical cord has been cut or the placenta is attached, shows any evidence of life, including ... (a) Breathing. (b) A heartbeat. (c) Umbilical cord pulsation. (d) Definite movement of voluntary muscles.⁵⁴

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

However, the Initiative's definition of viability allows abortionists to entirely usurp Arizona'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 Arizona will have extreme difficulty enacting or maintaining any laws that regulate abortion after viability.

II. The Arizona Right to Abortion Initiative 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 passage of the Arizona Right to Abortion Initiative places pro-life protections for women, adolescent 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. Arizona has a number of life-affirming laws:

- parental consent laws;⁵⁵
- informed consent at least 24 hours prior to a termination procedure;⁵⁶
- health and safety requirements including requiring a termination be performed by a physician;⁵⁷
- prohibiting terminations based on sex or race of the child;⁵⁸

⁵³ Ariz. Rev. Stat. § 36-2301.

⁵⁴ *Id.*

⁵⁵ Ariz. Rev. Stat. § 36-2152, 2156, & 2158.

⁵⁶ Ariz. Rev. Stat. § 36-2153.

⁵⁷ Ariz. Rev. Stat. § 36-2155.

⁵⁸ Ariz. Rev. Stat. § 36-2157.

- conscience protections for health care professionals and public and private hospitals that object to abortion based on their beliefs and convictions;⁵⁹ and
- required reporting on abortion complications.⁶⁰

These laws serve to protect women and adolescent girls from the inherent harms of abortion, as well as protect preborn children. However, these laws are subject to attack if the Initiative passes. Abortion activists may argue these safeguards “burden” a woman’s “right to reproductive freedom” pursuant to the constitutional amendment, leading to legislative repeal or judicial injunction.

In addition to the elimination of current pro-life laws, Arizona will face difficulty in passing any future protections for women, adolescent girls, and preborn children if voters approve the Initiative. The Initiative appears to impose a strict scrutiny standard on abortion regulations, similar to the Supreme Court in *Roe*. Specifically, the Arizona Right to Abortion Initiative prohibits the state from regulating all matters related to pregnancy unless the state demonstrates that the law is “justified by a compelling state interest achieved by the least restrictive means.”⁶¹ 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 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.⁶² The Supreme Court quickly found strict scrutiny was unworkable in the abortion context, and discarded this litigation standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, although it implemented the equally unworkable undue burden standard.⁶³ Later, the Supreme Court in *Dobbs* overturned *Roe* entirely, holding that there is no right to abortion in the U.S. Constitution.⁶⁴

Accordingly, the *Dobbs* 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 and all matters related to pregnancy 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.⁶⁵ However, despite the Supreme Court overturn of *Roe*, the use of the phrases,

⁵⁹ Ariz. Rev. Stat. § 36-2154.

⁶⁰ Ariz. Rev. Stat. § 36-2161 to 2163.

⁶¹ The Arizona Right to Abortion Initiative (Arizona 2024).

⁶² *Roe v. Wade*, 410 U.S. 113 (1973).

⁶³ 505 U.S. 833 (1992).

⁶⁴ *Dobbs*, 142 S. Ct. at 2284.

⁶⁵ *Id.*

”compelling state interest” and “least restrictive means,” in the Initiative implicate strict scrutiny review. In doing so, the Initiative imposes the highest standard of review on laws regulating abortion in Arizona that the Supreme Court has disavowed twice—first in *Casey*, then in *Dobbs*. This makes it difficult for Arizona to pass any protections for women and preborn children even though these laws further the state’s legitimate interests to do so.

Michigan residents faced a similar challenge. Only one year after the residents voted to amend their constitution to enshrine a right to abortion, the legislature repealed several pro-life policies in the state, such as 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 Arizona Right to Abortion Initiative. Michigan’s abortion amendment allows for an establishment of an “individual right to reproductive freedom,” and prohibits the state from regulating abortion unless “justified by a compelling state interest achieved by the least restrictive means.”⁶⁶ Given the similar nature between Michigan’s newly amended constitution and Arizona’s Initiative the ramifications of Arizona passing the Initiative may be just as devastating or more than those seen in Michigan.

Ultimately, the Initiative will make it practically impossible to enact any pro-life laws in the future. The Initiative will instill these dangerous practices into the state’s constitution, making reform an even more difficult mountain to climb.

III. The Arizona Right to Abortion Initiative Threatens Arizona’s Parental Involvement Laws.

The elimination of Arizona’s pro-life policies is particularly hazardous for minor girls. The passage of the Arizona Right to Abortion Initiative may lead to the elimination of Arizona’s parental consent law, which requires abortionists to notify one of the minor’s parents prior to the abortion.⁶⁷ 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

⁶⁶ MICH. CONST. art. I, § 28.

⁶⁷ Ariz. Rev. Stat. § 36-2152.

girls have a “biological predisposition for high-risk pregnancies.”⁶⁸ The high-risk nature of adolescent pregnancy is compounded by the fact that pregnant adolescent patients often delay care.⁶⁹ 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 . . .”.⁷⁰ 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.

Arizona’s current parental consent law responds 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. Further, Arizona’s parental consent law is one of the only life-affirming laws in the state. If Arizona voters approve the Initiative, this law will be at risk of challenges by abortion activists seeking to eliminate it.

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

The Initiative subjects women to coerced abortions while protecting their abusers. The Initiative states that Arizona may not “penalize[] an individual or entity for aiding or assisting a pregnant individual in exercising the individual’s right to abortion....”⁷¹ Therefore, under the Initiative, Arizona cannot prohibit a sex trafficker or abusive partner from bringing their victim to an abortion clinic to have an abortion since it is the woman’s constitutionally protected “right.” Consequently, the Initiative hamstring the state from enacting necessary safeguards for authentic choice, which will increase 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].”⁷² For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.⁷³ Post-abortive IPV victims also have a “significant

⁶⁸ 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.

⁶⁹ Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 743 (2015).

⁷⁰ *Id.*

⁷¹ The Arizona Right to Abortion Initiative (Arizona 2024).

⁷² 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).

⁷³ COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *Reproductive and Sexual Coercion*, Comm. Op. No. 554, at 2 (Feb. 2013).

association” with “psychosocial problems including depression, suicidal ideation, stress, and disturbing thoughts.”⁷⁴

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.”⁷⁵ 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.⁷⁶ 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].”⁷⁷

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.”⁷⁸ 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.”⁷⁹ 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 abortions⁸⁰

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.”⁸¹ “The [sex-trafficking] survivors in this study [] reported that they often did not freely choose the abortions they had while being trafficked.”⁸² A majority of the 66 sex-trafficking victims “indicated that one or more of their abortions was at least partly forced upon them.”⁸³ Given the prevalence of coerced abortions among sex-trafficking victims, the authors of the study note how

⁷⁴ Hall, *supra* note 71, at 11.

⁷⁵ Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 *BMJ SEXUAL & REPROD. HEALTH* 61, 62, 65 (2019).

⁷⁶ *Id.* at 62–63.

⁷⁷ *Id.* at 62.

⁷⁸ 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.

⁷⁹ David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women’s Emotional Responses and Mental Health*, *CUREUS*, Jan. 31, 2023, at 1.

⁸⁰ *Id.* at 1.

⁸¹ 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).

⁸² *Id.*

⁸³ *Id.*

“[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.”⁸⁴

Despite the prevalence of coercive abuse among women seeking abortions, the Initiative prohibits Arizona from enacting necessary safeguards. For example, if the state wants to enact a law to protect women against coerced abortions, it can only do so by demonstrating that it is using “the least restrictive means” and that the law is “justified by a compelling state interest.”⁸⁵ As stated above in Section II, Arizona will have a hard time meeting this standard.

In 2023, Michigan’s legislature sought 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 argued that the law creates barriers to women’s access to abortion. Thus, because abortion activists see any law that limits abortions as a burden on women, Arizona will likely not meet the Initiative’s standard to enact laws that would protect against coercive abuse.

In other words, if the Initiative is passed, abortion activists may challenge any attempt to enact new laws to protect against coercive abuse, arguing that such laws create “barriers” to abortion. Prohibiting 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 Arizona Right to Abortion 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 all reproductive health issues on demand, the Arizona Right to Abortion Initiative furthers the narrative that women need abortion in order to obtain success and equality in American society. This belief is unfounded and harms women.

First, as stated above, the language used in the Arizona Right to Abortion Initiative 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.”⁸⁶ 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

⁸⁴ *Id.* at 84.

⁸⁵ The Arizona Right to Abortion Initiative (Arizona 2024).

⁸⁶ 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/>.

the two in order to protect the life of one or the other (or both).”⁸⁷ Indeed, “there is no medical indication for elective induced abortion, since it cures no medical disease.”⁸⁸

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.”⁸⁹ 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.”⁹⁰ 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.”⁹¹ Indeed, “the repetition and acceptance of the ‘equality’ argument for favoring legal abortion,” harms women 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.”⁹²

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.”⁹³ Additionally, this leads to both a “public and private resistance to accommodating motherhood in employment,” which “leads to additional disadvantages for women.”⁹⁴ “For example, discrimination on the basis of pregnancy and motherhood has succeeded outright discrimination on the basis of sex.”⁹⁵ 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 Initiative 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 success and equality in America.

Conclusion

Enshrining a “right” to abortion in Arizona’s constitution will negatively impact the welfare of women and preborn children in Arizona. The Arizona Right to Abortion

⁸⁷ Rsch. Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *Concluding Pregnancy Ethically*, Prac. Guideline No. 10, at 5 (Aug. 2022).

⁸⁸ 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).

⁸⁹ *Id.*

⁹⁰ Rsch. Comm., Am. Ass’n of Pro-Life Obstetricians & Gynecologists, *supra* note 87, at 5.

⁹¹ 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).

⁹² *Id.* at 213.

⁹³ *Id.* at 214.

⁹⁴ *Id.* at 214.

⁹⁵ *Id.* at 216.

Initiative targets and undermines the life-affirming policies that were fought so hard to implement, potentially leading to the elimination of such laws. Arizona's few pro-life policies will be at risk of being replaced with an anti-life culture that threatens the health and safety of Arizona residents both inside and outside the womb. Further, having a constitutionally protected "right" to all reproductive matters will make it difficult for Arizona to enact any future protections for women and girls seeking abortion, which subjects women to an unregulated, dangerous abortion industry. This Initiative 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 Arizona.