Americans United for Life

Constitutional Peril in Montana: The Legal and Policy Implications of Enshrining a Right to Abortion in Montana's Constitution.

By Bradley N. Kehr, J.D.[1]

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[1] Government Affairs Director, Americans United for Life.

INTRODUCTION

On August 14, 2024, the Montana Supreme Court declared that the state of Montana did not have adequate justification to require that abortionists ensure parents are involved in a minor's health care decision.[2] The Court excluded parents from their minor daughter's life by building on its own decisions in *Armstrong v. State*[3] and *Weems v. State,*[4] in which the Court stripped from the people of Montana and their elected representatives the ability to enact commonsense protections for women, girls, and the unborn just as *Roe v. Wade* did for the Nation. In *Dobbs v. Jackson Women's Health Organization*,[5] the United States Supreme Court returned the power to the people of the United States. Now Montanans are being asked to acquiesce to the Montana Supreme Court's aggrandizement of power and voluntarily strip themselves of the ability to protect women, girls, and the unborn by voting to enshrine full and unfettered abortion into the Montana constitution.

Montana is not alone in this. But Montanans already have a front row seat to the consequences of allowing their hands to be tied. The pro-life movement has accomplished many victories in the wake of the Supreme Court's decision in *Dobbs*, while also facing new challenges. Now that the Supreme Court has overturned *Roe v. Wade*[6] 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, exactly as the Montana Supreme Court has already done to Montana. 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. In 2022, 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.

Montanans are currently being asked to sign onto a similar ballot initiative. If passed, the ballot initiative would amend the Montana constitution, as the Montana Supreme Court already claims to have done, to enshrine the allowance of intentional termination of a human being in the womb without restraint.[7] The amendment explicitly forbids the state from enacting laws that protect women and the unborn from abortion violence up to viability.[8] Finally, although the amendment seemingly allows for Montana

[2] *Planned Parenthood v. Montana*, 2024 MT 178 (2024).
[3] *Armstrong v. State*, 989 P.2d 364 (1999).
[4] *Weems v. State*, 529 P.3d 798 (2023).
[5] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
[6] 410 U.S. 113 (1973).
[7] Montana Right to Abortion Initiative (2024).
[8] *Id.*

to regulate abortion "after viability", it includes a virtually unlimited exception for abortions "to protect the pregnant patient's life or health."[9]

If the composition of the Montana Supreme Court were ever to change to one that recognizes the truth about abortion, the amendment would tie their hands and authorize abortion-on-demand throughout pregnancy, eliminate the ability to protect women's welfare and enact parental involvement laws, give abortionists free rein to operate clinics without health and safety regulations, increase the number of coerced abortions in Montana, further the harmful and false narrative that abortion is necessary for women to have equality and success in America, and attempt to silence the voices of women harmed by abortion. The amendment continues the work of abortion activists to turn Montanans' life-affirming state into an abortion destination that endangers the health and safety of its residents both inside and outside the womb. This is no longer a parade of "horribles," it is already the reality in Montana as it has become the reality in Michigan after a similar amendment.

As the Supreme Court acknowledges in *Dobbs*, states have a legitimate interest in preserving prenatal life, mitigating fetal pain, and protecting maternal health.[10] It is good for the welfare of women and preborn children that Montana is able to act in furtherance of these important interests. The amendment would prohibit these protections.

I. THE MONTANA REPRODUCTIVE RIGHTS AMENDMENT AUTHORIZES ABORTION-ON-DEMAND THROUGHOUT PREGNANCY

Passage of the amendment will effectuate abortion-on-demand up until a preborn baby's birth date. Although the proposed amendment includes language that seemingly allows Montana to prohibit abortion after "fetal viability", it allows for a broad "health" exception. The proposed amendment states, "It would prohibit the government from denying or burdening the right to abortion before fetal viability. It would also prohibit the government from denying or burdening access to abortion when a treating healthcare professional determines it is medically indicated to protect the pregnant patient's life or *health*."[11] Courts, including the U.S. Supreme Court, have broadly interpreted this health exception. In *Doe v. Bolton*, which was the companion case to *Roe*, the Supreme Court defined "health" in abortion laws as "*all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.*"[12] 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."[13]

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[9] *Id.*
[10] *Dobbs*, 142 S. Ct. at 2284.
[11] Montana Right to Abortion Initiative (2024) (emphasis added).
[12] *Doe v. Bolton*, 410 U.S. 179, 192 (1973).
[13] 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/.

Under the amendment's broad health exception, if a pregnancy is affecting a woman's "emotional well-being" for whatever reason, she can have an abortion up to the date of her unborn child's birth. By including this health exception, Montana will be authorizing 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.

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."[14] "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."[15] Dr. James Studnicki published a similar outcome in *Health Services Research and Managerial Epidemiology* regarding late-term abortions. As he says, "[t]he Guttmacher Institute has provided a number of reports over 2 decades which have identified the reasons why women choose abortion, and they have consistently reported that childbearing would interfere with their education, work, and ability to care for existing dependents; would be a financial burden; and would disrupt partner relationships."[16] Accordingly, most abortions occur for elective reasons of the mother, not because of the 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.[17] However, the number of late-term abortions is likely significantly higher given that the Centers for Disease Control and Prevention's ("CDC") data is limited by voluntary state reporting and the fact that abortion destination states such as California and Maryland refuse to provide any data to the CDC. The amendment will only increase the number of late-term abortions due to its broad health exception, putting more women at risk of suffering severe and life-threatening complications, as well as subjecting their 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.

a. The Montana Reproductive Rights 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

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[14] AM. ASSOC. OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, STATE RESTRICTIONS ON ABORTION: EVIDENCE-BASED GUIDANCE FOR POLICYMAKERS, Comm. Op. 10, at 10 (updated Sept. 2022).
[15] *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).
[16] James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Apr. 9, 2019, at 1, 1.
[17] Guttmacher Institute, *Induced Abortion in the United States*, GUTTMACHER (2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states.

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 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 Montana passes the amendment and authorizes abortion-on-demand, more women will experience life-threatening complications from late-term abortions.

b. The Montana Reproductive Rights Amendment Furthers the Psychological Harm of Abortion On Women.

Amending Montana'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 abortion has historically been polarized, but recent research indicates an increased

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[18] *See* Planned Parenthood, *How Safe Is an In-Clinic Abortion?*, (last visited July 30, 2024).
[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).
[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).

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 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 women's overall quality of life.

c. The Montana Reproductive Rights 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]

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[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).
[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).

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, Montana protects human life in the womb at all stages of development. However, the amendment's passage makes it difficult for Montana to enact or maintain any gestational limit on abortion 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.

II. THE MONTANA REPRODUCTIVE RIGHTS 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 reiterates the Montana Supreme Court's binding of the state's ability to protect women, young girls, and their preborn children, as shown by current activist litigation and legislative advocacy against pro-life laws. Montana has numerous life-affirming laws, although many have been enjoined by the Montana Supreme Court, including the following:

- a protection for the unborn once the child can feel pain;[37]
- a comprehensive informed consent process that ensures abortionists inform women of the risks of abortion as well as available alternatives, and gives women a 24-hour reflection period;[38]
- protections against coerced abortions;[39]
- parental consent laws;[40]
- a ban on gruesome partial birth abortions;[41]
- regulations on abortion-inducing drugs;[42]
- abortion reporting laws that require abortionists to report necessary data;[43]
- conscience protections for health care professionals and public and private hospitals that object to abortion based on their beliefs and convictions;[44] and
- protections for infants born alive after an attempted abortion.[45]

The intent of these laws is to protect women and girls from the inherent harms of abortion, as well as protect preborn children. However, the amendment would go

[36] *See Dobbs*, 142 S. Ct. at 2284.
[37] Mont. Code Ann. § 50-20-109.
[38] *Id.* at § 50-20-106 & 302.
[39] *Id.* at § 50-20-508.
[40] *Id.* at § 50-20-502.
[41] *Id.* at § 50-20-401.
[42] *Id. at* §§ 50-20-701 — 50-20-714.
[43] *Id.* at § 50-20-110.
[44] *Id.* at § 50-20-111.
[45] *Id.* at § 50-20-108 & 804.

even further than the Montana Supreme Court by prohibiting Montana from passing any future protections for women, girls, and preborn children by further restricting recourse to the courts requiring more than the strict scrutiny standard utilized by the Supreme Court in *Roe*. The amendment explicitly limits the areas in which the state can seek to protect woman, girls, and the unborn and then requires the state to prove those protections comply with narrow allowance. This amounts to a strict scrutiny review in a very narrow lane.

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.[46] 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 the Court implemented the equally unworkable undue burden standard.[47] Later, the Supreme Court in *Dobbs* overturned *Roe* and *Casey* entirely, holding that there is no right to abortion in the U.S. Constitution.[48]

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 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.[49]

The language of the amendment rebuffs the Supreme Court's change of standard in *Dobbs* and seeks to tie the hands of the state in a more restrictive way than even *Roe* did.

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 elements of their informed consent process, licensing requirements for abortion clinics, abortion reporting requirements, prohibitions on gruesome partial-birth abortions, etc.

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.[50] Yet, the Montana amendment's exception is even broader

[46] Roe v. Wade, 410 U.S. 113 (1973).
[47] 505 U.S. 833 (1992).
[48] *Dobbs*, 142 S. Ct. at 2284.
[49] *Id.*
[50] MICH. CONST. art. I, § 28.

because it uses the word, "health," rather than qualifying it to just the physical or mental health of the woman. Thus, the ramifications of Montana passing the amendment may be even more devastating than those seen in Michigan.

III. THE MONTANA REPRODUCTIVE RIGHTS AMENDMENT THREATENS MONTANA'S PARENTAL INVOLVEMENT LAWS.

As the Montana Supreme Court showed in *Planned Parenthood v. Montana*, the elimination of Montana's pro-life policies is particularly hazardous for minor girls.[51] The amendment's passage may lead to the elimination of Montana's ability to fight for its parental consent law, which requires abortionists to obtain notarized written consent of a parent or legal guardian prior to an abortion,[52] or similar parental involvement. 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."[53] The high-risk nature of adolescent pregnancy is compounded by the fact that pregnant adolescent patients often delay care.[54] 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 . . .".[55] 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.

Montana's work to protect the welfare and safety of minors by ensuring that abortionists notify parents of a minor daughter's desire to obtain an abortion has already been undermined, stripping the state of the ability to ensure pregnant minors receive proper and prompt care. If Montana voters approve the amendment, even

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[51] Planned Parenthood, 2024 MT 178.
[52] MONT. CODE ANN. §§ 50-20-501 – 50-20-511.
[53] 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.
[54] Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 743 (2015).
[55] *Id.*

efforts to find a way to implement and enforce such laws will be at risk of challenges by abortion activists seeking to eliminate them.

IV. THE MONTANA REPRODUCTIVE RIGHTS AMENDMENT GIVES ABORTIONISTS FREE REIN TO OPERATE WITHOUT ANY HEALTH AND SAFETY RESTRICTIONS.

Passing the amendment keeps the door open for abortion facilities to set up shop in Montana and would prohibit important laws regulating those facilities by preventing the state from acting in any way before viability. Just like in Michigan, abortion activists may seek to challenge Montana's laws regulating abortion clinics. Currently, Montana has a regulatory framework in place for the inspection and monitoring of abortion businesses.[56]

Across the country, abortion facilities compromise women's health and safety. Several have been cited for unsanitary conditions, including multiple locations with stained carpets, dusty and dirty air vents, wall smears and similar cleanliness issues that raise the risks of infection, improperly labeled pre-drawn syringes, and unsecured oxygen tanks.[57] In fact, at one abortion facility, staff failed to ensure the patient's medical record accompanied her to the hospital.[58] Another hospitalized patient's medical record was missing key information including the reason for sending the patient to the hospital, method of transportation, and whether her medical record went to the hospital with her.[59]

Unfortunately, if Montanans pass the amendment, it jams the door open for these facilities to operate without oversight, 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 MONTANA REPRODUCTIVE RIGHTS AMENDMENT ENABLES SEX-TRAFFICKERS AND ABUSERS TO COERCE VICTIMS INTO HAVING UNWANTED ABORTIONS.

The amendment subjects women to coerced abortions while protecting their abusers. It states that it "prevents the government from penalizing. . .anyone who assists someone in exercising their right to make and carry out voluntary decisions about their pregnancy"[60] The amendment does not define "voluntary." Therefore, under the amendment, Montana cannot "penalize" or prohibit a sex trafficker or abusive partner from bringing their victim to an abortion clinic to have an abortion if seemingly at her request or if the abortionist deems it is necessary to protect the woman's "health." As a

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[56] Mont. CODE ANN. § 50-20-110.
[57] *Unsafe: America's Abortion Industry Endangers Women*, AMS. UNITED FOR LIFE, 2021, at 73.
[58] *Id.*
[59] *Id.*
[60] Montana Right to Abortion Initiative (2024).

result, the amendment strips Montana 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]."[61] For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.[62] Post-abortive IPV victims also have a "significant association" with "psychosocial problems including depression, suicidal ideation, stress, and disturbing thoughts."[63]

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."[64] 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.[65] 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]."[66]

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."[67] 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."[68] 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 abortions . . . .[69]

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[61] 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).
[62] COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *Reproductive and Sexual Coercion*, Comm. Op. No. 554, at 2 (Feb. 2013).
[63] Hall, *supra* note 71, at 11.
[64] Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ SEXUAL & REPROD. HEALTH 61, 62, 65 (2019).
[65] *Id.* at 62–63.
[66] *Id.* at 62.
[67] 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.
[68] David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women's Emotional Responses and Mental Health*, CUREUS, Jan. 31, 2023, at 1.
[69] *Id.* at 1.

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."[70] "The [sex-trafficking] survivors in this study [] reported that they often did not freely choose the abortions they had while being trafficked."[71] A majority of the sex-trafficking victims "indicated that one or more of their abortions was at least partly forced upon them."[72] Given the prevalence of coerced abortions among sex-trafficking victims, the authors of the study note how "[h]ealthcare providers can play a crucial role in the trafficking rescue process by identifying possible victims and following up on those suspicions with careful, strategic questions, and actions that catalyze rescue or help create exit strategies."[73]

Despite the prevalence of coercive abuse among women seeking abortions, the amendment prohibits Montana from penalizing, prohibiting, or interfering with abusers or sex traffickers who are "assisting" a woman seeking an abortion as it would regulate the effectuation of her abortion. If the state wants to enact additional laws to protect woman and girls against coercion, it would not be allowed to do so until after viability, and then only if related to the health of the pregnant woman.[74] Even after having to wait until after viability, Montana will have a hard time meeting this standard to prevent coercion.

During the 2023 legislative session, 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.[75] Thus, because abortion activists consider abortion as evidence-based care and see any law that limits abortions as a burden on women, Montana 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 are regulations on abortion, and, in the second trimester, unrelated to the pregnant woman's physical health. 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.

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[70] 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).
[71] *Id.*
[72] *Id.*
[73] *Id.* at 84.
[74] Montana Right to Abortion Initiative (2024).
[75] The pro-abortion activists were ultimately unsuccessful in their attempt to repeal this law, and it remains in effect. Although, the law may be subject to further attacks in following legislative sessions.

VI. THE MONTANA REPRODUCTIVE RIGHTS 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.

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."[76] 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)."[77] Indeed, "there is no medical indication for elective induced abortion, since it cures no medical disease."[78]

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."[79] 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."[80] 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."[81] 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."[82] Yet, converse contrary 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

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[76] *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/.
[77] Rsch. Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *Concluding Pregnancy Ethically*, Prac. Guideline No. 10, at 5 (Aug. 2022).
[78] 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).
[79] *Id.*
[80] Rsch. Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *supra* note 87, at 5.
[81] Helen M. Alvare, *Nearly 50 Years Post-*Roe v. Wade *and Nearing its End: What* is *the Evidence that Abortion Advances Women's Heath and Equality*, 35 Regent L. R. 165, 216 (Feb, 2022).
[82] *Id.* at 213.

mother[] is the most important thing [they] do."[83] 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 with children receiving the care they require."[84] 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."[85] 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.

Instead of promoting women's health, safety, and socioeconomic success and equality in Montana, abortion has severe consequences for women's welfare. This amendment allows for late-term abortions up until the moment of birth, which subject women to increased risks of health complications and even death, as well as negatively affect their mental wellbeing. In addition, the rates of coerced abortions will increase significantly, as the amendment protects sex-traffickers and abusers in their coercive "assistance" with their victims' abortions. Minors will obtain abortions without any parental involvement, increasing their likelihood of experiencing health complications due to delayed care and high-risk pregnancies.

Not only will women suffer the consequences of the amendment's passage, but so will their preborn children. Even though the Supreme Court in *Dobbs* acknowledges that states have an interest in preserving prenatal life, the amendment completely disregards the humanity of preborn children. As stated in Section I (c), preborn children experience pain while in the womb, and abortion is a violent act that ends the preborn child's life. Although abortion has silenced the voices of these children, it has not silenced the voices of their mothers.

Women deserve better than this harm and abandonment; they deserve better than abortion. However, if the amendment is passed, more women and minor girls will fall prey to the deception that runs rampant in the abortion industry, to the detriment of their physical and emotional well-being.

CONCLUSION

Enshrining a "right" to abortion in Montana's constitution will negatively impact the welfare of women and preborn children in the state. The amendment targets and undermines the life-affirming policies Montanans fought so hard to implement, potentially leading to the elimination of such laws. Montana's strong pro-life policies will be at risk of being replaced with an anti-life culture that threatens the health and

[83] *Id.* at 213-14.
[84] *Id.* at 214.
[85] *Id.* at 216.

safety of Montana residents both inside and outside the womb. Further, having a constitutionally protected "right" to abortion will make it difficult for Montana 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 Montana.