



Constitutional Peril in South Dakota: The Legal and Policy Implications of Enshrining a Right to Abortion in South Dakota’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*,² while also facing new challenges. Now that the Supreme Court has overturned *Roe v. Wade*³ 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. 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.

South Dakotans are currently being asked to sign onto a similar ballot initiative ("Amendment G"). If passed, the ballot initiative would amend the South Dakota constitution to allow for the intentional termination of a human being in the womb in every month of the pregnancy.⁴ The amendment explicitly forbids the state from enacting laws that protect women and the preborn from abortion violence in the first trimester, including safety measures and requiring the involvement of a physician—"the State may not regulate a pregnant woman's abortion decision and its effectuation."⁵ Similarly, the amendment prohibits the state from regulating abortion in the second trimester unless the law is "reasonably related to the *physical* health of the pregnant woman"⁶—binding the state from protecting women from coercion and intimate partner violence. Finally, although the amendment seemingly allows for South Dakota to regulate abortion in the third trimester, it includes a broad exception for instances "to preserve the . . . health of the pregnant woman"⁷—placing oversight of third trimester abortions solely in the hands of abortionists.

If South Dakotans pass the amendment, the fallout will be devastating, especially for the welfare of South Dakota women and their preborn children. Passage of the amendment authorizes abortion-on-demand throughout pregnancy, 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 South Dakota, 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. The amendment allows abortion activists to turn South Dakotans' life-affirming state into an abortion

² *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

³ 410 U.S. 113 (1973).

⁴ A Constitutional Amendment Concerning the Regulation of Abortion (South Dakota 2024).

⁵ *Id.*

⁶ *Id.* (emphasis added).

⁷ *Id.*

destination that endangers the health and safety of its residents both inside and outside the womb. This no longer a parade of “horribles.” It is the reality in Michigan and could be the reality in South Dakota if this amendment passes.

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.⁸ It is good for the welfare of women and preborn children that South Dakota is able to act in furtherance of these important interests. The amendment would prohibit that.

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

Roe v. Wade was devastating for women and children in the womb. Amendment G is far worse. 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 South Dakota to prohibit abortion in the third trimester, it allows for a broad “health” exception. The proposed amendment states, “the State may regulate or prohibit abortion, except when abortion is necessary, in the medical judgment of the woman’s physician, to preserve the life and *health* of the pregnant woman.”⁹ 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.*”¹⁰ 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.”¹¹

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 preborn child’s birth. By including this health exception, South Dakota will be authorizing abortion-on-demand throughout all nine months of pregnancy. The abortionist simply has to find the abortion “necessary”—a word left undefined—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

⁸ *Dobbs*, 142 S. Ct. at 2284.

⁹ A Constitutional Amendment Concerning the Regulation of Abortion (South Dakota 2024) (emphasis added).

¹⁰ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

¹¹ 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/>.

Gynecologists (“AAPLOG”) states, “most abortions are done for social reasons.”¹² “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.”¹³ 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.”¹⁴ 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.¹⁵ 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 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 South Dakota 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 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: “[t]he 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.¹⁶ To put this in context, a 2019 study indicates “[i]t is estimated that about 1%

¹² AM. ASSOC. OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, STATE RESTRICTIONS ON ABORTION: EVIDENCE-BASED GUIDANCE FOR POLICYMAKERS, Comm. Op. 10, at 10 (updated Sept. 2022).

¹³ *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).

¹⁴ James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY, Apr. 9, 2019, at 1, 1.

¹⁵ Guttmacher Institute, *Induced Abortion in the United States*, GUTTMACHER (2019), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

¹⁶ See Planned Parenthood, *How Safe Is an In-Clinic Abortion?*, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion> (last visited July 30, 2024).

of all abortions in the United States are performed after 20 weeks, or approximately 10,000 to 15,000 annually.”¹⁷

Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications is significantly higher after 20 weeks’ gestation.¹⁸ 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.¹⁹ Furthermore, 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.”²⁰ 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.²¹

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.²² Immediate complications affect approximately 10% of women undergoing abortion, and approximately one-fifth of these complications are life-threatening.²³ If South Dakota passes this amendment and authorizes abortion-on-demand, more women will experience life-threatening complications from late-term abortions.

b. The South Dakota Reproductive Rights Amendment Furthers the Psychological Harm of Abortion on Women.

Amending South Dakota’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.”²⁴ “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.”²⁵

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.”²⁶ In fact, a recent 2023 study found that American “women whose first pregnancy ends in induced abortion are significantly more likely than

¹⁷ Studnicki, *supra* note 14, at 1.

¹⁸ Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 *OBSTETRICS & GYNECOLOGY* 729, 731 (2004).

¹⁹ *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).

²⁰ Bartlett, *supra* note 18, at 735.

²¹ *Id.*

²² See Planned Parenthood, *supra* note 16.

²³ REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 48 (2005).

²⁴ 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).

²⁵ 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).

²⁶ *Id.*

women whose first pregnancy ends in a live birth to experience mental health problems throughout their reproductive years.”²⁷ 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.”²⁸

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 South Dakota 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.²⁹ A 2010 study found that “the earlier infants are delivered, the stronger their response to pain”³⁰ 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.”³¹ As a result, preborn children display a “hyperresponsiveness” to pain.³² According to one group of fetal surgery experts, “[t]he administration of anesthesia directly to the fetus is critical in open fetal surgery procedures.”³³

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.³⁴ Accordingly, South Dakota currently protects human life in the womb at all stages of development. However, the amendment’s passage will make it difficult for South Dakota 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

²⁷ 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).

²⁸ Grauerholz, *supra* note 25; 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”).

²⁹ Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. MED. ETHICS 3 (2020).

³⁰ Lina K. Badr et al., *Determinants of Premature Infant Pain Responses to Heel Sticks*, 36 PEDIATRIC NURSING 129 (2010).

³¹ *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INST. (Sept. 2022), https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/#_ednref14.

³² Christine Greco & Soorena Khojasteh, *Pediatric, Infant, and Fetal Pain*, CASE STUDIES PAIN MGMT. 379 (2014).

³³ 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).

³⁴ See *Dobbs*, 142 S. Ct. at 2284.

mitigate fetal pain. This rhetoric disregards the humanity of preborn children and subjects them to painful abortion procedures.

II. THE SOUTH DAKOTA REPRODUCTIVE RIGHTS AMENDMENT SEEKS TO ELIMINATE PROTECTIONS FOR WOMEN, MINOR GIRLS, AND PREBORN CHILDREN, AND MAKES IT DIFFICULT FOR THE STATE TO ENACT FUTURE SAFEGUARDS.

The amendment's passage places pro-life 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. South Dakota has several life-affirming laws, including the following:

- a protection for the preborn at all stages of development;³⁵
- 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;³⁶
- protections against coerced abortions;³⁷
- parental notification laws;³⁸
- a ban on gruesome partial birth abortions;³⁹
- regulations on abortion-inducing drugs;⁴⁰
- abortion reporting laws that require abortionists to report necessary data;⁴¹
- conscience protections for health care professionals and public and private hospitals that object to abortion based on their beliefs and convictions;⁴²
- protections against discriminatory abortions based solely on the child's or on a baby's Down syndrome diagnosis;⁴³ and
- protections for infants born alive after an attempted abortion.⁴⁴

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 may be subject to attack if the amendment passes. Abortion activists may argue these safeguards "burden" or "interfere with" a woman's "right" to abortion pursuant to the constitutional amendment, leading to legislative repeal or judicial injunction.

In addition to the elimination of current pro-life laws, if voters approve the amendment, South Dakota will face difficulty in passing any future protections for women, girls. The amendment appears to go further than the strict scrutiny standard utilized by the Supreme Court in *Roe*. The amendment explicitly limits the areas in

³⁵ S.D. CODIFIED LAWS § 22-17-5-1.

³⁶ *Id.* at § 34-23A-56.

³⁷ *Id.* at §§ 25-17-13 & 13.1.

³⁸ *Id.* at §§ 34-23A-7 & 7.1.

³⁹ *Id.* at § 34-23A-27.

⁴⁰ *Id.* at § 36-4-47.

⁴¹ *Id.* at § 34-23A-19.

⁴² *Id.* at § 34-23A-12.

⁴³ *Id.* at §§ 34-23-64 & 90.

⁴⁴ *Id.* at §§ 34-23A-16, 16.1, & 16.2.

which the state can seek to protect women, girls, and the preborn 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 that they do 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.⁴⁵ The Supreme Court quickly found strict scrutiny was unworkable in the abortion context, and discarded this litigation standard in *Planned Parenthood v. Casey*, although the Court implemented the equally unworkable undue burden standard.⁴⁶ Later, the Supreme Court in *Dobbs* overturned *Roe* and *Casey* entirely, holding that there is no right to abortion in the U.S. Constitution.⁴⁷

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.⁴⁸

The language of the amendment rebuffs the Supreme Court’s change of standard in *Dobbs* and seeks to tie the hands of the state by imposing a standard more restrictive than *Roe*. Unlike judge made precedent, Amendment G seeks to create constitutional law that leaves no room for variance, using such language as “the state may not regulate.” Going even further than *Roe*, Amendment G removes any medical conversation from the decision to abort a child stating that the decision “must be left to the judgment of the pregnant woman,”⁴⁹ not her physician. Such language could be used to disallow a pregnancy resources center from even providing informational resources to abortion minded women, such as on abortion pill reversal.

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 of late-term abortions to protect the woman’s “physical or mental health,” and prohibits the state

⁴⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁶ 505 U.S. 833 (1992).

⁴⁷ *Dobbs*, 142 S. Ct. at 2284.

⁴⁸ *Id.*

⁴⁹ A Constitutional Amendment Concerning the Regulation of Abortion (South Dakota 2024).

from regulating abortion unless “justified by a compelling state interest achieved by the least restrictive means.”⁵⁰ Yet, the South Dakota 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 South Dakota passing the amendment may be even more devastating than those seen in Michigan.

III. THE SOUTH DAKOTA REPRODUCTIVE RIGHTS AMENDMENT THREATENS SOUTH DAKOTA’S PARENTAL INVOLVEMENT LAWS.

The elimination of South Dakota’s pro-life policies is particularly hazardous for minor girls. The amendment’s passage may lead to the elimination of South Dakota’s parental notification law, which requires abortionists to notify of one of the minor’s parents prior to the abortion.⁵¹ Amendment G states that “the State may not regulate a pregnant woman’s abortion decision and its effectuation, which *must be left to the judgment of the pregnant woman*.”⁵² Current South Dakota law defines a woman as “a female human being whether or not she has reached the age of majority.”⁵³ Under this framework, the amendment would undermine the fundamental rights of parents to make healthcare decisions for and with their children. Parental involvement 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 medical judgment concerning the minor. Additionally, if parents are aware that their daughter has obtained an abortion, they may better ensure she receives the best post-abortion medical attention, especially if the minor suffers post-abortive complications. Due to their developing bodies, minor girls have a “biological predisposition for high-risk pregnancies.”⁵⁴ The high-risk nature of adolescent pregnancy is compounded by the fact that pregnant adolescent patients often delay medical care.⁵⁵ 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”⁵⁶ 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.

⁵⁰ MICH. CONST. art. I, § 28.

⁵¹ S.D. CODIFIED LAWS § 34-23A-7 & 7.1.

⁵² A Constitutional Amendment Concerning the Regulation of Abortion (South Dakota 2024) (emphasis added).

⁵³ S.D. CODIFIED LAWS § 34-23A-68.

⁵⁴ 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.

⁵⁵ Nathalie Fleming et al., *Adolescent Pregnancy Guidelines*, 37 J. OBSTETRICS & GYNAECOLOGY CAN. 740, 743 (2015).

⁵⁶ *Id.*

South Dakota'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 South Dakota voters approve the amendment, such laws will be unenforceable.

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

Passing the amendment opens the door for abortion facilities to set up shop in South Dakota and would prohibit important laws regulating those facilities. Just like in Michigan, abortion activists may seek to challenge South Dakota's laws regulating abortion clinics. Currently, South Dakota has a regulatory framework in place for the inspection and monitoring of abortion businesses.⁵⁷ These laws would be unenforceable.

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.⁵⁸ In fact, at one abortion facility, staff failed to ensure that the patient's medical record accompanied her to the hospital.⁵⁹ 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.⁶⁰

Unfortunately, if South Dakotans pass the amendment, it opens the door for these facilities to operate without oversight, endangering more women and girls. 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 SOUTH DAKOTA REPRODUCTIVE RIGHTS AMENDMENT ENABLES SEX TRAFFICKERS AND ABUSERS TO COERCE VICTIMS INTO HAVING UNWANTED ABORTIONS.

The amendment would make laws that protect women from coerced abortions unenforceable while insulating their abusers from legal restraint. It states that "the state may not regulate a pregnant woman's abortion decision and its effectuation, which must be left to the judgment of the pregnant woman."⁶¹ Therefore, under the amendment, South Dakota cannot "regulate" who accompanies a woman to an abortion clinic or who

⁵⁷ S.D. CODIFIED LAWS § 34-23A-49.

⁵⁸ *Unsafe: America's Abortion Industry Endangers Women*, AMS. UNITED FOR LIFE, 2021, at 73.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ A Constitutional Amendment Concerning the Regulation of Abortion (South Dakota 2024).

affects or is involved in her decision or its effectuation. Further, the amendment would empower abortion activists to challenge South Dakota'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.⁶² That requirement would be unenforceable. As a result, the amendment strips South Dakota women of necessary safeguards for authentic choice and increases the risk 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].”⁶³ For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.⁶⁴ Post-abortive IPV victims also have a “significant association” with “psychosocial problems including depression, suicidal ideation, stress, and disturbing thoughts.”⁶⁵

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.”⁶⁶ 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.⁶⁷ 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].”⁶⁸

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.”⁶⁹ 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.”⁷⁰ 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

⁶² S.D. CODIFIED LAWS § 34-23A-55.

⁶³ 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).

⁶⁴ COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *Reproductive and Sexual Coercion*, Comm. Op. No. 554, at 2 (Feb. 2013).

⁶⁵ Hall, *supra* note 63, at 11.

⁶⁶ Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ SEXUAL & REPROD. HEALTH 61, 62, 65 (2019).

⁶⁷ *Id.* at 62–63.

⁶⁸ *Id.* at 62.

⁶⁹ 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.

⁷⁰ David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women's Emotional Responses and Mental Health*, CUREUS, Jan. 31, 2023, at 1.

abortion; . . . [and] a perceived decline in their overall mental health that they attribute to their abortions⁷¹

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.”⁷² “The [sex-trafficking] survivors in this study [] reported that they often did not freely choose the abortions they had while being trafficked.”⁷³ A majority of the 66 sex-trafficking victims “indicated that one or more of their abortions was at least partly forced upon them.”⁷⁴ 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.”⁷⁵

Despite the prevalence of coercive abuse among women seeking abortions, the amendment prohibits South Dakota 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 the second trimester, and the only if “reasonably related to the physical health of the pregnant woman.”⁷⁶ Even after having to wait for three months into the pregnancy, South Dakota 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.⁷⁷

If the amendment is passed, critical protections for women experiencing IPV or reproductive control would be unenforceable in the first trimester and likely in the second trimester because regulation at that point is limited to “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.

VI. THE SOUTH DAKOTA REPRODUCTIVE RIGHTS AMENDMENT FURTHERS THE FALSE NARRATIVE THAT ABORTION IS NECESSARY FOR WOMEN’S EQUALITY IN AMERICAN SOCIETY.

⁷¹ *Id.* at 1.

⁷² 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).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 84.

⁷⁶ A Constitutional Amendment Concerning the Regulation of Abortion (South Dakota 2024).

⁷⁷ 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.

Amendment G promotes the narrative that women need abortion in order to obtain socioeconomic success and equality in American society. This claim is unfounded and harms women.

The language used in the amendment is deceptive and does not describe the reality of what abortion is. Abortion is not healthcare. Few women seek abortions for medical reasons, and only a small percentage of abortions are done to protect a woman's health. Rather, abortion 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."⁷⁸ 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)."⁷⁹ Indeed, "there is no medical indication for elective induced abortion, since it cures no medical disease."⁸⁰

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."⁸¹ Furthermore "[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."⁸² Despite these evident truths, abortion activists continue to push 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."⁸³ 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."⁸⁴ Yet, contrary to the cultural narrative, a 2005 national study showed 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."⁸⁵ Notably, only 3% of mothers expressed dissatisfaction with motherhood.

⁷⁸ 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/>.

⁷⁹ Rsch. Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *Concluding Pregnancy Ethically*, Prac. Guideline No. 10, at 5 (Aug. 2022).

⁸⁰ 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).

⁸¹ *Id.*

⁸² Rsch. Comm., Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *supra* note 79, at 5.

⁸³ 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).

⁸⁴ *Id.* at 213.

⁸⁵ *Id.* at 213-14.

Pregnancy is neither an illness nor a disability and such a claim results in discriminatory treatment toward pregnant 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.”⁸⁶ Additionally, this leads to both 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.”⁸⁷

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 South Dakota, abortion has severe consequences for women’s welfare. The amendment allows for late-term abortions up until the moment of birth because of the unlimited “health” exception, 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 renders unenforceable legal restraints on coerced abortion. Minors will obtain abortions without any parental involvement, increasing their likelihood of experiencing health complications due to delayed care and higher-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 South Dakota’s constitution will negatively impact the health and welfare of women and preborn children in the state. The amendment targets and undermines the life-affirming policies South Dakotans fought so hard to implement, making them unenforceable. Amendment G will make it extremely difficult for South Dakota 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-

⁸⁶ *Id.* at 214.

⁸⁷ *Id.* at 216.

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 South Dakota. Amendment G will not promote women's health, equality or autonomy.