Issue 1 on the November 2023 Ballot

A legal analysis by the Ohio Attorney General

Ohioans will vote this November on Issue 1, which proposes adding a right to abortion and protections for contraception and other matters discussed below to Ohio's Constitution. Many Ohioans have asked me what the Reproductive Rights Amendment, commonly referred to as the "Abortion Amendment," will actually do if enacted. Will it allow any limits on abortion? Will it do away with parental consent or Ohio's partial-birth abortion ban? Ohioans deserve to know what they are voting on, so I have prepared this legal analysis to make the Amendment's impacts on Ohio law more understandable.

This is not a policy analysis and is designed only to describe what the legal effects of Issue 1 will be on our State. Whether Issue 1 is good, bad or mixed policy is for the voters to decide. My purpose here is to describe what the choice is, not to suggest what that choice ought to be – the "what," not the "why."

Below is a summary of some of the ways this Amendment, if enacted, would change the law. The summary discusses the Amendment's legal standards and how they compare to the different standards under *Roe v. Wade* and *Planned Parenthood v. Casey,* and concludes with a list of several laws that could be affected by this Amendment if it is enacted. Because the Amendment talks more broadly of "reproductive health care," including contraception, and other items "including but not limited to" abortion, this list makes mention of specific laws that, based on past experience, I expect will most certainly be challenged at some point. It is not, however, an exhaustive list of all statutes that might possibly be affected by the proposed Amendment. Assembling such a list would require a greater degree of conjecture and speculation than is proper here.

What the proposed Amendment says

The Amendment itself is short. Its full text is below. It provides little in the way of definitions. Some terms found in the Amendment reflect language used in legal cases for decades, which partly suggests how courts might read them. Others have debatable meanings, rendering their interpretation much less certain. It is this uncertainty that makes it difficult to forecast precisely how courts will apply the Amendment to certain statutes and hypothetical scenarios if it were to pass.

The Amendment

Be it Resolved by the People of the State of Ohio that Article I of the Ohio Constitution is amended to add the following Section:

Article I, Section 22. The Right to Reproductive Freedom with Protections for Health and Safety

A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:

1. contraception;
2. fertility treatment;
3. continuing one's own pregnancy;
4. miscarriage care;
5. and abortion.

B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:

1. An individual's voluntary exercise of this right or
2. A person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the

individual's health in accordance with widely accepted and evidence-based standards of care.

However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.

C. As used in this Section:

1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
2. "State" includes any governmental entity and any political subdivision.

D. This Section is self-executing.

The Amendment's key parts and differences from *Roe* and *Casey*

The U.S. Supreme Court, for almost 50 years, said the U.S. Constitution required abortion rights, and the Courts routinely decided which types of regulations the States could enact — from time limits to requiring parental consent and more – based on that precedent. The Court created the right to abortion in *Roe v. Wade*[1], and said more on the topic in many other cases, especially *Planned Parenthood v. Casey.*[2] Then, in 2022, the Court overruled *Roe* and said it was up to States to decide how to address the issue. The proposed Amendment appears to borrow some concepts from the *Roe* era, but also creates a new, legal standard that goes beyond what *Roe* and *Casey* said.

[1] 410 U.S. 113 (1973); overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

[2] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), overruled by *Dobbs*.

In *Roe v. Wade,* the U.S. Supreme Court said that the State's right to regulate varied by pregnancy's trimesters, and that a woman had a "fundamental right" to obtain an abortion before the point of "viability," or the point when a child, if born, could live outside the womb. Any pre-viability regulations were allowed only if they met a legal standard called "strict scrutiny."

"Strict scrutiny" means that any regulations must meet a "compelling government interest" — that is, a very strong interest — and must be "narrowly tailored" to meet that interest, meaning that the regulation had to match that interest closely, and not regulate far beyond that interest. Under that "strict scrutiny" standard, the Court struck down many State or local regulations, including laws that would have barred certain methods of abortions, laws that required parental consent for minors' abortions with no exceptions, or laws that would have required a 24-hour waiting period to consider the decision.[3] On the other hand, the Court allowed States to require parental notice or consent for minors to obtain abortions, as long as minors could go to court for a "judicial bypass" instead.[4] And the Court allowed States to decline to pay for abortions under government programs that paid for health care.[5]

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[3] *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976) (invalidating blanket parental consent and ban on saline abortion method), abrogated by *Dobbs*; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.,* 462 U.S. 416 (invalidating blanket parental consent requirement and 24-waiting period), overruled by *Casey*, 505 U.S. 833, and both abrogated by *Dobbs*.

[4] *H. L. v. Matheson*, 450 U.S. 398 (1981).

[5] *Maher v. Roe*, 432 U.S. 464, 474 (1977) (state need not fund elective abortion); *see also Harris v. McRae*, 448 U.S. 297, 315–17 (1980) (upholding federal Hyde Amendment barring funding of elective abortion); *Rust v. Sullivan*, 500 U.S. 173, 192–94 (1991) (upholding abortion-funding bar in Title X family-planning statute and regulations).

In *Planned Parenthood v. Casey,* the Court reduced the "strict scrutiny" standard to a new "undue burden" standard for abortion regulations, allowing the State to do more than the previous strict scrutiny standard had.[6] *Casey* reaffirmed the core idea of a right to abortion, but the lead opinion criticized *Roe* and later cases for "misconceiv[ing] the nature of the pregnant woman's interest" and "undervalue[ing] the State's interest in potential life." The Court therefore upheld several regulations in *Casey* itself, including parental consent and a 24-hour waiting period, including some (like the waiting period) that had previously been rejected under *Roe*. The *Casey* "undue burden" test is thus the one that had governed longest under *Roe*, spanning 30 years from 1992-2022. The *Casey* standard allowed regulations to be based on multiple interests, including the pregnant woman's own health, the interest in fetal life, and "protecting the integrity and ethics of the medical profession."[7] As a result, the Supreme Court, and lower courts following the test, upheld limits on certain methods of abortion, and on things such as abortions where the doctor knows the motivation is a possible diagnosis of Down syndrome.[8]

The proposed abortion Amendment would create a new standard that goes further than *Casey*'s "undue burden" test or *Roe's* original "strict scrutiny" test and will make it harder for Ohio to maintain the kinds of law already upheld as valid prior to last year's decision in *Dobbs*. In other words, the Amendment would give

[6] *Casey*, 505 U.S. at 874, overruled by *Dobbs*, 142 S. Ct. 2228.

[7] *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)

[8] *Gonzales,* 550 U.S. 124 (upholding federal partial-birth limit); *Women's Med. Pro. Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003) (upholding Ohio limit on "partial-birth feticide," R.C. 2919.151); *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021) (upholding Ohio Down syndrome law), abrogated by *Dobbs*, 142 S. Ct. 2228.

greater protection to abortion to be free from regulation than at any time in Ohio's history. That new test includes definitions and other terms that likewise make it harder for any law covering "reproductive decisions" to survive. This change is significant: The Amendment would not return things to how they were before *Dobbs* overruled *Roe,* and is not just "restoring *Roe.*" It goes further.

Here's how. The Amendment says that the "State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against" the exercise of any of the covered rights — abortion and more — "unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." That is stricter than *Roe* or *Casey* in several ways.

First, it says the State shall not "directly or indirectly" "burden" (or penalize, etc.) the covered right, or "discriminate against" it. *Casey* barred only "undue" burdens, and said that mild burdens were not enough to invalidate a law, as "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." Issue 1 covers any burden, apparently however slight. And the "discriminate" language could cover any area where the State acknowledges abortion or other "reproductive" care — such as fertility treatment — as different from other procedures, such as by not funding such elective procedures under Medicaid or other State benefit programs.

Second, the State can regulate *only* for the purpose of "advanc[ing] the [pregnant] individual's health." That means that the State cannot regulate for any other *purpose* or *interest* at all, no matter how mild the regulation. So the long-recognized interests in fetal life or in medical ethics cannot be protected, making

the laws previously upheld on those grounds no longer valid, even if the interests rise to the level of "compelling."

Third, even if a law meets the "health of the individual" part of this "exclusive scrutiny" test, it must still use the "least restrictive means" to advance that interest or purpose. While courts and commentators have sometimes compared those as synonymous, the U.S. Supreme Court has said that the "least restrictive means" requirement is even stricter than the already-strict "narrow tailoring" requirement and has distinguished them.

Fourth, the Amendment would require that the test be satisfied by proving it in court using "widely accepted and evidence-based standards of care." That contrasts with prior law under *Roe*/*Casey*, which allowed States to rely on their own reasonable medical judgment as long as there was a fair debate.

The Amendment would go legally further than *Roe/Casey* in other ways, too. First, it says that every "individual" has these rights, which could be read to include minors having the same rights as adults, as opposed to the traditional practice of children having limited rights. (This is discussed further below regarding parental consent.) Second*,* it covers "reproductive decisions, including but not limited to" the named areas of contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion — language that is broader than *Roe* or *Casey*. Some of those might not affect Ohio law as a practical matter, as Ohio has no restrictions on miscarriage care or on continuing a pregnancy. But the "not limited to" clause leaves open an unknown future in court litigation.

The Amendment likely also protects post-viability abortions under certain circumstances. On one hand, it says that "abortion may be prohibited after fetal viability." It then puts that assessment in one person's hands — the doctor

performing the abortion. It provides that in all cases, the doctor determines whether the fetus is viable and whether the pregnant woman's health justifies the post-viability abortion. In addition, the Amendment does not define "health," and previous court cases have said health, when not otherwise defined, can include other concerns, including mental health and "familial" factors (such as how many children someone has) and maternal age.[9]

All told, the Amendment's new standard goes beyond pre-*Dobbs* law under *Roe* and *Casey*. That means that many Ohio laws would probably be invalidated — even those that were allowed under *Roe* and/or *Casey* — and others might be at risk to varying degrees. Below is a summary of many of those laws.

Some of the discussion about particular subjects below will include matters that are not specifically named in the Amendment. While the text of the Constitution is controlling, broad principles often apply to things that are not named. For example, the First Amendment protects the "freedom of the press." Television and radio are not mentioned. But no one would argue that you are only free to spread your ideas using a printing press, but the government can stop you if you are on the air.

Ohio laws that could be challenged and possibly invalidated if the Amendment passes

Here are laws likely to be challenged, based on both our reading of the language, and also on the history of such laws being challenged during the previous *Roe v. Wade* era.

[9] *Doe v. Bolton*, 410 U.S. 179, 192 (1973), and *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997), both abrogated by *Dobbs*, 142 S. Ct. 2228.

The Heartbeat Act and any pre-viability time limits. Some of Ohio's laws may be defensible, but the Heartbeat Act would not exist if Issue 1 passes.

Ohio would no longer have the ability to limit abortions at any time before a fetus is viable. Viability is generally thought to be around 21 or 22 weeks. Passage of Issue 1 would invalidate the Heartbeat Act, which restricts abortions (with health and other exceptions) after a fetal heartbeat is detected, which is usually at about six weeks. No other pre-viability limit would be allowed.

Down syndrome discrimination law. Ohio currently bars doctors from performing abortions when they know that the abortion is motivated by a diagnosis of Down syndrome. That law was upheld in court during the *Roe v. Wade* era.[10] If Issue 1 passes, that law would be invalidated, along with any other laws aimed at preventing discriminatory motives, such as abortions performed based on the sex or disability of the fetus.

Particular methods of abortion. Ohio law regulates the methods used to perform abortions later in pregnancy, dilation and evacuation abortions (what Ohio law calls "dismemberment abortions"), or dilation and extraction abortions (what Ohio law calls partial-birth feticide). Ohio's partial-birth law was upheld in federal court under the *Casey* test.[11] Those laws would both be invalidated and these abortions would be permitted. For both methods, current Ohio law requires doctors to first initiate the death of the fetus, such as by injecting a heart-stopping

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Preterm-Cleveland v. McCloud, 994 F.3d 512, 527 (6th Cir. 2021) (en banc), abrogated by *Dobbs*, 142 S. Ct. 2228.

[11] *Women's Med. Pro. Corp. v. Taft*, 353 F.3d 436, 444 (6th Cir. 2003).

drug, before proceeding with the termination of the pregnancy and removal of the fetus. Those restrictions would likely not survive under an "exclusive scrutiny" test.

Pain-Capable Unborn Child Protection Act (20-week limit). Ohio law currently bans abortions after the 20th week post-fertilization, based on the research that indicates that a fetus can feel pain at that stage. If Issue 1 passes, this law would be invalidated, and these abortions would be permitted.

24-hour waiting period and informed consent. Ohio law currently requires a doctor to meet with a pregnant woman a day before an abortion and to explain various information about the procedure. The Ohio Department of Health also provides materials giving information about fetal development, and social-service information about help available if a woman decides to continue with her pregnancy and give birth.[12] Similar "informed consent" provisions were struck down under *Roe* but were later upheld under *Casey.* They would certainly be challenged under Issue 1, and the Court determination would likely turn on whether such provisions served to "burden, penalize, prohibit, interfere with, or discriminate." It is possible to foresee a court decision that said a waiting period was a "burden," but that informed consent is not. If so, neither provision would be likely to survive the "exclusive scrutiny" test.

Ohio's current post-viability abortion restriction or similar restrictions. Ohio law currently bars abortions after a fetus is able to live outside the womb with a health exception for serious medical conditions. The health need must be certified by a second doctor, not in business with the doctor performing the abortion. The

[12] Ohio's provisions were upheld in *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684 (10th Dist. 1993) and *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 364 (6th Cir. 2006).

doctor performing the procedure must make best efforts to have the baby saved, such as by having a second doctor present and performing the abortion in a hospital with NICU emergency care available. Issue 1 would likely eliminate those protections, as the majority medical opinion would likely hold that these provisions do little or nothing to protect the life or health of the mother.

Other regulation by the State is technically possible but would be ineffective. The Amendment allows the State to prohibit abortion after viability, "but in no case" if the doctor thinks it necessary to protect the mother's life or health — a broad concept that is not defined in the Amendment.

Issue 1 gives sole discretion to the physician in deciding if the law applies, with no requirement for a second opinion or objective criteria for evaluating the physician's professional judgment.

Parental consent. Ohio law currently requires a doctor to inform a minor's parents before performing an abortion on a pregnant minor but also allows a "judicial bypass," where a minor can skip notification of her parents if a judge agrees that she is mature enough to decide on her own or that the abortion is in her best interests.

The Amendment does not specifically address parental consent. However, the parental-consent statute would certainly be challenged on the basis that Issue 1 gives abortion rights to any pregnant "individual," not just to a "woman." Before *Roe* was reversed, parental consent laws were regularly challenged in courts. If Issue 1 passes, the question for a court will be whether the term "individual"

includes a "minor." There is no guarantee that Ohio's parental-consent law will remain in effect.[13]

Abortion-pill safety regulations. Ohio has specific laws to address the prescribing, dispensing, and provision of certain medications used to initiate the termination of a pregnancy (mifepristone or "RU-486"). These laws would likely be challenged, with an uncertain outcome.[14]

Limits against funding abortions or abortion providers, and funding of elective fertility treatments. Ohio law currently bars taxpayer money from being used to pay for abortions, unless medically necessary or involving a pregnancy caused by rape. Ohio law also bars certain other funds from going to entities that perform abortions. These laws have all been challenged in court over the years and would likely be challenged under the new language of Issue 1. The outcome would be uncertain.

In addition, the Amendment includes "fertility treatment" as one of the areas that the State may not "discriminate against." Currently, Ohio's Medicaid program, which provides health care for qualifying low-income Ohioans, does not cover fertility treatment such as artificial insemination or in vitro fertilization. But if declining to fund those elective procedures counts as "discriminating" under the Amendment, a court could find that Ohio must fund these types of treatments for Medicaid patients.

[13] Ohio's parental consent law, R.C. 2919.121, generally requires parental consent for an unmarried minor's abortion, unless the minor is emancipated or obtains a "judicial bypass" order.

[14] Ohio's mifepristone law, R.C. 2919.123, requires doctors to follow FDA labeling, and also to meet other requirements, and further governs distribution and sales.

Effect on non-abortion areas such as parental involvement in minors' use of contraception, sterilization, and transgender treatment. These other areas of law are harder to assess because Ohio does not have specific statutes addressing minors' access to these medical treatments or products. However, if the word "individual" as used in the Amendment includes minors, Ohio's general laws concerning minors and health care could be affected. Some other States have enacted, and some Ohio legislators have proposed, laws regarding transgender treatment of minors. Given the uncertainty of the breadth of the terms "reproductive decision" and "individual," as discussed above regarding parental consent for abortion, challenges are certainly likely, with outcomes uncertain. It would certainly be too much to say that under Issue 1 all treatments for gender dysphoria would be mandated at the minor individual's discretion and without parental involvement. This is a developing area of the law nationally, and all that could be said with certainty is that Issue 1, if passed, would impact the analysis of any future law.