Analysis of the Ohio Abortion Amendment

Abortion activists recently introduced a proposed amendment that would enshrine abortion in the Ohio Constitution (hereinafter the "Abortion Amendment"). The proposed language seeks to amend Article I of the Ohio Constitution by adding Section 22, entitled "The Right to Reproductive Freedom with Protections for Health and Safety."

The Abortion Amendment goes far beyond codifying the now-defunct decision in *Roe v. Wade*. The language is dangerously vague and will compromise parental rights and endanger minors and crime victims. It also threatens the freedom of conscience of Ohio's healthcare professionals and precludes the enactment and enforcement of commonsense, protective laws.

It could force Ohio taxpayers to pay for abortions, contraception, fertility treatments, and even the surgical removal of healthy reproductive organs. Taxpayers could be compelled to fund these services and products even for non-residents and for crime victims when the crimes are not reported to law enforcement or appropriately addressed. The Abortion Amendment victimizes rather than protects and empowers women and girls.

TEXT OF THE ABORTION AMENDMENT

The Abortion Amendment provides:

1. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion.

2. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either an individual's voluntary exercise of this right or 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.

3. 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.

4. As used in this Section, "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"; and "State" includes any governmental entity and political subdivision.

5. This Section is self-executing.

ANALYSIS

The concerns with the Abortion Amendment starts with the title. The term "reproductive freedom" is inadequately defined and intentionally vague. It does not fairly represent the breadth and scope of the radical changes that the Abortion Amendment would cause. The use of "Protections for Health and Safety" in the title is also misleading. Rather than protect women's health and safety, the amendment endangers both women and girls.

Term "Reproductive Freedom" is Dangerously—and Intentionally—Vague

Ohio voters deserve to know exactly what they are voting on—especially when asked to amend their foundational document: the state's constitution. The Abortion Amendment fails to accurately and fully inform Buckeyes of the meaning of "reproductive freedom" and the full implications of a vote in favor of the amendment.

The Abortion Amendment centers on the term "reproductive freedom," which is not adequately defined. Rather, it simply refers to a wide-ranging laundry list of examples of what "reproductive freedom" encompasses: "decisions on contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion." The terms used to describe "reproductive freedom" are also not defined, leaving voters to guess what they mean.

For instance, the right to "fertility treatment" is not defined and will apply to any "individual" (minors, non-residents, those beyond normal child-bearing age, men, same sex couples, etc.). And these procedures would likely be at state taxpayer expense because the state cannot "burden" an individual's voluntary exercise of this right. So, Ohio taxpayers could be forced to pay for not only IVF treatments, but even a "paid surrogate" to allow two men to have a child.

The vague language could be interpreted by Ohio courts to encompass other medical procedures that have a nexus to reproductive anatomy, such as the removal of healthy reproductive organs and the provision of cross-sex hormones and other harmful chemicals that alter the normal functioning of the male or female body as part of gender identity transition.

The Abortion Amendment declares "reproductive freedom" to be a "fundamental right." However, voters are not informed of the meaning and import of "fundamental rights" which have traditionally included rights reflected in the U.S. Constitution and the Ohio Bill of Rights, such as right to free speech and the right trial by jury.

Fundamental rights require a high degree of protection from government encroachment. This level of protection is commonly called "strict scrutiny" and requires that state officials, when proposing a regulation or restriction on that right, must demonstrate a "compelling state interest." Further, the regulation or restriction must be narrowly tailored to effectuate that compelling interest.

Notably, even under the now overruled decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, abortion was not considered a "fundamental right" under the U.S. Constitution. Rather, abortion could be regulated under the lesser "undue burden" standard. It is not, therefore, accurate to claim that the Abortion Amendment simply resurrects and codifies *Roe v. Wade*. It goes dangerously beyond *Roe*.

The Abortion Amendment "Opens the Door" to Infanticide

The Abortion Amendment prohibits government officials from burdening, prohibiting, or interfering with a person's "voluntary exercise" of his/her "reproductive freedom." But there is no guidance as to what is meant by "voluntary exercise." Does it include "having to care for a newborn baby"? Does it include the "right" to neglect or abandon the newborn? We don't know. This intentional failure to

properly define the breadth and scope of the "right" to "reproductive freedom" could "open the door" to infanticide: the killing of a born, living baby.

The Abortion Amendment Threatens the Freedom of Conscience of Medical Providers

Under the Abortion Amendment, laws protecting the freedom of conscience of healthcare professionals and permitting them to opt out of performing or participating in abortions, the removal of healthy reproductive organs, the provision of cross-sex hormones, and other objectionable procedures could be seen as a "burden" on or "interference" with a person's "right" to "reproductive freedom." The paramount importance of freedom of conscience has been repeatedly affirmed.[1] The U.S. Supreme Court has consistently ruled in favor of protecting the freedom of conscience of every American, holding that "[f]reedom of conscience… cannot be restricted by law."[2] Our Nation's history, tradition, and jurisprudence confirm that Americans—including healthcare professionals—cannot be forced to commit an act that is against their moral, religious, or conscientious beliefs.

But in this "battle of rights," the historically fundamental freedom of conscience (recognized under both the U.S. Constitution and the Ohio Bill of Rights) may be deemed subservient to the newly created "right" to "reproductive freedom." This threat to freedom of conscience is untenable. And it will lead to more nurses, doctors, and other medical professionals leaving the medical field altogether rather than having their consciences violated.

The Abortion Amendment Repeals Commonsense and Protective Abortion Laws and Precludes Their Future Enactment

Ohio law contains many protective, abortion-related laws:

- Limit on abortion at 22 weeks (20 weeks post-fertilization age), OHIO REV. CODE § 2919.201

[1] America's Founders were united in a desire to protect freedom of conscience. For example, Thomas Jefferson made clear that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[1] Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience of all Americans be protected. He described conscience as "the most sacred of all property." Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

[2] *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (emphasis added).

- Limit on partial birth abortion ("intact dilation and extraction"), OHIO REV. CODE § 2919.151
- Limit on dismemberment abortion ("dilation and evacuation"), OHIO REV. CODE § 2919.15
- Limit on discriminatory abortions performed because of Down syndrome diagnosis, OHIO REV. CODE § 2919.10
- Parental consent for minor seeking abortion, OHIO REV. CODE § 2919.12(B)(1)(a)
- Informed consent and 24-hour reflection period, OHIO REV. CODE § 2317.56(B)
- Ultrasound requirement, OHIO REV. CODE § 2919.194, OHIO REV. CODE § 2317.561
- Public funding limits, OHIO REV. CODE § 5101.56
- Private insurance coverage limits, OHIO REV. CODE § 3901.87
- Abortion reporting requirements, OHIO REV. CODE § 2919.202
- Abortion provider health and safety standards (including transfer agreement), OHIO REV. CODE § 4731.41, § 2919.201(A)-(B); OHIO ADMIN. CODE 3701-83-19(E)
- Limits on telemedicine abortions, OHIO REV. CODE § 2919.124(B)

Each of these lawfully enacted, commonsense requirements is jeopardized by the Abortion Amendment's prohibition on any "burden" or "interference" with an individual's "reproductive freedom." The Legislature will be further prohibited from enacting new legislation to respond to the growing medical evidence of abortion's harms to women and from evidence of abortion providers often substandard facilities and practices. Buckeyes will be left completely unprotected.

Language Purporting to Allow Regulations on Post-Viability Abortions is Illusory

Section 3 of Abortion Amendment states that "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." The broad exception for "health" renders this purported protection illusory. This unlimited "health" exception will be used by those opposed to any restrictions or regulations on abortion to "rubber-stamp" unnecessary, dangerous, and inhumane late-term abortions.

The Abortion Amendment does not include guardrails as to when a post-viability abortion is "necessary." It leaves that determination to the individual physician's

"professional judgment," which is not defined or qualified and thus subject to abuse by doctors who oppose any limitations on abortion. "Professional judgment" can mean anything and can differ greatly between physicians. Ohio officials, including the medical licensing board, have no objective standards by which to judge a physician's actions, placing patients at risk and leaving physicians without meaningful guidance.

Other states have wisely implemented stronger language to prevent abuse of the exception by abortionists. Some require a "reasonable" medical judgment: "medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved."[3] This is the most common standard employed to define and qualify the physician's exercise of professional judgment, including when deciding to perform post-viability abortions to preserve maternal life and health.

Even states like California employ the lesser "good faith medical judgment" standard in their state abortion-related statutes.[4] But Ohio's Abortion Amendment includes none of these limitations on a physician's decision-making, leaving the door wide open for misuse of the exception.

Further, Section 4 further defines "fetal viability" as "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" (emphasis added). This definition is medically inaccurate and will callously endanger many pre-term infants who would otherwise survive after birth.

The vast majority of abortion-related state laws use a medically appropriate definition of "viability" such as: "that stage of fetal development when, in the judgment of the physician based on the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a ***reasonable likelihood*** of sustained survival of the unborn child outside the body of his or her mother, ***with or without artificial support***" (emphasis added).

It is important to note the significant differences between the Abortion Amendment's definition of "viability" and the medically correct definition. First, the Abortion

[3] *See e.g.,* GA. CODE ANN. § 31-9B-1(6).
[4] *See e.g.*, CAL. HEALTH AND SAFETY CODE, §123468(b)(2).

Amendment requires a "significant" likelihood of sustained survival, while the correct definition requires a "reasonable likelihood" of sustained survival. How will a "significant likelihood of sustained survival" be determined? How many babies will be denied a chance at life under this provision? We don't know, and neither will Ohio's voters who will be asked to approve this medically inappropriate and dubious standard.

Second, the Abortion Amendment's definition of "viability" could be interpreted to preclude the application of "extraordinary measures," while the medically correct definition includes the application of "artificial support." Again, how will "reasonable measures" be defined? What medical measures are contemplated by the language? How many babies who would otherwise have a good chance at survival instead die because of a denial of care?

These concerns further support the conclusion that the Abortion Amendment "opens the door" to infanticide.

The Abortion Amendment Endangers Parental Rights

In addition to not knowing what is meant by a "fundamental right" to "reproductive freedom," voters will also be unwittingly compromising parental rights if the Abortion Amendment is approved.

The amendment guarantees a "fundamental right" to "reproductive freedom" to every "individual." This means that anyone, including a minor (male or female) and resident or non-resident of Ohio, has a "right" to "contraception, fertility treatment," medical care while "continuing one's own pregnancy, miscarriage care, and abortion," and other tangentially related procedures such as the removal of healthy reproductive organs. These and other complex and dangerous procedures will occur without the knowledge or consent of parents.

This dangerous and implicit repeal of Ohio's existing parental involvement requirements will ensure that minors—including those being sex-trafficked—can be brought into Ohio to receive "no-questions-asked" abortions. This will only further embolden traffickers to continue to wreck the lives of innocent young women in Ohio and beyond.

Parents are best equipped to protect and care for their children's health and well-being. They have both the right and responsibility to do so. The Abortion Amendment would eviscerate this fundamental right.

The Abortion Amendment Will Force Ohio Taxpayers to Fund Abortion, Contraception, Fertility Treatments, and Cross-Sex Hormones

The U.S. Supreme Court and federal law prohibit federal taxpayer dollars from funding abortions. Strong majorities of taxpayers agree that tax dollars should not be used to pay for abortion. Yet under the Abortion Amendment, Ohio taxpayer dollars could be required to fund abortions, birth control, fertility treatments, cross-sex hormones, and even puberty blockers.

Similar language in other state laws has been construed by courts to require the government to pay for abortion services. And since Ohio funds some types of health care, it could also have to fund "reproductive health care," including abortion procedures and providers, under the amendment.

Buckeyes would be forced to pay for these procedures and products for residents and non-residents, minors and adults, males, and females. Ohio will join California, New York, and Minnesota as a dangerous, unregulated, and unrestricted "Wild West" for abortions to the detriment of women, infants, crime victims, and Ohio taxpayers.

The Abortion Amendment Ignores Legitimate State Interests

States have multiple, legally recognized interests supporting abortion regulations. These "legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[5]

The Abortion Amendment completely ignores these legitimate state interests. This inexplicable failure improperly "handcuffs" legislators in their efforts to protect and serve all Buckeyes, including the unborn. It also wrongly ignores the growing evidence of abortion's harms to women.

[5] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (internal citations omitted).

Further, while the Abortion Amendment purports to permit regulation of abortion where the State uses "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care," this protection is purely illusory. "Health" is not defined and will likely be interpreted to include more nebulous concerns that extend beyond physical health, such as emotional or mental health.

It is important to remember that under the defunct *Roe* regime, "health" was defined extremely broadly and essentially sanctioned abortion-on-demand throughout pregnancy. Specifically, in *Roe*'s companion case, *Doe v. Bolton*, the Supreme Court determined that "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient… may relate[] to health."[6]

Finally, the language ensures the use of pro-abortion "standards of care" that tolerate few—if any—meaningful regulations on abortion. This use of a pro-abortion "standard of care," coupled with the likely application of a broad definition of "health" ensures that unfettered, unregulated abortion-on-demand is the goal of the Abortion Amendment.

Ohio Will Refuse to Cooperate with Legitimate Legal Investigations and Proceedings

Finally, the Abortion Amendment protects third parties and groups assisting an "individual" to exercise the "right to reproductive freedom." This appears to include non-residents exercising their "rights" in states other than Ohio.

Ohio will not assist in legal proceedings in other states (*e.g.*, honor subpoenas or make documents, witnesses, or defendants available) if those legal proceedings concern abortion or the removal of healthy reproductive organs and the provision of cross-sex hormones and other harmful chemicals that alter the normal functioning of the male or female body.

CONCLUSION

If passed, Ohio's Abortion Amendment would have dire consequences across the state—from invalidating many popular, commonsense limitations on abortion to jeopardizing the health and safety of women and children.

[6] 410 U.S. 179, 192 (1973).