



MISSOURI'S AMENDMENT 3 – THE “RIGHT TO REPRODUCTIVE FREEDOM AMENDMENT”

The “Right to Reproductive Freedom Amendment”:

- Creates an expansive “right” to reproductive freedom;
- Threatens women’s health and safety by trading robust legal protections for unregulated abortion-on-demand;
- Is dangerously and intentionally vague and could permit abortion-on-demand up to birth for any reason;
- Risks harm to an unborn baby who might require medical help to survive outside her mother’s womb;
- Risks harm to minors and jeopardizes parental rights;
- Could force taxpayers to fund elective abortions, contraception, sterilizations, fertility treatments, and gender transition drugs and surgeries; and
- Threatens the freedom of conscience of Missouri’s healthcare professionals.

INTRODUCTION

Amendment 3, the “Right to Reproductive Freedom Amendment (hereinafter, the “Abortion Amendment”), would establish a right to “reproductive freedom” in the Missouri Constitution and could create an unfettered right to abortion-on-demand up to birth for virtually any reason. It could eviscerate Missouri’s comprehensive abortion regulations that provide medically appropriate and much-needed protections for women and girls. The Abortion Amendment would enshrine not only abortion “rights” but also a limitless array of “reproductive rights” such as sterilization, assisted reproduction, surrogacy, cross-sex hormones, and even the surgical removal of healthy reproductive organs for women, men, and children. The Abortion Amendment endangers minors, jeopardizes parental rights, and threatens the freedom of conscience of Missouri’s healthcare professionals. It could be used to force Missouri taxpayers to pay for abortions and other “reproductive care” that violate their deeply held beliefs.

RELEVANT EXCERPTS FROM THE TEXT OF THE ABORTION AMENDMENT

“The Right to Reproductive Freedom Amendment”

2. The Government shall not deny or infringe upon a person’s fundamental right to reproductive freedom, which is the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions.

3. The right to reproductive freedom shall not be denied, interfered with, delayed, or otherwise restricted unless the Government demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means. Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid. For purposes of this Section, a governmental interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintaining the health of the person seeking care, is consistent with widely accepted clinical standards of practice and evidence-based medicine, and does not infringe on that person’s autonomous decision-making.

4. Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, interfere with, delay, or otherwise restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person.

5. No person shall be penalized, prosecuted, or otherwise subjected to adverse action based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall any person assisting a person in exercising their right to reproductive freedom with that person’s consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so.

...

8. For purposes of this Section, the following terms mean:

(1) “Fetal Viability”, the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus’s

sustained survival outside the uterus without the application of extraordinary medical measures.

ANALYSIS

Amendment Creates an Expansive Right to “Reproductive Freedom”

Missouri 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’s language fails to accurately inform Missourians of the dangerous scope of the phrase “reproductive freedom,” leaving them in the dark about the full implications of a vote in favor of the Amendment. The Abortion Amendment misleadingly provides that “reproductive freedom” is “the right to make and carry out decisions about *all matters* relating to reproductive health care, including *but not limited to*” abortion and contraception. (Emphasis added).

This is not a full and fair definition. The language is vague and could be misused by Missouri courts to encompass other medical procedures such as sterilization, assisted reproduction, surrogacy, 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.

The Abortion Amendment also purports to declare “reproductive freedom” as a “fundamental right.” The Amendment does not inform voters of the meaning and import of “fundamental rights”—rights that have been recognized as receiving the highest degree of protection from government infringement or regulation. The Abortion Amendment elevates the “right to reproductive freedom” beyond what was recognized under *Roe v. Wade* and *Planned Parenthood v. Casey*, imposing the highest level of judicial scrutiny on any law or regulation that touches on the newly manufactured “right.”

Even more concerning, the Abortion Amendment limits what constitutes a “compelling interest” that justifies government action—confining it solely to the interest of the person exercising her “reproductive right.” Missouri’s life-affirming laws are often based on other important interests, such as (1) protecting unborn children; (2) ensuring respect for all human life from conception; (3) mitigating fetal pain; (4) preserving the integrity of the medical profession and regulating and restricting practices that might cause the medical profession to become insensitive, even disdainful, to life; (5) preventing discrimination of unborn children on the basis

of race, sex, or disability; or (6) even protecting minors from harmful gender reassignment surgeries.¹

Many of Missouri’s protective laws, including its gestational limits and limit on discriminatory abortions, could be invalidated under the Abortion Amendment’s distorted compelling interest standard. Further, portions of the Missouri Stands for the Unborn Act² (which painstakingly details the state’s interests in regulating abortion to protect unborn life, maternal health, and the integrity of the medical profession and the evidence supporting those interests) could be invalidated as advocating for or supporting an unconstitutional infringement on a woman’s “reproductive right.”

Amendment Uses a Medically Inaccurate Definition of “Fetal Viability”

The Abortion Amendment creates an unbridled right to abortion until “fetal viability.” While fetal viability typically ranges from 22 to 24 weeks gestational age, the Abortion Amendment uses a medically inaccurate definition of “fetal viability” that provides healthcare professionals with sweeping discretion to determine viability based on their “good faith judgment” about an unborn child’s ability to survive outside the mother’s womb “***without*** the application of extraordinary medical measures.” (Emphasis added). This standard could be misused to permit on-demand abortions up to the moment of birth in circumstances where the child might need medical intervention to increase her chances of survival.

Conversely, Missouri’s protective laws employ a medically appropriate definition of “viability.” Missouri currently defines “viability” as “that stage of fetal development when the life of the unborn child *may* be continued indefinitely outside the womb by ***natural or artificial*** life-supportive systems.”³ (Emphasis added.) In contrast, the Abortion Amendment redefines fetal viability as “the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a *significant likelihood* of the fetus’ sustained survival outside the uterus ***without the application of extraordinary medical measures.***” (Emphasis added).

It is important to note the highlighted differences between the Abortion Amendment’s definition of “viability” and the medically correct definition in current Missouri law. First, the Amendment requires a “significant likelihood” of sustained survival, while the current definition protects any unborn child who “may” live indefinitely outside

¹ See Mo. Rev. Stat. § 188.026; *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

² Mo. Rev. Stat. § 188.026.

³ Mo. Rev. Stat. § 188.015(11).

the mother's womb. The Abortion Amendment would create a demanding viability standard by requiring healthcare professionals to gauge whether a child's survival is *highly likely* rather than *merely possible*. How will a "significant likelihood of sustained survival" be measured? The Amendment's viability standard stacks the odds against an unborn baby receiving appropriate and available medical care if there is concern that she might only survive for a short time.

Second, under the Abortion Amendment's definition of "viability," a child that needs "extraordinary medical measures" to survive would not be considered viable. That means a pre-term baby or even a full-term baby who might require medical intervention to survive outside her mother's womb may be aborted. For example, a child at 35 weeks gestation may not have fully developed lungs. Under the Abortion Amendment, that child might not be considered "viable" if she could not breathe outside her mother's womb without the help of a ventilator. Yet neonatal intensive care units (NICUs) exist to provide exactly this type of advanced medical care that application of the Abortion Amendment may deem "extraordinary." The definition of "viability" under current Missouri law appropriately considers a child viable even if she needs "artificial life-supportive systems" to survive outside her mother's womb. How many lives will not be deemed worthy of medical intervention under the Amendment? We don't know, and neither will Missouri's voters who will be asked to approve this medically inappropriate standard.

The Abortion Amendment's viability standard is also problematic because whether an unborn child is likely to survive outside the mother's womb could be left to the "good faith judgment" of a non-physician "health care professional." As a result, a nurse or even an unlicensed healthcare worker could decide whether a child is "viable." This standard is lower than *Roe* and *Casey*, under which abortion-related medical decisions depended on a *physician's* "appropriate medical judgment" or "good faith clinical judgment."⁴ Even pro-abortion states like California require that a *physician* use "good faith medical judgment" to determine fetal viability.⁵ (Emphasis added.)

Amendment Creates a Massive Loophole for Post-Viability Abortions

The Abortion Amendment's broad exception permitting a post-viability abortion when "needed" to protect the "life or physical or mental health" of the pregnant patient creates a massive loophole that swallows the rule.

⁴ *Roe v. Wade*, 410 U.S. 113, 165 (1973); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992).

⁵ See e.g., Cal. Health and Safety Code, §123468(b)(2).

First, the Abortion Amendment lacks any guardrails or clear medical standards for when abortion is “needed.” It does not require a licensed physician to certify that an abortion is medically necessary and may authorize a nurse or unlicensed counselor to make this consequential determination.

Second, the Abortion Amendment broadly allows for post-viability abortions to protect “physical or mental health.” For nearly 50 years under *Roe*, broad health exceptions permitted abortions for a range of factors related to a woman’s health, including: “physical, emotional, psychological, familial, and the woman’s age.”⁶ The Amendment’s far-reaching health exception could be used to justify virtually any abortion, including a gruesome, unnecessary, and inhumane late-term abortion. It could be broadly interpreted to sanction abortion on demand throughout the entire pregnancy.

Amendment Jeopardizes the Enactment and Enforcement of Commonsense Protective Laws

Missouri protects unborn life through all stages of pregnancy and limits abortion except in medical emergencies. Missouri law also contains commonsense protections for women and girls. The Abortion Amendment could jeopardize each of these protections:

- No abortion except in a medical emergency, Mo. Rev. Stat. (M.R.S) § 188.017(2)
- Limit on post-viability abortions, Mo. Rev. Stat. § 188.030(1)
- Limit on partial-birth abortion, Mo. Rev. Stat. § 565.300.3
- Limit on discriminatory abortions based on sex or race of the unborn child or a Down syndrome diagnosis, Mo. Rev. Stat. § 188.052(1)
- Abortion reporting requirements, Mo. Rev. Stat. § 188.052
- Parental consent for a minor seeking an abortion, Mo. Rev. Stat. § 188.028
- Informed consent requirements and 72-hour reflection period, Mo. Rev. Stat. § 188.027
- Ultrasound requirement, Mo. Rev. Stat. § 188.027(4)
- Regulations on chemical abortion and prohibition on the use of telemedicine to dispense abortion-inducing drugs, Mo. Rev. Stat. §§ 188.021, 188.044
- Public funding and insurance coverage limits, Mo. Rev. Stat. §§ 188.205, 376.805

⁶ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

- Health and safety mandates for abortion providers and facilities, Mo. Rev. Stat. §§ 188.015, 188.020, 188.080, 188.215, 197.225, 197.205

The Abortion Amendment threatens each of these protections by empowering abortion advocates to attack all existing abortion-related regulations. The Amendment provides that state officials may not deny, interfere with, delay, or otherwise restrict the expansive “right to reproductive freedom.” This goes far beyond *Roe* and *Casey*, which recognized that a woman’s right to abortion was not “absolute” and that some state regulation in this area was appropriate to further state interests in safeguarding maternal health and protecting life.⁷ But under the Abortion Amendment, existing protective laws such as a reflection period or parental consent requirement could be seen as delaying or interfering with the newly created constitutional right. Legal challenges could see these commonsense protections invalidated by Missouri courts. Further, the General Assembly could be hindered from responding to the growing medical evidence of abortion’s harms to women or the harms of gender reassignment surgeries on minors. Their hands would be tied, and Missourians could be left completely unprotected.

Recent experiences in Michigan and Ohio (where similar abortion amendments have already been adopted) evince an erosion of legal protections once a constitutional amendment creating an expansive “right” to abortion is adopted. Both states have introduced or enacted measures to repeal existing commonsense abortion regulations.⁸ In Michigan, abortion advocates have filed legal challenges to state laws requiring that a woman be fully informed about the abortion procedure and wait 24 hours before having an abortion, and that limits state taxpayer funding of abortion, while Ohio’s limit on abortion after an unborn child’s heartbeat has been detected has also been challenged. Abortion advocates contend that these protective laws interfere with the new constitutional right to “reproductive freedom.”

Amendment Risks Harm to Children and Undermines Parental Rights

Under the Abortion Amendment, “a person,” including a minor or resident of another state, can assert a constitutional right to “reproductive freedom.” This means that anyone, including a minor (male or female), has a “right” to abortion, contraception, sterilization, and other procedures, including the removal of healthy reproductive organs. These and other complex and dangerous procedures could occur without the knowledge or consent of parents. Even worse, the Amendment would shield from

⁷ *Roe*, 410 U.S. at 153-54; *see Casey*, 505 U.S. at 846.

⁸ *See* Reproductive Health Act, S.B. 2, S.B. 474, S.B. 476, S.B. 477, H.B. 4006, H.B. 4951, H.B. 4953, H.B. 4954, H.B. 4955, H.B. 4956, 2023 Leg., 102nd Sess. (Mich. 2023); Enact the Reproductive Care Act, H.B. 343, 2024 Leg., 135th Gen. Ass. (Ohio, introduced Dec. 6, 2023).

liability any person who “assists” a minor in obtaining an abortion, sterilization, or other procedure without their parents’ knowledge.

Most states require parental involvement in a minor’s decision to have an abortion. Existing Missouri law requires consent from both the minor and her parent or guardian—for good reason. Parents play a crucial role in shielding their children from harm. Because children cannot understand the long-term mental, emotional, and physical consequences of their decisions, they are susceptible to coercion from outside forces. The Abortion Amendment could be misused to completely exclude parents from their protective role and prevent parents from carrying out their right and responsibility to safeguard their children’s health and well-being. Removing parents from the equation only weakens protections for children’s health and welfare.

***Amendment Could Force Missouri Taxpayers to Fund Abortion,
Contraception, Sterilizations, Fertility Treatments, and Gender Transition
Drugs & Surgeries***

The U.S. Supreme Court and federal law prohibit taxpayer dollars from funding abortions except to save the mother’s life or in cases of rape or incest. Most taxpayers agree that tax dollars should not be used to pay for abortion.⁹ Yet under the Abortion Amendment, Missouri taxpayers could be forced to fund not only abortions, but also contraception, assisted reproduction and surrogacy, cross-sex hormones, and even puberty blockers for minors. They could be forced to fund these procedures and products for residents and non-residents, minors and adults, males and females.

If the Abortion Amendment is approved, Missouri would join California, New York, and Minnesota as a dangerous, unregulated, and unrestricted “Wild West” for abortions and experimental procedures to the detriment of women, infants, and Missouri taxpayers. That is the reality Missourians could face because, under the Abortion Amendment, failure to fund reproductive choices could be seen as improper “interference” with the newly created constitutional right to “reproductive freedom.

⁹ See. e.g., January 2023 Marist Poll, <https://www.kofc.org/en/resources/communications/polls/2023-kofc-marist-poll-cross-tabs.pdf>. Sixty percent of adults surveyed “opposed” or “strongly opposed” taxpayer funding of abortion.

Amendment Threatens Healthcare Professionals' Freedom of Conscience

Under the Abortion Amendment, laws protecting healthcare professionals' freedom of conscience and permitting them to opt out of performing morally questionable procedures are endangered. Abortion advocates are likely to argue that such opt-outs are an impermissible "interference" with a fundamental right.

Our Nation's Founders emphasized the paramount importance of freedom of conscience.¹⁰ This fundamental freedom of conscience is recognized under both the U.S. and Missouri constitutions.¹¹ Our Nation's history, tradition, and jurisprudence confirm that Americans—including healthcare professionals—cannot be forced to commit an act against their moral, religious, or conscientious beliefs. But in a "battle of rights," the longstanding freedom of conscience may be treated as subservient to the newly created "right to reproductive freedom" invented by the Abortion Amendment. The Amendment's prohibition on "interference" could result in healthcare professionals being forced to participate in reproductive "care" to which they object. In turn, this threat may lead nurses, doctors, and other medical professionals to leave the practice of medicine rather than risk having their consciences violated.

CONCLUSION

The Abortion Amendment, if approved, could have dire consequences, from jeopardizing the health and safety of women and children to being misused to challenge commonsense regulations on abortion.

¹⁰ 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." 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).

¹¹ MO Const art I § 5.