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Ohio's Disastrous Abortion Ballot Proposal

An abortion-rights protester speaks through a megaphone at a rally after the United States Supreme Court overturned *Roe v. Wade* in Columbus, Ohio, June 24, 2022.*(Megan Jelinger/Reuters)*

By **CARRIE CAMPBELL SEVERINO AND FRANK J. SCATURRO** *Carrie Campbell Severino is president of JCN. Frank J. Scaturro is vice president and senior counsel of JCN and a former special counsel to the House Select Investigative Panel on Infant Lives.*

March 13, 2023 1:52 PM

A proposed Ohio constitutional amendment would make the state into a haven for no-limits abortion and other procedures.

Two abortion-advocacy groups, Ohioans for Reproductive Freedom and Ohio Physicians for Reproductive Rights, are attempting to place on the November 2023 ballot a proposed state constitutional amendment that would effectively obliterate most limits to abortion or sex-change surgery, among its other far-reaching consequences. The proposal was approved by the Ohio Ballot Board today, after which the groups will begin the process of collecting the signatures required to make the November 7 ballot.

Headlines have largely framed the proposed amendment as a means of adding a right to abortion to the state constitution. But if it became law, the measure would go much further than these groups' collective desire to repeal Ohio's heartbeat law, which generally prohibits abortion upon the detection of fetal heartbeat (typically around six weeks) while still allowing doctors to prevent the death or impairment of major bodily functions of the mother. (The statute was blocked in the state's lower courts, and the Ohio supreme court is expected to decide its ultimate fate.) The proposed amendment would outlaw virtually any restrictions on abortion and all other procedures, including sex-change surgeries, that touch on reproduction, for both adults and minors. It would cancel out not only parental-consent laws but also mere parental notification for minors' abortions or sex-change surgeries; strike down health protections for people of all ages who undergo these procedures, including requirements that a qualified physician perform them; and erase any meaningful limits on late-term abortions.

That the proposal's language is unconstrained should be no surprise. Its drafters want it that way. The coalition promoting it includes groups like the ACLU that have taken extreme positions not only on abortion, but also on a wide range of culture-war issues. And beneath it all is an overarching hostility to parents who would disagree.

Beyond abortion, the text of the proposed amendment provides more broadly that "every individual has a right to make and carry out one's own reproductive decisions, including but not limited to" several categories: contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion. "Reproductive decisions," however, is a very broad term. By explicitly defining such decisions as "not limited to" the enumerated categories, the proposal establishes its scope as sweeping.

A natural reading would extend to any medical procedure that involves the human reproductive system, including sex-change surgery. The language also applies to individuals without any age qualification, so the

proposal makes no distinction between adults and minors. Additional language would deny parents the right to any intervention on behalf of their children that would discourage them from obtaining the procedure in question:

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.

Legislators in over two dozen states are currently debating measures that would impose limits on what procedures could be performed to alter the appearance and sexual characteristics of minors to align with their identified sex instead of their biological sex. Whatever their preferred policy, many people on both sides of that debate would agree that such procedures should not be performed on children without parental consent. The proposed Ohio amendment would turn this common-sense familial principle upside down, insisting that every minor must have access to such procedures and that there is nothing an objecting parent can do about it. Any individual who tries to assist a minor in pursuing such procedures would be protected by law, while a parent who objects would be cut out of the decision-making process, perhaps even penalized.

The Ohio proposal is so broadly worded that it would prevent the legislature not only from requiring the consent of parents before their child pursues a particular procedure, but also from requiring mere notification of parents — well short of the power to veto their child's decision — before the procedure takes place. After all, requiring even notification has the effect of "directly or indirectly" burdening or interfering with the decision in question.

Even beyond that, the state legislature would find its hands tied from passing any number of measures to protect baby and mother alike so long as they could be characterized as abortion restrictions. Consider as examples some of the laws that the U.S. Supreme Court struck down during the years after it handed down *Roe v. Wade*: standard-of-care provisions to optimize the chances of fetal survival, informed-consent requirements and 24-hour waiting periods for mothers, partial-birth abortion prohibitions, and requirements that doctors performing abortions have hospital-admitting privileges. Never mind that the latter aimed to prevent the kind of atrocities that occurred at the hands of the Philadelphia abortionist Kermit Gosnell.

To be sure, the Court, prior to last year's decision in *Dobbs v. Jackson Women's Health Organization*, occasionally changed its mind on some of these challenged laws, including most notably when it altered its standard of review in *Planned Parenthood v. Casey* (1992). But the scope of laws it struck down at various times *without any textual basis in the Constitution* is stunning. Imagine how much more damage the Ohio proposal would do with its explicit treatment of abortion and other reproductive matters as sacrosanct.

It appears that the amendment, if approved, would even offer a level of protection to nonphysicians in their performance of covered procedures — whether abortion, sex-change surgery, or something else. After all, the language extends to any "person or entity" who provides assistance with the procedure at issue.

One might counter that the Ohio proposal includes the following limiting language that applies in the abortion context, which contemplates that a physician would be involved at least in post-viability abortions:

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.

This language actually poses additional problems, reinforced by the proposal's definition of "fetal viability" — "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 post-viability determination is arguably the one context in which the proposed amendment limits authorization for doctors alone as opposed to whatever other "person or entity" might be performing an abortion. Yet far from adopting a meaningful limiting principle, this language, devoid of an objective benchmark to define fetal viability, gives carte blanche to doctors in their determinations. Its "standard" is whatever a doctor subjectively decides.

The insertion of the word "health" in this provision without any qualification poses the added problem that arose under *Roe*, where the Supreme Court by judicial fiat also injected a "health" exception for any prohibition of post-viability abortion: Over the course of several abortion cases, the Court employed a notion of health so broad that, for many lower courts, including the U.S. Court of Appeals for the Sixth Circuit in an Ohio case in 1997, it was enough for a doctor to be willing to approve the procedure based on "emotional" and "familial" factors. This effectively permits abortion at any stage of pregnancy up to the time of birth.

The proposed Ohio constitutional amendment would make the state into a haven for no-limits abortion and other procedures. It would become a likely jurisdiction to harbor a future Kermit Gosnell, whether he is a practitioner of abortion, sex-change surgery, or other procedures under the umbrella of reproductive care. Complete strangers who assist children in obtaining life-altering procedures would find themselves on the right side of the law, while parents who try to protect their children would be deemed to have run afoul of the law.

If this amendment makes it to the ballot and Ohioans allow it to become part of the state constitution, their elected representatives in Columbus will be powerless to pass any statute that would undo the damage. If voters do not reject this proposal, they can expect to suffer its extreme consequences well into the indefinite future.

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