



NOVEMBER
2022
BALLOT PROPOSAL
22-3

An Overview

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On November 8, 2022, Michigan voters will decide whether to adopt an amendment to the State Constitution to establish an individual right to reproductive freedom, including the right to make and carry out all decisions about pregnancy, such as prenatal care, childbirth, postpartum care, contraception, sterilization, abortion, miscarriage management, and infertility; allow the State to prohibit abortion after fetal viability unless needed to protect a patient's life or physical or mental health; prohibit state discrimination in enforcement of the right; prohibit the prosecution of an individual, or a person helping a pregnant individual, for exercising rights established by the proposed amendment; and invalidate State laws that conflict with the proposed amendment.

Proposal 22-3 is the result of an initiative petition circulated among electors for qualifying signatures, and will appear on the ballot as follows:

Proposal 22-3

A proposal to amend the state constitution to establish new individual right to reproductive freedom, including right to make all decisions about pregnancy and abortion; allow state to regulate abortion in some cases; and forbid prosecution of individuals exercising established right

This proposed constitutional amendment would:

- Establish new individual right to reproductive freedom, including right to make and carry out all decisions about pregnancy, such as prenatal care, childbirth, postpartum care, contraception, sterilization, abortion, miscarriage management, and infertility;
- Allow state to regulate abortion after fetal viability, but not prohibit if medically needed to protect a patient's life or physical or mental health;
- Forbid state discrimination in enforcement of this right; prohibit prosecution of an individual, or a person helping a pregnant individual, for exercising rights established by this amendment;
- Invalidate state laws conflicting with this amendment.

Should this proposal be adopted?

- YES
 NO

If a majority of electors vote "yes" on Proposal 22-3, the State Constitution will be amended to include the proposed language.

BACKGROUND

Section 14 of the Michigan Penal Code, enacted in 1931, prohibits a person from willfully administering to any pregnant woman any medicine, drug, substance or thing whatever, or employing any instrument or other means, with intent to procure the miscarriage of any such woman, unless it is necessary to preserve the life of such woman.¹ A person who violates Section 14 is guilty of a felony (punishable by up to four years' imprisonment or a maximum fine of \$5,000, or both) or, in case the death of the pregnant woman, of manslaughter.

¹ Section 14 was held unconstitutional regarding abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in the exercise of his medical judgment. *People v Bricker*, 389 Mich 524 (1973).

In 1972, a group called the Michigan Coordinating Committee for Abortion Law Reform led a ballot initiative to legalize abortion before 20 weeks. Specifically, Proposal B would have allowed a licensed medical or osteopathic physician to perform an abortion at the request of the patient if the gestational period had not exceeded 20 weeks and if the procedure were performed in a licensed hospital or other facility approved by the Department of Public Health. Michigan voters did not approve Proposal B.

The following year, the United States Supreme Court issued its decision in *Roe v. Wade*, in which the Court struck down a Texas law making abortion illegal except when necessary to save the mother's life.² In striking down the Texas law, the Court found that inherent in the Due Process Clause of the Fourteenth Amendment is a fundamental "right to privacy", which protects a pregnant woman's choice whether to have an abortion. The Court pointed out, however, that the right is not absolute and must be balanced with the government's interest in protecting women's health and the life of the fetus. The Court resolved these competing interests by establishing a pregnancy trimester framework to govern abortion regulations in the US. Following the *Roe* decision, Michigan's 1931 abortion ban went dormant. In 1992, the Court abandoned the trimester framework in favor of a new "undue burden" standard, in which state statutes were found unconstitutional when they were enacted for "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus".³

In June 2022, the US Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe* and *Casey* on the grounds that the US Constitution makes no reference to abortion, and the right is not implicitly protected by any constitutional provision, including the Fourteenth Amendment.⁴ The Court noted that the Fourteenth Amendment has been held to guarantee some rights not expressly mentioned in the Constitution but those rights must be "deeply rooted in this Nation's history or tradition" and "implicit in the concept of ordered liberty", and the Court deemed abortion was not. Following the *Dobbs* decision, Michigan's 1931 law went back in effect.

In anticipation of the US Supreme Court's overturning *Roe*, Planned Parenthood of Michigan filed a lawsuit in April 2022 seeking to block enforcement of the 1931 law. In May 2022, a Michigan Court of Claims judge blocked enforcement of the 1931 law. County prosecutors in Jackson and Kent Counties appealed, and a Michigan Court of Appeals panel ruled that the injunction blocking enforcement of the law applied only to the Attorney General's office and not to county prosecutors. However, the Court of Appeals' ruling was in effect for only a few hours. In a separate case, an Oakland County Judge granted an emergency temporary restraining order against county prosecutors. The judge later granted a preliminary injunction that temporarily barred county prosecutors from enforcing the 1931 law.

In September 2022, the Court of Claims judge ruled that the State's 1931 abortion ban is unconstitutional because it "would deprive pregnant women of their right to bodily integrity and autonomy, and the equal protection of the law".⁵ The decision was appealed to the Michigan Supreme Court.

During the 2022 election cycle, a group called Reproductive Freedom for All circulated petitions and collected a sufficient number of signatures for a proposed constitutional

² 410 US 113 (1973).

³ *Planned Parenthood v. Casey*, 505 US 833 at 877.

⁴ 597 US ____.

⁵ *Planned Parenthood of Michigan v. Attorney General*, opinion and order of the Michigan Court of Claims, Case No. 22-00044-MM (2022).

amendment to be placed on the 2022 November general election ballot. Opponents challenged the initiative petition claiming there was insufficient space between certain words of the text of the proposed amendment. The State Board of Canvassers deadlocked on whether to certify the initiative for placement on the November election ballot. Reproductive Freedom for All appealed to the Michigan Supreme Court, which ordered the Board to certify the petition as sufficient for placement on the November election ballot.⁶

DISCUSSION

Following the US Supreme Court's overturning of *Roe* in its *Dobbs* decision, state legislatures have become the authority in abortion rights and regulations. In Michigan, the 1931 law prohibits a person from administering an abortion and prescribes a felony for a violation unless the procedure is necessary to preserve the life of the mother. Proponents of Proposal 3 contend that this prohibition does not align with the values of voters. According to the Pew Research Center, 62% of US adults say that abortion should be legal in all or most cases.⁷ Proponents believe that Michigan voters concur with these national survey statistics and that the Michigan Legislature should repeal the State's abortion ban because its membership is elected to represent the will of the voters. However, the Michigan Legislature has not repealed the 1931 law. Accordingly, proponents believe that enshrining an individual's right to an abortion in the Michigan Constitution by approving Proposal 3 is the appropriate course of action.

Proponents also suggest that the lack of abortion rights has negative impacts on women's social position. Amicus briefs in the *Dobbs* case cited studies demonstrating that *Roe* reduced birth rates by a significant margin, which causally increased the likelihood of women graduating high school and attending college.⁸ The brief cited below noted that this level of educational attainment improves women's financial attainment, as well. Proponents believe that a return to the lack of lawful abortion access would negatively affect the educational and financial attainment that women in the State have achieved over the past 50 years.

In general, some opponents of Proposal 3 disagree with the proposition that an individual has a fundamental right to an abortion. The Pew Research Center reports that 13% of US adults say that abortion is morally wrong in all cases and 33% say that its morally wrong in most cases.⁹

Opponents of Proposal 3 also contend that the proposal's language is too ambiguous and broad in scope. Some believe that it could allow any health professional, not only a physician (as currently regulated), to administer an abortion, and that it could allow abortions after fetal viability for insignificant health concerns, among other examples. Conversely, proponents see breadth as an advantage, allowing physicians administering (and individuals seeking) an abortion to act with discretion based upon the facts of each individual's circumstance.

⁶ *Reproductive Freedom for All v. Board of State Canvassers*, order of the Michigan Supreme Court, Docket No. 164760 (2022).

⁷ Pew Research Center, www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/#americans-views-of-abortion. Retrieved 9-30-22.

⁸ Brief for Economists as Amicus Curiae, p. 26, *Dobbs v. Jackson Women's Health Organization*, 597 US ____ (2022).

⁹ Pew Research Center, www.pewresearch.org/fact-tank/2022/07/15/key-facts-about-the-abortion-debate-in-america. Retrieved 9-30-22.

In addition, opponents point to the ballot proposal's language with the contention that it could have wide-ranging effects on indirectly-related State laws. They suggest that the proposal could negate the current requirement that a minor obtain parental consent to receive an abortion and the current prohibition on partial-birth abortions. Moreover, they contend that approval of Proposal 3 could eliminate the State's ability to regulate abortions that occurred before fetal viability, among other things. They believe that any ambiguity regarding the proposal's provisions would have too many wide-ranging effects for voters to make an informed decision or for proponents to understand the outcomes if the proposal were approved. Moreover, opponents and proponents alike note that, regardless of one's opinions on the various reproductive rights issues, it could take years and many court cases to determine the extent of the rights listed in the proposal.

FISCAL IMPACT

Approval of the proposal would have no fiscal impact on State or local units of government. As noted, the 1931 ban has been dormant since the 1973 *Roe* decision; thus, no incarceration costs have been incurred nor fines imposed. If the proposal were not adopted, and absent a final judicial decision nullifying it, the 1931 law essentially would be reimplemented, which would impose costs for the State, particularly the Department of Corrections, and local jails.

Based on the most recent report to the Michigan Legislature, incarceration costs in State correctional facilities currently average \$125.20 per day, ranging from a low of \$105.26 per day to a high of \$136.69, based on the security level of the correctional facility.¹⁰ Additionally, new felony arrests and convictions would increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities. However, it is unknown how many people would be prosecuted, which makes the actual cost indeterminate. Any additional revenue from imposed fines would go to local libraries.

¹⁰ "Report to the Legislature pursuant to Article 2, PA 87 of 2021, Section 904", Michigan Department of Corrections, www.michigan.gov/corrections. Retrieved 10-11-22.