



Issue Analysis Proposal 3

THE ISSUE

In this legal analysis we address the issue of whether or not Proposal 3 allows for common-sense regulations on “reproductive freedoms,” and particularly whether children may be regulated more strictly than adults.

A RIGHT UNLIKE ANY OTHER

To understand why Proposal 3 would be fundamentally different from other rights if it is adopted, we must examine the standard courts use when analyzing constitutional rights. When courts examine other constitutional rights, they apply the traditional strict scrutiny standard. However, as we explain below, the language in Proposal 3 changes and manipulates the compelling interest prong of the strict scrutiny test, thus making the analysis of this new “reproductive freedom” right different than all other constitutional rights. The drafters of Proposal 3 cleverly rigged the language of this new “reproductive freedom” right to be invulnerable in court to legal challenge and will make any regulation of abortion essentially impossible.

WHAT IS STRICT SCRUTINY?

Strict scrutiny is the judicial standard that courts apply to laws that infringe on fundamental constitutional rights to test whether or not a law is unconstitutional and unenforceable. The test contains two requirements that a law must meet in order to survive:

- 1) The law must be crafted to further a “compelling government interest,” and,
- 2) The law must be narrowly tailored to further that interest.

EXAMINING THE PROPOSAL’S TEXT

Is there a compelling state interest to pass any law that treats children differently than adults when it comes to these new “reproductive freedom” rights? According to the very language of Proposal 3 itself, the answer is “NO” if such a law in any way “infringe[s] on that individual’s autonomous decision-making.”

If the drafters of Proposal 3 had wanted these new rights to be treated the same as other fundamental rights they would have simply stopped at this language under Section (1). If they had done so, then any laws or regulations that infringe on these new “reproductive freedom” rights would be analyzed under the same traditional strict scrutiny standard as other fundamental constitutional rights.

But instead, Proposal 3 specifically changes the strict scrutiny standard as it applies to “reproductive freedom” by adding these new requirements under Section (4). This language radically changes the way laws or regulations impacting these new rights are scrutinized in a manner completely at odds with the analysis applied to all other existing rights. Because of the inclusion of this language, it is plainly and simply untrue that lawmakers will be able to regulate Proposal 3 like any other constitutional right.

Proposal 3 asserts that “[a] state interest is ‘compelling’ only if it ... does not infringe on that individual’s autonomous decision-making.” This means that any law or regulation that interferes with any person’s “autonomous decision-making” automatically fails the strict scrutiny test and is unconstitutional.

PROPOSAL 3

§ 28 Reproductive freedom.

(1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

An individual’s right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a **compelling state interest achieved by the least restrictive means.**

Notwithstanding the above, the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.

(2) The state shall not discriminate in the protection or enforcement of this fundamental right.

(3) The state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall the state penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent.

(4) For the purposes of this section:

A state interest is “compelling” only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual’s autonomous decision-making.

“Fetal viability” means: the point in pregnancy when, in the professional judgment of an attending 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.

(5) This section shall be self-executing. Any provision of this section held invalid shall be severable from the remaining portions of this section.





THE PRACTICAL EFFECT OF THE PROPOSAL

Laws or regulations that restrict or infringe upon the constitutional rights of minors are not valid simply because they affect children rather than adults. To the contrary, when a law does intrude upon a constitutional right of a minor, it still must pass the strict scrutiny test in order to survive. For example, while courts have affirmed that children have a fundamental right to free speech under the First Amendment just as adults, within the special environment of a school the state has a compelling interest in maintaining discipline and preventing substantial interference with the educational process. Even at school, children retain their First Amendment rights and such rights may only be infringed upon if the state action can satisfy the traditional strict scrutiny test.

However, unlike free speech and other fundamental constitutional rights, Proposal 3 has created its own new strict scrutiny test that is vastly more restrictive and will effectively prevent any regulation or limit on the exercise of any individual's (including minors) "reproductive freedom" decisions.

UNDERSTANDING THE CONSEQUENCES

When trying to understand how this new language will affect existing or future laws and regulations that may conflict with Proposal 3, ask yourself the following question: "Would this law interfere in any way with a person's ability to make a decision related to these new "reproductive rights," completely free from anyone else's influence?" If the answer is "yes," then Proposal 3 says that law is unconstitutional.

Because Proposal 3 asserts that "[a] state interest is 'compelling' only if it ... does not infringe on that individual's autonomous decision-making," this means that any law or regulation that interferes with any person's "autonomous decision-making," regardless of whether that individual is a child or an adult, automatically fails the strict scrutiny test and is unconstitutional. It is hard to conceive of a law or restriction that would not infringe in some way on an individual's "autonomous decision-making."

APPLYING THE NEW STANDARD

When we apply this new compelling state interest standard to the questions that many citizens have raised about Proposal 3, we can see both how it will inevitably conflict with numerous existing laws, and further prevent the state from enacting common-sense regulations in the future.

QUESTION: Since children are already regulated differently than adults when it comes to other fundamental constitutional rights, won't the same be true under Proposal 3?

ANSWER: No. While regulations restricting the exercise of other fundamental rights of minors are analyzed under the traditional strict scrutiny standard which does allow for a compelling state interest which treats adults and minors differently, the new strict scrutiny test for Proposal 3 states that any regulation that "infringe[s] on [an] individual's autonomous decision-making," is NOT a compelling state interest. Because any regulations treating minors differently than adults in the exercise of their "reproductive freedom" interferes with the minor's "autonomous decision-making," therefore the regulation fails the strict scrutiny test and is unconstitutional.

QUESTION: The Second Amendment doesn't differentiate between adults and children but we still have gun laws that restrict minors' access to firearms. Can't we do the same thing under Proposal 3?

ANSWER: No. A law that infringes on the constitutional right to bear arms is tested under its own specific standard that is unique to that particular legal issue. As elaborated upon in *New York State Rifle & Pistol Association, Inc. v. Bruen*, restrictions on firearms are analyzed as to whether the law or regulation in question is "consistent with this Nation's historical tradition of firearm regulation." This standard and analysis is strictly limited to the Second Amendment and is completely different and separate from the traditional compelling interest test. Consequently, the ability to regulate the Second Amendment rights of minors more strictly than adults does not provide any legal basis for the restriction of other fundamental rights, and cannot be compared to regulations involving Proposal 3.

QUESTION: We already have laws in place that require parents to consent to medical treatments for their children, so won't those same protections still be in place even if Proposal 3 is adopted?

ANSWER: No. While laws that require parental consent for medical treatments that are unrelated to anything covered under Proposal 3 may remain, such laws will not be able to be applied to any medical decision which does fall under the expansive categories listed in the proposal. By definition, any law that requires parental consent for a child's medical decision is an infringement on the "individual's autonomous decision-making," and therefore is not a compelling state interest and fails the strict scrutiny test.

