



## THE PERILS OF PROPOSAL 3

### MICHIGAN'S CONSTITUTIONAL ABORTION AMENDMENT

*“Debate founded on the full disclosure of the whole truth and free of propaganda and slogans is the substance that can save free men.”*

*President Herbert Hoover*

The ACLU, Planned Parenthood, and other pro-abortion activists are promoting a ballot proposal to amend Michigan's Constitution (Proposal 3). The “Right to Reproductive Freedom Initiative” (RRFI), if passed, creates a new, unlimited, and unregulated right to abortion and an additional, undefined “right to reproductive freedom.” This radical proposal is not solely about abortion; rather, this poorly worded change to our State Constitution will create additional new rights and invalidates numerous existing laws protecting women, children, and parents.

These activists falsely claim the amendment merely places the U.S. Supreme Court ruling in *Roe v Wade* back into effect. Nothing is further from the truth. If passed, the RRFI enshrines in Michigan's Constitution the most extreme abortion law in America. The expansive, vague, and broad terms used in this new law are not defined. This new fundamental constitutional right overrides any conflicting statute. The proposed amendment is attached.

#### **I. THE TRUE IMPACT OF THE PROPOSED AMENDMENT**

The new right to reproductive freedom “includ[es], **but is not limited to**, prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.” This means

courts will inevitably expand the definition of what sexual practices and other conduct will be protected by this new “right.”

The proposed amendment to Michigan's Constitution will do the following:

1. Allows a minor child to have an abortion without the knowledge or consent of the child's parents.
2. Because of the all-encompassing exceptions, the amendment effectively guarantees the right to abortion at any time right up to the moment of birth. Further, it effectively guarantees the right to partial birth abortion and the right to terminate a child's life in the womb at any time based upon a child's disability, gender, race, or for any other reason.
3. Violates parental rights in directing their children's upbringing and education (MCL 380.10), especially in the area of sex education (MCL 380.1507, 1507b). Public schools will now have the legal right to refuse to inform parents about any issue relating to “reproductive freedom” and sexuality. Parents will no longer be able to excuse their children from sex education classes (MCL 380.1507a) because minors will have their own “fundamental right to reproductive freedom” separate and distinct from his/her parents.
4. Creates a right for a minor child to procure a sex change via permanent and irreversible sterilization without the knowledge or consent of the child's parents.

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<sup>1</sup> GLJC attorneys have participated in numerous cases before the U.S. Supreme Court, multiple State Supreme Courts, Federal District and Courts of Appeal, all state courts in Michigan, and various other state courts. GLJC Attorneys have over 130 years of combined constitutional legal experience and have served in various capacities throughout government, including, Federal Judge, Counsel to the Michigan and U.S. Senate, Constitutional Law Professors, Law School Professors, Michigan State Bar Board of Commissioners, Public Administrator, and other official capacities. *The GLJC Defends Truth, Protects Liberty, and Promotes Good Governance.*



5. Allows school clinics to provide contraceptives to children without the knowledge or consent of the child's parents.
6. Creates new sexuality rights based on "reproductive freedom" that would be elevated over all other fundamental constitutional rights like freedom of speech, the freedom to exercise one's religious conscience, and the fundamental right of parents to control and direct the upbringing of their children.
7. Prohibits enforcement of criminal statutes against statutory rape and child sexual abuse (MCL 750.520), female genital mutilation (MCL 750.136), and other similar statutes. In other words, sex between a 12-year-old girl and a 45-year-old man will now be protected by this new right, so long as the child "consents." As written, the new "super right" makes it virtually impossible to enforce or enact a statute prohibiting certain sexual activity, such as, pedophilia.
8. Invalidates age of consent laws (relating to "reproductive freedom") protecting minors. There is no age limitation in the RRFI amendment. In addition, numerous other laws regarding bans on state funding of abortion, parental notification, parental consent, informed consent laws, 24-hour waiting period, etc., will all be invalidated.
9. Provides this new "right to reproductive freedom" to all individuals, including children. The word "individual" is not defined. On its face, all children are individuals. This new right does not exclude minors. Children have constitutional rights that are coextensive with adults.<sup>2</sup>
10. Elevates any type of sexual activity relating to "reproductive freedom" to the status of a fundamental constitutional right. This will include transgender rights and many other forms of sexual expression. Minors will be entitled to access puberty blockers, cross-sex hormones, gender transition surgeries, and similar medical treatment as they all relate to "sterilization" and "reproductive freedom."
11. Creates a new, undefined "anti-discrimination" protection to enforce these radical new fundamental rights.
12. Abortions may be performed by any "health care professional" and are not limited to doctors. The phrase "health care professional" is not defined in the amendment.
13. Protects abortion providers by prohibiting the State from penalizing, prosecuting, or otherwise taking adverse action against them.
14. Prevents Child Protective Services workers and other mandatory reporters from fulfilling their duty to report child sexual abuse because of the so-called "consent" of the minor. For example, if a school counselor discovers that a minor is having sex with her schoolteacher, the counselor is now prohibited from reporting such sexual abuse because the minor can claim she is "consenting" and exercising her new "reproductive right." Further, the school counselor could be charged with violating the anti-discrimination provision by reporting the minor's sexual behavior.
15. Guarantees the right to "reproductive freedom" to all prisoners, foster children, and all individuals under the care of the state.

The new amendment guarantees many new rights will be "created" by activist courts based upon this new autonomous right to "reproductive freedom." This new right protects "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." None of these terms are defined in the amendment. Also, this is not an exhaustive list. "Reproductive freedom" is not limited to only the listed areas. What about gender-reassignment surgeries (i.e., the sterilization of men and

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<sup>2</sup> *In Re Gault*, 387 U.S. 1, 13 (1967); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *J.S. ex rel. Smith v. Holly Area Sch.*, 749 F. Supp. 2d 614, 621 (E.D. Mich. 2010); *J.S. v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3d Cir. 2011).

women) and related medical care? The possibilities are unconstrained and endless.

The RRFI Amendment will inevitably conflict with and nullify numerous laws unrelated to abortion, such as age of consent/statutory rape laws, parental notification laws, parental consent laws, screening to prevent forced abortions, health and safety requirements for abortion clinics, conscience protections for doctors/nurses who object to abortions, criminal penalties for prostitution, bans on human cloning, and numerous other laws because of this new, broad and vague “right” to reproductive freedom.

## II. PERMITS ABORTION ON DEMAND UP TO THE MOMENT OF BIRTH

The language in the amendment purporting to limit the unfettered right to an abortion to only pre-viability cases (essentially the first trimester) is a farce and is unenforceable. The language states:

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*... 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.*

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This limitation is illusory. It claims to allow state regulation of abortion for post-viability pregnancies; however, it unequivocally states that if a “health care professional” determines an abortion is necessary to protect the “physical or mental health” of the mother, then the state may not regulate such abortions. These terms are intentionally not defined. “Health care professional” presumably includes nurses, LPNs, counselors, and other non-doctors.

It is hard to imagine a pro-abortion “health care professional” not certifying that a mother’s physical or mental health would be harmed unless the abortion is performed. This is a huge exemption that permits abortion on demand right

up to the moment of birth. This exemption language makes any attempt to regulate post-viability abortions superfluous and of no effect.

For example, if a mother who is 8 months pregnant claims to Planned Parenthood that she will be sad, unhappy, and distressed if she has the baby, Planned Parenthood would be completely protected by the RRFI to perform that late-term abortion and kill the child.

## III. THE RADICAL NEW CONSTITUTIONAL “SUPER-RIGHT” TO “REPRODUCTIVE FREEDOM”

A constitutionally established right will always presumptively override any statute with which it may conflict. Any statute which interferes with or infringes upon a constitutional right may only survive if it can satisfy strict scrutiny analysis, meaning the law must be narrowly tailored to use the least restrictive means to further a compelling government interest. However, the drafters of the RRFI have deliberately crafted language which subverts and narrows this test in a manner that will produce manifestly unjust results.

Under normal circumstances, a law prohibiting sexual conduct between adults and minors, for example, would be characterized as advancing the state’s interest in protecting minors from sexual exploitation and abuse by predatory adults. Under the RRFI Amendment, however, such an objective would no longer be sufficient to be considered a “compelling state interest.” The RRFI clearly states:

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*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.*

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Because of this language, all other legitimate and well-recognized compelling state interests such as the protection of minors, the protection of

parental rights, as well as many others, will never be adequate to uphold a law if challenged under the RRFI.

Not only does the RRFI require that any asserted compelling state interest be strictly limited to “protecting the health of an individual seeking care,” but it further mandates that the interest may not “infringe on that individual’s autonomous decision-making.” Under this new narrow test, no law or regulation restricting any act or conduct relating to “reproductive freedom” will ever survive a legal challenge.

Essentially every law in existence infringes on someone’s “autonomous decision-making.” Any existing law prohibiting sexual activity between adults and minors (which would constitute a “decision[ ] . . . relating to pregnancy” under the amendment) would become impossible to uphold because it would clearly be an “infringe[ment] on that individual’s autonomous decision-making.” Once again, this impossible to overcome standard will apply to numerous other laws, any of which would be accurately characterized as imposing restrictions on a person’s “autonomous decision-making.”

The inclusion of this radical and extraordinarily broad language in the RRFI Amendment has the practical effect of turning the RRFI into an unlimited and unrestricted “super-constitutional right.” Essentially, no law would ever be considered capable of surviving a challenge against the amendment, no matter how reasonable or how carefully written, as the drafters of this amendment have deliberately re-fashioned the existing strict scrutiny standard into a new and impossible to satisfy test.

The ramifications of enshrining such an amendment and its radical language into the Constitution will be far-reaching and will erode protections for the most vulnerable members of society while also undermining the rights of parents. When constitutional liberties, such as freedom of speech or religion, inevitably collide

with this new constitutional super-right, the right to “reproductive freedom” will always win.

#### **IV. MINORS AND ADULTS WILL HAVE THE SAME RIGHTS UNDER THE RRFI.**

Despite the claims by supporters of the RRFI, this amendment will apply with equal force and protection to both adults and minors, without distinction. Proponents have pointed to statements from attorneys and professors claiming that “the right of [a] minor can be subject to a degree of regulation to which adults are not subject,” and that it is routine for the state to enact regulations concerning the rights of children in ways which they could not do so for adults.<sup>3</sup> However, a claim that “there can be some gradations in how the right can be exercised by a minor” directly contradicts the plain language of the proposed amendment.

A common example given by proponents of this amendment is that the right to bear arms may be more restricted for children than adults. This is only because such additional firearm restrictions are analyzed under an entirely different type of standard under the Second Amendment rather than a compelling interest test. Firearm restrictions are instead analyzed as to whether the law or regulation is “consistent with this Nation’s historical tradition of firearm regulation.”<sup>4</sup> This type of analysis is strictly limited to the Second Amendment and is completely different than the traditional compelling interest test. Thus, a comparison between the RRFI’s application to minors and the Second Amendment’s application to minors is like comparing apples and oranges.

Under normal circumstances the rights of minors may be more strictly regulated than those of adults. This is only because such additional restrictions may be tested and upheld against the traditional strict scrutiny standard, discussed above.

A more apt comparison is under the First Amendment Free Speech clause that does utilize the traditional compelling interest test. While

<sup>3</sup> Hendrickson, C. & Boucher, D. (August 16, 2022). Michigan's abortion amendment: Here's what it will and won't do if approved. *Detroit Free Press*. <https://www.freep.com/story/news/politics/2022/08/16/michigan-abortion-law-amendment/10296812002/>

<sup>4</sup> *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. \_\_\_\_; 142 S.Ct. 2111 (2022).

First Amendment rights apply to children as well as adults, minors may be reasonably restricted while at school because the government may demonstrate a compelling state interest in promoting the efficient and disciplined education of children within the school environment.

However, under the language of the RFFI, a state interest is only “compelling” if it is for “the limited purpose of “*protecting the health of an individual seeking care...and does not infringe on that individual’s autonomous decision making.*” Despite the claim that the state will still be able to regulate this new constitutional right differently for minors than for adults, the inclusion of this new compelling state interest test renders any distinction between an adult and a minor legally impossible.

As minors are indisputably considered “individuals” under the RFFI, any restriction or regulation which encroaches upon a minor’s “autonomous decision-making” cannot be overridden by any traditional compelling state interest. Therefore, any distinction between the rights of minors and adults under the RFFI is not permitted by its plain language.

#### **V. CONFLICTING LAWS WILL BE OVERTURNED**

Proponents claim this amendment will not affect or invalidate other laws. Yet, the Michigan Board of Canvassers disagreed and stated plainly in its summary of the RRFI that it will:<sup>5</sup>

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*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; and invalidat[e] all state laws that conflict with this amendment.*

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<sup>5</sup> Hendrickson, C. (September 10, 2022). The abortion rights amendment made Michigan's ballot. Here's exactly what it says. *Detroit Free Press*. <https://www.freep.com/story/news/politics/elections/2022/09/10/reproductive-freedom-for-all-michigan-text/68111011007/>

<sup>6</sup> Hendrickson, C. & Boucher, D. (August 16, 2022). Michigan's abortion amendment: Here's what it will and won't do if approved. *Detroit Free Press*. <https://www.freep.com/story/news/politics/2022/08/16/michigan-abortion-law-amendment/10296812002/>

“All state laws” means **all state laws**. For example, this amendment will negate parental consent laws for minors. Bonsitu Kitaba from the ACLU admits that a future court will make just such a ruling. She said:

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*We would have to ensure that those parental consent laws don't unduly burden the constitutional right to abortion, to seek out contraception and all of the protections that are in the Reproductive Freedom for All campaign. I can't talk about the legality of that right now because it's not in front of a court. It hasn't been passed yet, so that is a decision a court will have to make down the road.<sup>6</sup>*

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The activists’ plan is to get this extreme, undefined, broad, and vague language enshrined in the Michigan Constitution and then rely on the courts to invalidate all the laws and other constitutional rights they deem to be an “undue burden” on this radical new super-constitutional right to abortion and an individual’s right to “autonomous decision-making” in every other category listed in the amendment.

#### **VI. CONCLUSION AND ACTION STEPS**

We must all act to stop this extremely dangerous proposal that harms Michigan women and children. Here are a few Action Steps:

**PRAY:** Pray for the defeat of this proposal. Activate church and other prayer chains.

**SPEAK:** Talk to everyone in your circle of influence and tell everyone you know about this extreme proposal. It must be defeated.

**SEND:** Share copies of this Issue Brief with everyone you know. A condensed, companion

Fact Sheet is also available to be shared. Both are available at [www.GreatLakesJC.org](http://www.GreatLakesJC.org).

**POST:** Post information about the RRFI on all your social media platforms. PDFs of this issue brief and fact sheet are available at [www.GreatLakesJC.org](http://www.GreatLakesJC.org).

**ENGAGE:** Get involved and be fully informed. Support all efforts to get the word out. For updates and further information, please visit [www.GreatLakesJC.org](http://www.GreatLakesJC.org).

**VOTE:** Encourage everyone you know to vote NO on Proposal 3. Encourage everyone to get registered to vote. Do not forget to vote for constitutional, rule-of-law Supreme Court Justices and other judges on the ballot this fall.

This radical proposal is not solely about abortion; rather, this poorly worded amendment creates new “reproductive freedom” rights and invalidates numerous existing laws protecting women, children, and parents.

If passed, the RRFI will enshrine in Michigan's Constitution the most extreme abortion law in the country. This will put Michigan's law on a par with China and North Korea. We must all act to stop this extreme and dangerous proposal that harms women and children.

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## **PROPOSAL 3 – RRFI AMENDMENT LANGUAGE**

(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.